

State Liability Insurance Derived from an antijuridical damage caused in the provision of health services.

Analysis of the guarantee of the rights of the pregnant woman, the unborn child, the newborn baby and the protection of the State's assets¹

Seguro de Responsabilidad Civil del Estado Derivado de un daño antijurídico causado en la prestación de servicios sanitarios.

Análisis de la garantía de los derechos de la mujer embarazada, del nasciturus, del recién nacido y de la protección del patrimonio del Estado

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Article

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Abstract

This research article aims to analyze compliance with the guarantee of the rights of pregnant women, unborn children, and newborns when they are victims of wrongful damage caused by the Colombian State. It also intends to identify the advantages of state liability insurance, which seeks to protect the State's assets. The damage victims are subjects of special reinforced constitutional and conventional protection. Numerous relevant changes have been made seeking the protection of their guarantees, which is why this investigation is highly relevant. These subjects, direct consumers of a medical service, have a special safeguard of their rights by the healthcare provider, i.e., a health professional or public or private legal entity that facilitates the provision of this service. When the patient's guarantees are affected by the public servant's negligent, reckless, or violative action of the *lex artis*, illegal damages arise that need compensation. Compensation is made effective based on the cause of the damage or by the insurer of the victimizer. Because these victims are subjects of special constitutional and conventional protection, the Colombian Council of State has established the payment of significant sums of money to guarantee the fundamental right to comprehensive compensation. Consequently, the State transfers the risk to an insurance company that guarantees the payment of this compensation. This research adopted a qualitative approach with an exploratory and critical scope, supported by a critical and holistic hermeneutic method, documentary review techniques, and conversation with experts. Scopus, Scielo, Pubindex, and Latindex databases, among others, were established as research tools.

Keywords: pregnant women, unborn children, neonates, *primum non nocere*, state liability insurance, damage

Resumen

Este artículo de investigación pretende analizar el cumplimiento de la garantía de los derechos de las mujeres gestantes, los niños por nacer y los recién nacidos cuando son víctimas de un daño culposo causado por el Estado colombiano. También pretende identificar las ventajas del seguro de responsabilidad estatal, que busca proteger el patrimonio del Estado. Las víctimas del daño son sujetos de especial protección constitucional y convencional reforzada. Numerosos cambios relevantes se han realizado buscando la protección de sus garantías, razón por la cual esta investigación es de gran relevancia. Estos sujetos, consumidores directos de un servicio médico, tienen una especial salvaguarda de sus derechos por parte del prestador de salud, es decir, un profesional de la salud o persona jurídica pública o privada que facilita la prestación de este servicio. Cuando las garantías del paciente se ven afectadas por la actuación negligente, imprudente o violatoria de la *lex artis* del servidor público, surgen daños antijurídicos que requieren indemnización. La indemnización se hace efectiva con base en la causa del daño o por la aseguradora del victimario. Por ser estas víctimas sujetos de especial protección constitucional y convencional, el Consejo de Estado colombiano ha establecido el pago de

importantes sumas de dinero para garantizar el derecho fundamental a la reparación integral. En consecuencia, el Estado transfiere el riesgo a una compañía de seguros que garantiza el pago de esta indemnización. Esta investigación adoptó un enfoque cualitativo con alcance exploratorio y crítico, apoyado en un método hermenéutico crítico y holístico, técnicas de revisión documental y conversación con expertos. Como herramientas de investigación se utilizaron las bases de datos Scopus, Scielo, Pubindex y Latindex, entre otras.

Palabras clave: mujeres embarazadas, nascitur, neonatos, *primum non nocere*, seguro de responsabilidad estatal, daño

Introduction

This article, resulting from research, aims to analyze the guarantee of the human rights of pregnant women, unborn children, and neonates. These subjects of special constitutional and conventional protection may be victims of wrongful damage caused by a health professional or a public hospital. The article also aims to identify the advantages of state liability insurance. The insurance policy protects the assets of the State, which can be compromised by the substantial and procedural actions brought by the victim, who has the status of beneficiary of the policy.

