Considerations on the Liability for Intentional Personal Injury of the Surgeon Who Carries Out Arbitrary Medical-Surgical Treatment: The Italian Case

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Abstract

The criminal liability of surgeons is one of the most complex and engaging issues in contemporary criminal doctrine and jurisprudence. This study focuses on the surgeon's liability for personal injury for providing medical-surgical treatment without the patient's informed consent. Over the years, Italian doctrine and jurisprudence have recognized that medical-surgical treatment conducted without the patient's informed consent or in the presence of invalid informed consent constitutes a criminal offence, even though the latter is not expressly provided for by Italian Criminal Law. According to the Italian Court of Cassation, medical-surgical treatment integrates the objective and subjective elements of some criminal offences already provided by the Italian Criminal Code, such as intentional personal injury (Article 582 of the Italian Criminal Code), unintentional homicide (Article 584 of the Italian Criminal Code), or private violence (Article 610 of the Italian Criminal Code). The conflicting jurisprudential solutions proposed over the years on the issue generate a series of perplexities about the medical professional's activities, uncertainty about whether the doctor must intervene in particular cases, and, most crucially, which criminal offence should be applied if he intervenes.

Keywords: Medical-surgical treatment, informed consent, criminal liability, personal injury, Italian Criminal Code

Introduction

Arbitrary medical-surgical treatment, carried out in the absence of the prior acquisition of the informed consent of the adult and capable patient or the presence of his conscious dissent, has been considered by doctrine and jurisprudence as criminally relevant. The question is an often-disputed topic in Italian doctrine and jurisprudence, and it is a problem that demands special consideration according to

the specific elements it raises, particularly the importance attributed to informed consent in the medical field.

The patient's right to informed consent requires the patient to be fully informed about his health conditions, such as diagnosis, prognosis, benefits, and risks of the treatment, as well as alternative therapies and the consequences of the refusal[1] (See Furramani & Bushati, 2021, p. 266; Furramani, 2017, p. 364).

However, it is necessary to analyse if the violation of this right may result in criminal consequences, given that criminal law does not provide for the absence of informed consent to medical-surgical treatment. The doctrine considers informed consent a cause of the lawfulness of medical treatment (Antolisei, 1969, p. 240; Vassalli, 1973, p. 81), and failure to inform the patient and obtain his consent inevitably generates criminal illegitimacy because medical treatment violates the patient's right to self-determination (Omodei, 2020, p. 81). The only situation in which the doctor can intervene without first obtaining the patient's informed consent is that of necessity and urgency, as defined in Article 54 of the Italian Criminal Code, in the presence of specific conditions that justify a doctor's intervention to protect the patient's health or life (See Furramani, 2014, p. 114).

Currently, the criminal relevance of medical treatment is assessed through reference to general offences and the occurrence of harmful events (Brusco, 2006, p. 4262). Regarding arbitrary medical treatment, the Italian Court of Cassation's jurisprudence has specifically considered the offence of intentional personal injury under Article 582 of the Italian Criminal Code. The idea that arbitrary medical-surgical treatment may be criminally relevant implies the need for a preliminary examination of the Supreme Court's rulings in this regard.

Literature Review

Medical-surgical treatment refers to a wide range of medical treatments, including the medical treatment of cosmetic surgery. According to the doctrine, the concept of medical-surgical treatment refers to "*the activity aimed at eliminating or attenuating or making it possible in any case to eliminate or attenuate an abnormal state of the body or mind, that is the improvement of the external appearance of the person*" (Crespi, 1955, p. 6). Therefore, the opportunity arises to broaden the scope of medical-surgical treatment as it is not only related to activities aimed at treating or freeing the organism from a disorder or disease but also to activities that have the aim of decreasing, even if they do not entirely eliminate, physical suffering (Crespi, 1955, p. 6).

Doctrine (Bilancetti & Bilancetti, 2013, p. 706; Eusebi, 1995, p. 728; Giraldi, 1993, p. 149; Manna, 2004, p. 460; Rodriguez, 1991, p. 1153; Viganò, 2004, p. 150; De Lia,

[1] Article 1, para. 3, Law No. 219, 22 December 2017, *Rules on informed consent and advance treatment provisions*, in the Italian Official Gazette, No.12 of 16-01-2018.

2000, p. 48; Iadecola, 2002, p. 2041; Iadecola, 2002, p. 517) and jurisprudence consider that medical-surgical treatment carried out in the absence of informed consent or the presence of invalid informed consent is criminally relevant, attributing to the surgeon the responsibility for injury or death even when the latter carries out the treatment according to the medical art rules[1] (Iadecola, 1993, p. 163; Furramani & Bushati, 2021, p. 283).

