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Review

Professional liability subsequent to the Cartabia Reform: implications for pathologists

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Summary
The Cartabia Reform modifies the standard used by the Public Prosecutor for the submission of requests for filing or referral for trial. The standard has shifted to the "reasonable prediction of conviction" by moving the principle of *in dubio pro reo* to the investigation phase. The scope of the legislative amendment is focused on protecting the rights of investigated individuals, who are too often brought to trial without adequate supporting evidence. The implications that this reform has on legal proceedings concerning the criminal liability of healthcare professionals, including pathologists, is discussed.

Key words: pathologist's negligence, medico-legal liability, healthcare professionals responsibility, Cartabia reform

Background

The Cartabia Reform aims to reduce the number of case files that reach trial, which create an obstacle in the justice system and prolong the processing times of trials that no longer meet European expectations. The legislator focused on narrowing the filters placed by the system on access to trial for cases where the judge does not consider the report of the crime to be well-founded and dismisses the case before it reaches the deciding judge. Specifically, this concerns a request for dismissal filed by the Public Prosecutor and the G.U.P. (Judge for the preliminary hearing).
The purpose of this review is to assess the possible consequences that may affect the evaluation of the professional liability of pathologists when the reform is in effect.

Cartabia Reform

The reform has modified the standard used by the Public Prosecutor for the submission of requests for filing of or referral for trial.
From an abstract suitability of the evidence to support the accusation in court (previously regulated by Art. 125 of the transitional provisions) [1], the standard has shifted to the "reasonable prediction of conviction", by moving the principle of *in dubio pro reo* to the investigation phase. The reform has repealed Article 125 disp. att. and amended Article 408 of the Code of Criminal Procedure by indicating the new requirements for the Public Prosecutor to request the filing of the case. The requirements

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are no longer based on the inadequacy of evidence to support the accusation in court, but on the inadequacy of evidence to support a reasonable prediction of conviction [2].

The principle of *in dubio pro reo* is a fundamental institution of our criminal justice system. Based on this assessment, the Judge requests an acquittal in favor of the defendant if the proof of guilt is uncertain or contradictory [3]. Specifically, if the Judge is faced with doubt that the defendant may not have committed the act and, thus, the conviction of guilt does not pass the beyond reasonable doubt threshold, he must acquit the defendant.

With the Cartabia Reform, this principle is attributed to the Public Prosecutor. He is the first filter for the validity of the allegation of the crime and may request that the case be dismissed if deemed unfounded or bring to trial if deemed reasonably (and therefore probably) suitable for conviction of the defendant. Therefore, if the Public Prosecutor has doubts that the evidence collected during the investigation is sufficient to lead to the conviction of the defendant in a trial, they must request the dismissal of the case during the preliminary investigation phase.

The scope of the legislative amendment is focused on protecting the rights of investigated individuals who are too often brought to trial without adequate evidentiary support.

This *ratio legis* is accompanied by recent reforms concerning the professional liability of healthcare professionals, which have reduced the possibility of criminal sanctions against them.

The Cartabia reform aims to focus on the filter between the crime report and the criminal trial embodied by the preliminary investigations and the assessments made by the prosecutor [4-7]. Restricting the possibility of bringing charges in a field such as healthcare professional liability means reducing such proceedings to a dialectical and adversarial field that is limited to the preliminary investigation or the preliminary hearing. It is important to underline that reaching a conviction in the healthcare field is difficult due to the high level of proof required.

In these preliminary phases, it is essential for the Public Prosecutor to have a dialogue with the expert consultants and specialists called upon by the various parties. Prosecutor, defendant, and even the Judge, have to make their evaluations and considerations on the case, in order to determine whether to request dismissal or to proceed to trial.

It is understandable that this could affect the work of those who assist the Public Prosecutor in the technical-scientific evaluation of cases related to medical liability, such as forensic pathologists and specialist consultants. Both could receive requests for evaluations concerning not only the accusatory hypothesis, but also from the defense, in order to allow the Public Prosecutor to assess the lack of those requirements that could lead to a reasonable conviction for the defendant in the trial phase.

The Gelli-Bianco Law intervened on the issue of medical liability by introducing Article 590-sexies of the Italian Penal Code, redefining the criteria for determining instances of criminal liability for healthcare professionals [8]. Law No. 24 of March 8, 2017 (also known as the Gelli-Bianco Law) significantly changed the criminal response to conduct attributable to cases of negligent homicide or injury in the healthcare field.