The constant evolution of society has created prevailing needs for regulatory response. The medical/health care provided to pregnant women and neonates has led to significant case law and doctrinal developments due to the lack of an express standard that regulates their care. The condition of subjects of special constitutional and conventional protection is reaffirmed by the inclusion, among others, of prioritization in medical care by a health professional—a public servant—linked to the State. The health professional and the state-owned enterprise must observe health protocols because the protection and guarantee of the human dignity of pregnant women and unborn children is necessary. These patients have, in short, the status of subjects of special constitutional and conventional protection.

With regards to medical health care, the pregnant mother and the newborn—healthy or with some pathology or medical condition that requires the care of a health professional—can be direct victims of wrongful damage caused by a public health institution. The State takes out a liability insurance policy to protect its assets against possible judicial actions of third-party liability in contract or in tort or direct reparation for failure in the relevant service. The purpose of the contract is to guarantee the protection of the State's assets. At the same time, the policy protects the fundamental right to comprehensive compensation for damages caused to the victim of the adverse event originating, in principle, in the specialty of gynecology and obstetrics.

The patient or user of the medical service is considered the beneficiary of the state liability insurance and qualified as an indirect *consumer* of the property damage policy. The insurance protects a human and fundamental right: comprehensive compensation for damages caused by the perpetrator, i.e., the policyholder and insured of the insurance contract. The policyholder and insured transfer the risk to an insurance company to safeguard public assets that may be compromised in a declaratory process of direct reparation due to a failure in the provision of the medical service.

This research was conducted using the qualitative research approach with an exploratory and critical scope. Furthermore, documentary review techniques, conversations with experts, and the critical and holistic hermeneutic method were used. Scopus, Scielo, Pubindex, and Latindex databases, among others, were established as research tools.

The Provision of Medical Services and Subjects of Special Constitutional and Conventional Protection

The Colombian State is obliged to facilitate the provision of health services to all Colombians. In state-owned enterprises, health services are provided through a general practitioner or a doctor who is an expert in a specialty—the latter, related to gynecology and obstetrics medical services. These professionals care for users or patients who require special constitutional and conventional protection: the pregnant mother, the unborn child, or the newborn, for example.⁴

Subjects of special constitutional protection

The category of subjects of special constitutional protection arises in the Colombian legal system because of the recognition of the formal inequality of some population sectors (Daza Rojas, 2018). Some population groups that require special attention to protect their rights have been identified to satisfy the teleology inherent to the Social Rule of Law. Vulnerable subjects demand protection due to the special conditions in which they find themselves.

It is possible to list the subjects of special constitutional protection from the categories in Table 1.

Table 1. Categories of subjects of special constitutional protection

⁴ Medical and health liability allows for the initiation of an action to compensate for the damages caused to the victim. The policy must cover property and non-property damages.

Motivation	Category	Court decision supporting the category
Age	Boys, girls, and adolescents	C-468 of 2018
Ethnic and cultural diversity	Indigenous and other ethnic minorities	SU-092 of 2021
Physical or mental condition	People with disabilities and older adults	UN (2006) T-013 of 2020
Social status	Street dwellers	C-062 of 2021
Inmates	Convicted and in the process of sentencing	T-301 of 2022
Displaced people	National and foreign	T-129 of 2019
Sex and sexual orientation	Women	T-356 of 2021
LGBTI population	Collectives	T-968 of 2021

Source: Authors' elaboration.

Due to these circumstances, in order to guarantee the practical materialization of real or substantial equality (Art. 13 of the Criminal Code), the following is the duty of the State and, in turn, of the constitutional judge: to adopt the measures for positive differentiation to put aside any suspicious criteria of discrimination (Torres Avila, 2012).

1.1. Subjects of special conventional protection

To realize the ideal of a free individual not subjected to fear and misery, it is imperative to create scenarios that effectively guarantee that people enjoy their rights. Economic, social, civil, and political rights are some of these guarantees.