According to the different approaches on the topic, each medical-surgical treatment, in principle, integrates the objective and subjective elements of some criminal offences already provided for in the Italian Criminal Code. The jurisprudence of the Italian Supreme Court has confirmed this orientation in a series of decisions[2] (Viganò, 2004, p. 141; Giamaria, 1991, p. 1123), which oscillate between a first and widespread orientation, which identifies the offence of intentional personal injury under Article 582 of the Italian Criminal Code[3] (Iadecola, 1998, p. 240; Cfr. Centonze, 2012, pp. 59 et seq.); and if this injury results in death, which is causally attributable to the surgery, the surgeon will be liable for unintentional homicide under Article 584 of the Italian Criminal Code[4] (Gribaudi, 2012, p. 55; Di Pentima, 2013, p. 131; Ciauri, 2009, p. 1102; Mellillo, 1993, p. 63). The latter orientation causes numerous perplexities and does not appear to be acceptable. A second orientation invokes the private violence offence under Article 610 of the Italian Criminal Code in the case of a surgeon acting in the absence of the patient's informed consent[5], even if the treatment is performed following the *leges artis,* regardless of the outcome of the treatment (See Canestrari, 2006, p. 676; Arrigoni, 2004, 1264; Fiandaca, 2009, p. 307).

In this regard, it is necessary to highlight another different opinion, which excludes the intentional nature of medical conduct. Noting, in the first place, that medical treatment is intended to improve a person's health conditions (Crespi, 1995, p. 6), and precisely for this reason, medical behavior differs from criminal behavior that affects the subject's psychophysical integrity (Gribaudi, 2012, p. 56; Furramani & Bushati, 2021, p. 283; Furramani, 2017, p. 167). Nevertheless, this peculiar nature of the medical act is insufficient to justify medical conduct carried out without informed consent. Consequently, arbitrary medical-surgical treatment has often been considered criminally relevant. Even today, there are no univocal orientations in doctrine and jurisprudence.

Part of the doctrine (Eusebi, 1995, p. 728; Rodriguez, 1991, p. 1153; Passacantando, 2005, p. 241) argues that medical-surgical activity affects the bodily integrity of the patient and that the surgeon is exempted from criminal liability only if the patient has

[1] Ass. Firenze, 8 November 1990, *cit.* p. 163.; Cass. Pen., Sez. IV, 11 July 2001, no. 1572, *cit*., p. 2041.
[2] Ass. Firenze, 8 November 1990, *cit.*; Cass. Pen., Sez. IV, 11 July 2001, no. 1572, *cit.*, p. 2041.; Trib. Roma, 25 May 2000, in *Giust. pen.,* 2000, *cit.*, p. 49.
[3] Cass. Sez. Un., 21 January 2009, no. 2437, in *Dir. pen. proc*, 2009, IV, p. 447.
[4] Cass. Pen., 21 April 1992, in *Cass. Pen.,* 1993, pp. 63 et seq.
[5] Cass. Pen. Sez. I, no. 3122, 29 May 2002, Volterrani.; Cass. Pen., Sez. IV, 11 July 2001, no. 1572, in *Riv. it. med. leg*., 2002, p. 867.

given his informed consent (See Furramani & Bushati, 2021, p. 283). In this case, the patient's informed consent serves as a foundation for justifying the medical treatment (Bilancetti & Bilancetti, p. 272).

The literature examined for this study focuses on various perspectives that doctrine and jurisprudence have on the surgeon's criminal liability. The jurisprudential solutions proposed over the years on the criminal relevance of arbitrary medical-surgical treatment are divergent and conflicting and consequently entail a series of uncertainties on the criminal offence to apply in case of violation of the patient's informed consent. The same fluctuations are registered in the doctrinal viewpoints. These perplexities generate doubts about the medical professional's activities, uncertainty about whether the doctor must intervene in certain situations, and, most crucially, which offence should be applied if he intervenes.

Research Method

The purpose of this study is to explore the various doctrinal and jurisprudential viewpoints on criminal liability for arbitrary medical-surgical treatment. This elaboration is composed of two parts: the first examines the criminal relevance of arbitrary medical-surgical treatment characterised by therapeutic purposes and the configuration of the objective and subjective elements of the criminal offence of intentional personal injury, according to Article 582 of the Italian Criminal Code. The second focuses on an in-depth analysis of the criminal relevance of non-therapeutic medical-surgical treatment and the various perspectives concerning the latter.

This elaboration uses qualitative research methods to analyse the criminal liability of the surgeon for performing the medical treatment without the patient's informed consent. Furthermore, our research aims to highlight the Italian Court of Cassation's contrasting jurisprudence regarding the issue.