Implications for healthcare professionals

According to the Court, a doctor would be criminally liable for the death or injury of a patient due to:

- "slight" negligence or recklessness;
- "slight" negligence in the execution of clinical practice guidelines or good healthcare practices that are not regulated by protocols;
- "slight" negligence in the identification and choice of guidelines or good clinical practice that are inadequate for the specific case;
- gross negligence in executing recommended guidelines or good clinical practice, taking into consideration the level of risk to be managed and the specific difficulties of the medical procedure.

Therefore, the justification for non-punishment, provided in the second paragraph of Article 590-sexies of the Italian Criminal Code, would apply only if the healthcare professional, while following the clinical practice guidelines or good healthcare protocols, still caused injury or death to the patient due to a "slight" lack of expertise in implementing them. Criminal punishment would only apply in cases where the healthcare professional is responsible for negligent conduct due to slight negligence during the execution phase, despite the correct formulation of the diagnosis and choice of guidelines. Consequently, all negligent conduct characterized by recklessness and negligence, even if of slight magnitude, would remain out of the scope of the aforementioned justification for non-punishment.

The formulation of the incrimination norm provided by Article 590-sexies of the Italian Criminal Code requires both the investigating authority and the Judge to evaluate the material conduct of the healthcare professional through a multi-phase assessment:

- the first assessment concerns the causal relationship between the conduct of the healthcare professional and the injury or death;

- the second assessment concerns the attribution of the negligent conduct to cases of recklessness, negligence, or incompetence;
- the third assessment concerns the attribution of the unskilled conduct to forms of slight negligence, and whether such conduct was characterized by lack of skill in execution or incorrect adherence to clinical guidelines and good healthcare protocols.

Implications for pathologists

Criminal responsibility profiles of pathologists rarely concern unilateral criminal phenomena. The pathologist finds himself involved in the crime with other professionals, united in the offense by the bond of negligent complicity (art. 113 c.p.) [9].

Such circumstances make legal reconstruction regarding possible pathologist liability more complex and difficult, especially when multiple healthcare professionals have intervened with actions that are potentially capable of causing injury or death [10]. This has become a customary occurrence, often resulting in medical activities that are the product of collaboration and overlapping of work by multiple professionals [11].

In particular, the pathologist's activity may take place in three different phases of the multidisciplinary process:

- diagnostic stage (after/before executing surgical or medical therapy);
- prognostic stage;
- predictive stage.

This situation can determine different and unusual accountability profiles; in the diagnostic phase, the pathologist may answer for the inauspicious outcome for a therapy performed based on an incorrect report, even if the consequence of the culpable injury is not directly attributable to the incorrect report.

In the second case, the pathologist has a decisive role by evaluating patient outcome regardless of treatment.

In the third case, the pathologist evaluates the possibility for the patient to receive a specific therapy.

The relevance of the effects that are produced in one way or the other requires that the work of the pathologist take place not in a context of professional "isolation" but of discussion and review of cases, so that a shared diagnostic process prevents human error or reliance solely on the skills of a single professional. Therefore, following legislation that favors the drafting of protocols and reference guidelines to reduce medical liability profiles, it seems necessary that the diagnosis be structured with systems of professional networks and communication technologies designed to encourage remote consultation (e.g. digital pathology) and, therefore, combined accurate and complete reports.

Conclusions

In complex cases involving medical malpractice, the stringent standards for requesting indictments against healthcare professionals, including pathologists, could lead to an increase in requests for case dismissal by the prosecutor in the absence of adequate consultation between the parties during the preliminary investigation phase. However, the complainant or victim can oppose this request by presenting counter arguments through their own expert consultants, which could turn the Judge for Preliminary Investigations into an obstacle for the case, going against the intent of the reform. To avoid this, it would be preferable to increase opportunities for consultation and dialogue between the parties during the preliminary investigation phase to provide the prosecutor with a reasonable prediction of conviction and, therefore, a basis for indictment.

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Declaration of competing interest

The Authors certify that they have no affiliation with or involvement in any organization or entity with any financial interest or non-financial interest in the subject matter or materials discuss in this paper.

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2 Article 125 disp.att.: 1. *The public prosecutor submits to the judge a request for dismissal when they believe that the report of the alleged crime is unfounded because the elements acquired during the preliminary investigations are not sufficient to support the accusation in court.*

3 Article 408 C.p.p.: *When the evidence gathered during the preliminary investigations does not allow for a reasonable prediction of conviction or application of a security measure other than confiscation, the public prosecutor presents a request for archive to the judge. Along with the request, the file containing the report of the crime, the documentation related to the investigations carried out, and the minutes of the acts performed before the judge for preliminary investigations are transmitted*.

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