1.1.1. The American Convention on Human Rights

Article 1 of the American Convention on Human Rights—Pact of San José de Costa Rica—provides that States must take on the commitment to respect rights and freedoms. It is imperative to avoid all types of discrimination based on race, sex, language, religion, and political orientation. Furthermore, it is vital to know the national and social origins of the population or any diverse population condition. Based on this postulate, Article 25 of this instrument grants equality to the legal nature of a right and, in turn, a mandate for optimization.

This said article is a mandate whose distinctions or discriminatory treatment are prohibited. However, to guarantee substantial equality, it is possible to adopt distinctions in treatment and various legal treatments to protect those who find themselves in circumstances of evident weakness. This treatment is owing to the principle of human dignity (Faúndez Ledesma, 2004).

Thus, those who find themselves in conditions such as the ones described in Article 1 require special protection: It is imperative to adopt measures that satisfy the enjoyment of rights, for

example, of sick people in vulnerable conditions. The weak, those who are vulnerable in conditions of structural need, are the ones who should be considered subjects of special conventional protection (Bernal Camargo & Padilla Muñoz, 2018).⁵

The Inter-American Court of Human Rights and care for the maternal population

Regarding the care of the maternal population, the Inter-American Court of Human Rights has indicated that states have special protection duties. Thus, Article VII of the Declaration of the Rights and Duties of Man provide that women who are pregnant and breastfeeding have the right to special protection, care, and help. Additionally, Article 4.2 of the United Nations Convention on the elimination of all forms of discrimination against women presents the following reflection: Each State party must adopt special and precautionary measures to protect women and their motherhood. The measures that States adopt for this purpose will not be considered discriminatory.⁶

The Inter-American Court of Human Rights and the Brítez Arce and others vs. Argentina ruling: The protection of the rights of pregnant women

The principles and conventions constitute the fundamental input for protecting the rights of pregnant women. Thus, in the ruling Brítez Arce et al. vs. Argentina, the Inter-American Court of Human Rights estimates that the categories previously described materialize in specialized, adequate, and differentiated health services. Healthcare must be provided during pregnancy and after childbirth to avoid maternal morbidity and mortality.

When these circumstances are not addressed, obstetric violence emerges as a form of intimidation based on gender. The event described produces the liability of the State—in this case, Colombian—and, consequently, the payment of compensation in favor of the victim. As the victim is a subject of special protection, the amount of compensation could be equal to or greater than three hundred current statutory monthly minimum wages (Consejo de

⁵ Health personnel and hospital establishments may cause harm when caring for pregnant women, unborn babies, and neonates, which must be compensated. This statement reveals the importance of state responsibility liability insurance.

⁶ The Colombian Supreme Court of Justice has indicated that in the exercise of medical acts, compensation obligations may arise, borne by the gynecology and obstetrics professional. The patient may be harmed as a result of errors in diagnosis. These are the so-called false positives and false negatives. There are precautionary measures at the international and national levels. In the last case, with the entry into force of the General Code of Procedure (2014), the catalog of precautionary measures was expanded. From the classic possibility of judicial sequestration, seizure of assets and registration of the claim contemplated by the Code of Civil Procedure (1970), with a guarantee and protection of rights, the new procedural provision allows the practice of new unnamed measures. The measures are not expressly provided for in the law and, by the way, are novel. Unnamed precautionary measures aim to “protect litigated rights, prevent damages or ensure the effectiveness of claims” (Constitutional Court, sent. C-835, 2013) to prevent the enforcement of the ruling from being a simple expectation.

Estado, 2014). The damage manifests itself in different ways and, consequently, violates the rights of pregnant women at different stages: during pregnancy, childbirth, and in the postpartum period.

Finally, the Inter-American Court of Human Rights has indicated that the following behaviors constitute dehumanized, disrespectful, abusive, and negligent treatment of pregnant women: the absence of clear and complete information about the patient's health condition and the practice of forced or coerced medical interventions (Brítez Arce et al. v. Argentina Case, 2022).