The criminal liability for personal injury under Article 582 of the Italian Criminal Code: the definition of “desease”

The liability for personal injury provided for by Article 582 of the Italian Criminal Code in the case of arbitrary medical-surgical treatment has been confirmed several times by the Italian Supreme Court, according to which the absence or the invalidity of the patient's informed consent makes the medical-surgical treatment criminally relevant as it violates the patient's free self-determination (Omodei, 2020, p. 81).

In this context, it is relevant to analyse Article 582 of the Italian Criminal Code, which in the first paragraph outlines: *"Whoever causes a personal injury to anyone, from which a disease of the body or mind derives, shall suffer the penalty of imprisonment from three months to three years".* It is necessary to highlight that the mental element that characterizes the conduct envisaged by this criminal offence is the conscience and intention of causing anyone an injury from which a disease of the body or mind derives.

It is easy to understand that to configure the objective element of the offence of intentional personal injury (Article 582 of the Italian Criminal Code), we should refer to the definition of disease. The latter represents an issue much discussed in doctrine and jurisprudence.

Thinking back to the preparatory works of the Italian Criminal Code, the notion of "disease" was attributable to a much broader concept, as it included *any anatomical or functional impairment of the organism*[1] (Iadecola, 2006, p. 484; Fanelli, 2006, p. 960). This notion, which differs from the definition provided by medical science, has been the subject of conflicting orientations in the Supreme Court jurisprudence, divided into two different currents; a first jurisprudential orientation that embraced the definition of disease as *any anatomical and functional impairment of the organism*[2] (See Brusco, 2006, p. 4268; Iadecola, 2007, p. 179; Lattanzi & Lupo, 2010, pp. 208 et seq.; Cfr. Massaro, 2006, pp. 2453 et seq.; Fiori, 2009, pp. 519 et seq.; Baima Bollone & Zagrebelsky, 1975, pp. 18 et seq.). Based on these considerations, even if the surgeon carries out a therapeutic treatment aimed at improving health or even when the patient benefits from the treatment, he still must answer for the crime of intentional personal injury according to Article 582 of the Italian Criminal Code. And a second orientation based on medical-legal science, which in our opinion, seems more acceptable, according to which the term "*disease*" refers to a functional or appreciable impairment of the organism (Rodriguez, 1993, p. 153 et seq.; Turillazzi, 2009, p. 1086; Vigano, 2004, pp. 178 et seq.). In this context, those impairments that don't provoke an anatomical or functional alteration cannot be considered a disease, according to Article 582 of the Italian Criminal Code[3].

Both doctrine and jurisprudence generally accept the last viewpoint. Considering this approach, the Supreme Court's jurisprudence held that if the patient received surgical treatment that improved his health, the latter could not have caused the "*disease"*[4] (Turillazzi et al., 2009, p. 1063).

It is worth recalling, here, the position of the Italian Supreme Court in the famous Massimo[5] sentence and also the jurisprudential orientation before 1992[6], which qualified the arbitrary medical-surgical treatment that resulted in a lesion of the

[1] Cass., Sez. V, 2 February 1984, no. 5258.; Cass., Sez. V, 14 November 1979, no. 2650; Cass., Sez. I, 30 November 1976, no. 7254; Cass., Sez. I, 11 October 1976, no. 2904.; Cfr. Cass., Sez. Un., 21 January 2009, no. 2437, in *Dir. pen. proc.*, 2009, IV, p. 447.; Cass., Sez. IV, 19 March 2008, no. 17505.; Cass. Pen., Sez. IV, 28 October 2004, no. 3448.; Cass., Sez. V, 15 October 1998, no. 714.; Cass. Pen., Sez. IV, 14 November 1996, no. 10643.

[2] Cfr. Trib. Ferrara, 3 March 1977, Beltrame, in *Foro it.*, 1977, II, p. 302.; In this sense Cass., Sez. V, 16 March 2010, no. 16271, in *CED Cassazione*, no. 247259.

[3] Cfr. Cass., Sez. V, 16 March 2010, no. 16271, *cit*.

[4] Cass., Sez. Un., 18 December 2008 - 21 January 2009, no. 2437.

[5] Cass. Pen., 21 April 1992, no. 5639, Massimo, in *Cass. pen*., 1993, p. 63.

[6] Cass. Pen., 2 February 1984, in *Giust. pen.,* 1985, II, p. 32.; Cass., Pen., 11 November 1976, in *Riv. pen.,* 1977, p. 473.; Cass. Pen., 14 November 1979, in *Cass. pen*, 1981, p. 545.; Cass. Pen., 21 April 1992, *cit.*, p. 63.

patient's tissues as intentional personal injury according to Article 582 of the Italian Criminal Code, considering "*disease*" not only *"the functional alteration"* but *"any anatomical alteration of the organism"* (Gribaudi, 2012, pp. 55-56; Pellissero, 2005, pp. 464 et seq.).

It is clear that the notion of disease used is suitable for covering all consequences of medical-surgical treatment, including the mere incision of the tissues, which constitutes a minor anatomical alteration (Viganò, 2004, p. 171), and also scars, bruises, contusions, and states of shock, even when they do not affect the general organic conditions (Bilancetti & Bilancetti, 2013, p. 284).

It is necessary to note that the definition of disease as any anatomical alteration is doubtful and is not acceptable for some reasons. In the first place, from the medical point of view, the simple changes of the organism do not integrate the concept of disease[1] (See Baima Bollone & Zagrebelsky, 1975, pp. 20 et seq.; Galiani, 1974, pp. 144 et seq.; Gallisai, 1993, p. 392). Secondly, this definition considers criminally relevant even medical-surgical treatment aimed at beneficial purposes or followed by an auspicious outcome.

This orientation of the Court has been the subject of numerous criticisms by the criminal law and medico-legal doctrine, which considers *"disease"* the *"process that determines an appreciable functional impairment of the organism"*[2] (See Mantovani, 1995, p. 192; Antolisei, 2008, p. 77; Iadecola, 2007, p. 179; Fucci et al., 2011, p. 273; Casciaro & Santese, 2012, p. 337; Coratella, 2006, p. 104). This definition coincides with the medico-legal definition of disease as an evolutionary pathological process unfailingly accompanied by significant impairment of the organism's functions. Logically, the simple anatomical alteration of the organism that does not interfere with the organism's functionality should be excluded[3] (Iadecola, 2007, p. 185; Brusco, 2006, p. 4268; Turillazzi, 2009, p. 1095; Massaro, 2006, p. 2454).

Medical behaviour: "typical" or "atypical" conduct of the offence of intentional personal injury?

Concerning the objective element of the criminal offence of intentional personal injury (Article 582 of the Criminal Code), the United Sections of the Italian Court of Cassation intervened in 2008[4]. In this ruling, the Court considered the surgeon's criminal irresponsibility for providing a treatment not authorized by the patient, executed under the protocols and *leges artis* that improved the patient's health conditions. According to the Court, medical behaviour does not fall under the

[1] Cass. Pen., 26 May 2010, (dep. 23 September 2010), no. 34521,
[2] Cass. Pen., 26 May 2010, no. 34521, *cit*.
[3] Cass. Pen., 28 June 2011 (dep. 6 September 2011).; Cass. Pen., 26 May 2010, no. 34521, *cit*.
[4] Cass. Pen., Sez. Un., 18 December 2008, no. 2437.

provisions of Articles 582 (Pietra, 2009, p. 70), 584[1] or 610 of the Italian Criminal Code[2] (Eusebi, 1995, p. 728; Furramani & Bushati, 2021, pp. 281-282).

The orientation is also embraced by the doctrine, according to which medical-surgical therapeutic treatment performed without the patient's informed consent but under the *leges artis* and followed by a beneficial result is criminally irrelevant[3] (Salerno, 2014, p. 953; Barni, 2010, pp. 747 et seq.), because the causal efficacy concerning the disease event is lacking in this case (Salerno, 2014, p. 953; Barni, 2010, pp. 747 et seq.; Giunta, 2001, pp. 377 et seq.).

The issues raised are all centred on the type of medical treatment performed on the patient. Doctrine and jurisprudence highlight that arbitrary non-therapeutic medical treatment can involve different criminal offences. The point deserves particular attention since the doctrine brings therapeutic activity back to the area of lawful activity, but it does not constitute a cause for the exclusion of criminal liability, rather it represents a non-codified cause of justification (Antolisei, 1969, p. 240; Vassalli, 1973, p. 81).

In this context, it is necessary to distinguish between therapeutic medical treatment carried out in compliance with the *leges artis* and medical treatment in violation of the latter.

There is no doubt that therapeutic treatment carried out following the standards of medical art (*leges artis*) and the existence of a beneficial outcome[4] for the patient cannot constitute criminal behaviour. Compliance with protocols and medical art rules aims to remove or attribute risks connected with medical treatment to fortuitous events only (Marinucci, 1991, pp. 22 et seq.). As a result, it is crucial to emphasize that not every arbitrary medical-surgical treatment can aggravate the patient's health conditions or cause *"disease"*. Furthermore, the medical behaviour is not characterized by intention to cause injuries, as required by the personal injury offence under Article 582 of the Italian Criminal Code[5] (Gliatta, 2010, p. 464; Barni,

[1] According to Eusebi, the medical act in the absence of the patient's informed consent should not be considered lawful only because it has been performed *leges artis* but also considering the purpose of such conduct, which is to combat the disease. Therefore, it does not constitute the offence of intentional personal injury according to Article 582 of the Italian Criminal Code, regardless of the outcome (Eusebi, 1995).

[2] Cass. Pen., Sez. Un., 18 December 2008, no. 2437, *cit*.

[3] Cass. Pen., Sez. I, 26 March – 12 June 2014, no. 24918; Cass. Pen., 8 June 2010, no. 21799.

[4] See Cass. Pen., Sez. Un., 18 December 2008 – 21 January 2009, no. 2437. In this direction see App. Bari, Sez. III, 20 September 2011.

[5] In this regard App. Bari, Sez. III, 20 September 2011, (in: www.giurisprudenzabarese.it); Cass. Pen., Sez. V, 21 April 2016, no. 16678.; Cass., Sez. Un., 18 December 2008, no. 2437; Cass. Pen., Sez. IV, 14 March 2008, no. 11335, in *Dir. pen. proc.*, 2009, I, p. 70.; Cass. Pen., 21 January 2009, no. 2437.; Cass. Pen., Sez. I, 29 May 2002, no. 528, in *Studium iuris*, 2003, p. 511.; Cass. Pen., Sez. I, 29 May 2002, no. 26446, in *Riv. It. dir. proc. pen*., 2003, p. 604.; Cass., Sez. IV, 9 March 2001, Barese, in *Cass. pen*., 2002, p. 517.; Cass. Civ., Sez. III, 15 January 1997, *Scarpetta c. Ospedale civile Umberto I Ancona*, in *Foro it*., 1997, I, p. 771.; Cass. Civ., Sez. III, 6 October 1997, *Musumeci v. Finocchiaro*, in *Giur. it*., 1998, p. 1816.; Cass. Civ., Sez. III, 16

2002, p. 613; Iadecola, 1991, p. 165; Manna, 2007, p. 611; Turillazzi et al., 2009, p. 1088; Pietra, 2009, p. 70; Furramani & Bushati, 2021, p. 282). On the other hand, from the point of view of the objective element, it is excluded that arbitrary medical treatment followed by a favorable outcome may cause the "disease", in the sense of appreciable health damage resulting in functional impairment of the patient's body, as required by Articles 582 and 584 of the Italian Criminal Code (Manna, 2007, p. 611; Polvani, 1993, p. 736; Furramani & Bushati, 2021, pp. 281-282).

Nevertheless, the risks associated with medical-surgical treatment cannot be removed since medical-surgical treatment can cause harm to the patient's health or endanger his life, regardless of compliance with the medical art rules or following precautionary rules of medical diligence (Giunta, 2001, p. 402). Consequently, the surgeon should obtain the patient's informed consent.

Given the various solutions proposed by doctrine and jurisprudence, it is also necessary to consider decision No. 11335 of 2008 of the Italian Court of Cassation[1], which excludes the configuration of the crime of personal injury under article 582 of the Italian Criminal Code. In this case, the Court considers that the sole lack of the patient's informed consent cannot establish the criminal liability of the surgeon[2] (Pietra, 2009, p. 75; Furramani & Bushati, 2021, p. 283).

The above considerations are valid for therapeutic medical-surgical treatment performed in compliance with the protocols and medical art rules and followed by an auspicious outcome. However, the criminal relevance of arbitrary medical treatment for non-therapeutic purposes remains to be analyzed. Consider, for example, cosmetic surgery, which involves operations aimed at improving a person's exterior appearance.

Brief considerations on arbitrary medical-surgical treatment followed by an unfavourable outcome

In such an interpretative context, it seems reasonable to investigate the criminal relevance of the arbitrary medical-surgical treatment that results in an unfavourable outcome. After the profound and radical changes recorded in jurisprudence concerning the latter hypothesis, the Court of Cassation excludes the configuration of the objective element of the offence of intentional personal injury according to Article 582 of the Italian Criminal Code, even when the arbitrary medical treatment is

October 2007, no. 21748, in *Fam. dir*., 2007, p. 1162.; Cfr. Cass., Sez. III, 14 March 2006, no. 5444, in *Mass. giur. it*, 2006; Cass. Pen., Sez. IV, 21 April 1992, *Massimo*, in *Cass. pen*., 1993, p. 63.; Cass., Sez. IV, 27 March 2001, Cicarelli, in *Riv. it. med. leg*., 2002, p. 574.; Cass., 11 July 2001, Firenziani, in *Cass. pen*., 2002, p. 2041.

[1] Cass. Pen., Sez. IV, 14 March 2008, n. 11335.

[2] Cass. Pen., 29 May 2002, *cit*., p. 604 s.

followed by a worsening of the patient's health conditions, in consideration of the therapeutic purpose that characterizes medical conduct[1] (Giunta, 2001, p. 403).

The Supreme Court (Decision No. 21799/2010) confirmed this viewpoint, recognizing that: "*in the case of an intervention followed by an unfortunate outcome, it could be discussed the responsibility for voluntary injuries or unintentional homicide in the case of death, in the presence of absolutely anomalous and distorted behaviour of the doctor, and in any case dissonant concerning the curative purpose that must characterize one's therapeutic approach."* In this case, it must be ascertained that the surgeon *"acted even though he was conscious that his intervention, which would later cause harm or death of the patient, would have produced an unnecessary impairment of the patient's physical or mental integrity"*[2] (concrete predictability of the event). Following the reasoning of the Supreme Court, the medical intervention that causes an unnecessary impairment of the individual's bodily integrity, characterized by non-therapeutic purposes, is suitable for integrating the offence of intentional personal injury under Article 582 of the Italian Criminal Code (Furramani & Bushati, 2021, p. 284). Eventually, if death occurs, it is configurable the crime of unintentional homicide, according to Article 584 of the Italian Criminal Code[3] (Fucci et al., 2011, p. 265; Papi, 2011, p. 697; Bilancetti & Bilancetti, 2013, pp. 751 et seq.), both from an objective and a subjective point of view (Beulke & Diebner, 2013, pp. 839 et seq.)

Even in the latter case, it emerges that Supreme Court jurisprudence has overcome the traditional elaboration, which tended to bring arbitrary medical-surgical treatment back into the criminally relevant area, even though performed in compliance with protocols and medical art rules.

Based on this orientation, even the medical-surgical treatment carried out according to *leges artis* but followed by an unfortunate outcome cannot configure the offence of personal injury (Article 582 of the Italian Criminal Code)[4] (Cfr. Passacantando, 1993, pp. 107-109; Manna, 2007, p. 611; Manna, 1984, pp. 3 et seq.) since the latter necessarily requires the mental element of intention[5] (Fiori et al., 2002, p. 881; Cfr. Nannini, 1989, p. 77; Lattanzi & Lupo, p. 22) in addition to the presence of the objective element. In this particular hypothesis, the worsening of the patient's health conditions is suitable for configuring the "disease" under Article 582 of the Italian Criminal Code (Cfr. Polvani, 1993, p. 736; Polvani, 1996, p. 193), but in line with the orientation of the Court of Cassation, it lacks the mental element of the crime, and

[1] Cass. Pen., Sez. IV, 24 June 2008, no. 37077.
[2] Cass. Pen., Sez. IV, 8 June 2010, no. 21799, in *Riv. it. med. leg*., 2010, 747, with critical notes by M. Barni; Cass. Pen., Sez. Un., 18 December 2008, no. 2437.; Cass. Pen., Sez. IV, 23 September 2010, no. 34521.; Cass. Pen., Sez. V, 6 September 2011, no. 33136.
[3] Cass. Pen., 26 May 2010, no. 34521, *cit*.
[4] In this sense Trib. Palermo, the ordinance of 31 January 2000, GIP Massa, in *Foro it.,* 2000, III, p. 441.
[5] The mental element required by the criminal offence of personal injury under Article 582 of the Italian Criminal Code is intention. In these terms Cass. Pen., Sez. IV, 9 March 2001, no. 28132, Barese, in *Cass. pen.,* 2002, p. 517.; Cass. Pen., Sez. IV, 9 March 2001, no. 585, in *Juris Data, Sentenze Cassazione Penale*.

therefore, the intention of voluntary injuries (Article 582 of the Criminal Code), which is incompatible with medical activity[1] (Iadecola, 2010, pp. 1050 et seq.; Casciaro & Santese, 2012, pp. 338 et seq.).

On the contrary, in the arbitrary medical treatment performed in violation of medical art rules, it is possible to notice the presence of an intention to cause injuries. It is therefore evident, according to the Supreme Court jurisprudence, to recognize intention as a mental element necessary for configuring the offence of personal injury, the behaviour of the doctor must be absolutely anomalous and distorted and, in any case, dissonant with the curative purpose that characterizes therapeutic medical treatment. Therefore, medical conduct must be abnormal and much more serious than lack of skill, negligence, or imprudence[2].

The last issue to address is identifying the mental element of the arbitrary medical treatment performed in violation of the patient's expressed dissent. The jurisprudence[3] has unequivocally outlined the configurability of the crime of intentional personal injury (Article 582 of the Italian Criminal Code) in the case of medical treatment performed in violation of the patient's dissent, even if indirectly expressed (Cfr. Manna, 2004, p. 460; Viganò, 2004, pp. 150 et seq.). In this case, medical conduct can be placed on the same level as the conduct that damages the person's bodily integrity, thus configuring the criminal offence of intentional personal injury according to Article 582 of the Italian Criminal Code.

To clarify, the Court of Cassation has correctly held that "*the conduct of the doctor who intervenes with an inauspicious outcome on a patient who has expressed disagreement with the type of surgery represented to him must be qualified intentional and not negligent.*[4]*"* In this case, the mental element of the crime is evident, the presence of intention and conscience in carrying out an intervention that will certainly cause a worsening of the patient's clinical situation. Consequently, the intention is recognizable in the behaviour of the doctor who acts with the awareness of a useless intervention, whose risks are prevalent to the benefits[5] (Pietra, 2009, p. 72).

To conclude, the approach that recognizes that any arbitrary medical treatment might constitute the offence of intentional personal injury, even if performed following medical art rules (*leges artis*) and with a favourable outcome, is not acceptable[6].

The Italian Supreme Court emphasizes that in circumstances where a surgeon performs a medical treatment without the patient's informed consent if he has operated on the conviction of the presence of consent due to carelessness or lack of

[1] Cass. Pen., 8 June 2010, no. 21799.
[2] *Ibidem*.
[3] Cass. Pen., 26 May 2010, no. 34521, *cit*.
[4] *Ibidem.*
[5] Cass. Pen., Sez. IV, 14 March 2008, no. 11335.
[6] Cass. Pen., 11 July 2001, no. 1572, *cit.*: *"Since this activity implies the completion of acts which in their materiality manifest the objective element of the crime, damaging the bodily integrity of the subject*".

skills, he must be held liable for negligence[1] (Di Pirro, 2013, p. 97). Therefore, remains open the possibility of configuring the crime of negligent personal injury (Article 590 of the Italian Criminal Code)[2] or manslaughter (Article 589 of the Italian Criminal Code), where, because of the doctor's inexperience or negligence, the death of the patient occurs[3] (Eusebi, 1995, p. 728; Iadecola, 2002, p. 2041; Viganò, 2004, pp. 162 et seq.).

Reflections on non-therapeutic medical-surgical treatment

According to the doctrine, non-therapeutic medical-surgical treatment comprises both the objective and subjective elements that define the offence of personal injury under Article 582 of the Italian Criminal Code (Beulke & Diebner, 2013, p. 839). From the point of view of the objective element, non-therapeutic medical conduct, which does not improve the patient's health and is carried out without the patient's informed consent, can cause the disease as required by Article 582 of the Italian Criminal Code (Furramani & Bushati, 2021, p. 284).

And from a subjective point of view, the surgeon acts intending to damage the patient's physical or psychological integrity as required by the offence of personal injury (Furramani & Bushati, 2021, p. 284). Logically, we should also accept the configuration of unintentional homicide under Article 584 of the Italian Criminal Code if the non-therapeutic medical treatment causes the patient's death, which is causally related to personal injuries.

And what if the doctor performs the treatment in violation of the medical art rules, with completely abnormal and distorted behaviour that is not aimed at the patient's cure? In this regard, an appropriate solution appears to be the one offered by the Court of Cassation when it argues that: *"the doctor who subordinates the patient to an event (which then results in death) will answer for unintentional homicide (...), in the absence of any therapeutic purpose, for purposes dissimilar from the protection of the patient's health, such as when it consciously causes unnecessary mutilation or acts for purposes different from the patient's health protection.*[4]"

The decision of the Court clarifies the point of the situation regarding the criminal relevance of non-therapeutic medical treatment carried out in the absence or the presence of invalid informed consent of the patient. And therefore, it is necessary for criminally relevant conduct to identify the therapeutic purpose of the treatment, the existence of informed consent, and compliance with the medical art rules. In

[1] Cass. Pen., Sez. Un., 21 January 2009, in *Cass. Pen*., 2009, p. 1806.
[2] Cass. Pen., Sez. V, 21 April 2016, no. 16678.
[3] Cass. Pen., Sez. IV, 14 March 2008, no. 11335, *cit*.
[4] Cass. Pen., Sez. IV, 23 September 2010, no. 34521.; Cass. Pen., 8 June 2010, no. 21799, *cit.;* Trib. di Milano, 21 July 2000, has recognized the responsibility of the doctor under Article 582 of the Italian Criminal Code for the administration of an insulin-based therapy for anti-abortion purposes without the patient's informed consent, applied in the absence of the protocols accepted by the scientific community, which resulted in hypoglycaemic crises and consequent temporary disabilities.

particular, the purpose of the treatment is considered necessary for determining the presence of intention in medical conduct[1] (Fiori et al., 2011, pp. 258 et seq.; See Fucci et al., 2011, p. 269).

Even if it must be admitted that this distinction is not the only criteria to be considered in identifying the mental element, given that intention must also be found in the therapeutic medical act performed against the patient's will, in violation of his explicit dissent.

Currently, the position embraced by the Italian Supreme Court concerning the offence of personal injury is that which coincides with the concept of disease as an "*evolutionary pathological process, necessarily accompanied by a more or less significant impairment of the functional structure of the organism."*[2] Therefore, to configure the crime of personal injury, the medical conduct must naturally cause a harmful event connected to a functional impairment suitable for configuring the notion of disease outlined above, as well as being performed in violation of medical *leges artis* (Salerno, 2014, p. 961).

In this regard, it is necessary to distinguish between the hypotheses of medical-surgical treatment carried out in the total absence of the patient's informed consent or cases of invalid consent and medical treatment carried out in violation of the patient's explicit refusal[3] to undergo the treatment (Canestrari, 2015, p. 67; Canestrari, 2014, pp. 79 et seq.; Barni, 2002, p. 613; Fiori & Marchetti, 2009, p. 229; Fiori et al., 2002, pp. 891 et seq.). In the last case, it is possible to notice the mental element of the personal injury offence, the intention, required by article 582 of the Italian Criminal Code since the doctor consciously acts on a patient who explicitly refuses medical treatment after being adequately informed.

Final conclusions

The previous approach, which proposed the configurability of the crime of intentional personal injury (Article 582 of the Italian Criminal Code) or unintentional homicide (Article 584 of the Italian Criminal Code) in the hypothesis of arbitrary medical-surgical treatment, now appears to be outdated. It is crucial to highlight, at this point, that medical behaviour should not be confused with activity intended to inflict injury (Cfr. Vergallo et al., 2010, pp. 21 et seq.). Instead, the mental element required by Article 582 of the Italian Criminal Code as specific intent will be configurable in the hypothesis in which: *"(...) the surgeon, or doctor, even if motivated by therapeutic intentions, is aware that his intervention will produce an unnecessary impairment to the*

[1] Cass. Pen., 8 June 2010, no. 21799, *cit*.
[2] Cass. Pen., 28 June 2011 (dep. 6 September 2011).; Cass. Pen., 26 May 2010, no. 34521, *cit*.
[3] Cass. Pen., Sez. IV, 20 April 2010, no. 21799; Cass. Sez. Un., 21 January 2009, no. 2437, in *Dir. pen. proc.*, 2009, IV, p. 447; Cass. Pen., Sez. IV, 23 January 2008, no. 16375.; Cass. Pen., Sez. I, 29 May – 11 July 2002, in *Riv. it. dir. proc. pen*., 2003, I, p. 604; Cass. Pen., Sez. IV, 11 July 2001, no. 1572, in *Riv. it. med. leg*., 2002, p. 867.; Trib. Palermo, the ordinance of 31 January 2000, GIP Massa, in *Foro it.,* 2000, III, p. 441.

physical or psychological integrity of the patient[1]" (Cfr. Barni, 2002, p. 615; Fiori, 2009).

Consequently, cases in which the surgeon is guided by non-therapeutic purposes should be considered differently, such as cases of scientific research or experimentation or other purposes different from the protection of the patient's health. In this case, the medical conduct can cause an impairment to the patient's safety and the mental element coincides with the intention of personal injury (Article 582 of the Italian Criminal Code) (Cfr. Manna, 2004, p. 463).

In conclusion, the significance of informed consent in all medical-surgical treatments must be acknowledged, as it serves as a necessary prerequisite for the lawfulness of medical treatment and as a fundamental right of freedom; but it is also true that a lack of informed consent does not automatically constitute the offence of personal injury (Article 582 of the Italian Criminal Code) or unintentional homicide (Article 584 of the Italian Criminal Code)[2]. Considering arbitrary therapeutical medical-surgical treatment as intentional personal injury or unintentional homicide when there is no specific legislation on the subject means violating the principle of legality of criminal law, which can harm legal certainty.

In this context, the intervention of the legislator is necessary. Consequently, we had to wait for a univocal jurisprudential position or legislative intervention to establish the boundaries of criminal relevance of arbitrary medical-surgical treatment.

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