Pregnant Women, Newborns, and Babies Born Healthy or with any Pathology or Medical Condition that Requires Healthcare

The Colombian state-owned enterprise, through its team of gynecologists and obstetricians, must consider the particular condition that pregnant women, the fetus or unborn children, and newborns in optimal conditions or with some medical anomaly have. As users of medical products or services, the subjects above are subject to a plurality of medical procedures and diagnoses (Castro Ayala, 2018). In performing the medical contract, prudent and diligent conduct by those who make up the health system is required. Behavior must observe appropriate protocols, mainly when dealing with a highly vulnerable health service user.⁷

The application of the principles of medical bioethics and public health in the care of pregnant women, unborn children, and newborns

The complexity of the medical inputs requires the intervention of multiple specialists. Therefore, a cordial relationship between the patient and the doctors involved in medical practice must exist. The relationship must be based on humane, adequate, and sensitive treatment for the health service user (Rodríguez Blanco et al., 2013). The observance of non-maleficence, autonomy, beneficence, and justice is relevant in the doctor-patient relationship. Unfortunately, in the contemporary context, the depersonalization of this type of relational bond is evident (Falasco, 2005).

When the human rights of pregnant women or unborn children—endowed with special constitutional and conventional protection—are ignored, a transgression of the patient's essential rights occurs. The damage translates into inadequate medical practice, causing damages that must be comprehensively repaired. State liability insurance guarantees this right when the principle of non-maleficence is violated.

⁷ Damage can be caused by therapeutic errors, for example, ordering inappropriate medications or procedures, which aggravate the condition of pregnant women or the newborn, and exposing the patient to harm through unjustified risks. These errors can be prevented and avoided through diligent or prudent action (Supreme Court of Justice, Rad. 6199, 2002).

1.2. *Primum non nocere*: First, do not harm pregnant women, unborn children, and newborns

To avoid violating the human rights of vulnerable subjects, the World Health Organization has designed a list of recommendations on maternal and neonatal care (Organización Mundial de la Salud, 2022). The idea is to promote a positive postnatal experience between birth and day 42, counted from the birthdate. The objective is to fulfill the purpose of the principle of non-maleficence (Beauchamp & Childress, 1999) “First, do not harm the patient” in prenatal care. Consequently, the Colombian Ministry of Health and Social Protection issued a series of institutional packages to guarantee the safe care of pregnant women (Ministerio de Salud de Colombia, n.d.). The suggested protocols help minimize the risk of harm to pregnant women and unborn children. Thus, they facilitate the protection of the State’s assets and avoid the precautionary measures requested by the plaintiff.⁸

Human dignity and the prevention of harm to pregnant women, unborn children, and newborns

The primary objective of care for subjects with a highly complex situation of vulnerability focuses on the protection of human dignity, in principle, of a pregnant mother and the unborn child. This is the guiding principle of medical care reserved for women and those born healthy or with an exceptional condition, which must be strengthened, despite positions such as that of the American bioethicist Macklin (2003). She points out that human dignity is a concept that could disappear from medical bioethics without any consequences. The human rights of the referred patient are reduced due to respect for people’s autonomy.⁹

However, human dignity allows each patient to be considered, regardless of their physical or mental conditions, as a unique and unrepeatable being. The patient demands special consideration regarding their life plan and respect for their decisions in the healthcare process. Medical care also requires respecting the capacity for self-determination, which is closely linked to the patient’s human dignity. As a moral standard of patient care, dignity

⁸ Precautionary measures, of course, are applied in cases where the plaintiff is a mother, a newborn, or someone harmed indirectly (siblings, grandparents, uncles, parents). The intention of precautionary measures is given by the preventive nature of the Colombian procedural system. If they are not effective, the right to comprehensive reparation in this type of process would be null and void. The doctrine has considered the need to practice precautionary measures in declaratory medical and health liability proceedings. The need is due, among others, to the so-called *suspectio debitoris*. There is distrust in the defendant because he is suspected of evading his obligation to repair the damage caused to the patient (Álvarez Gómez, 2014). It is possible to request the judge to replace the precautionary measures decreed or to be decreed with others that offer the security required by the judge. That is to say, it is possible to prevent the practice or demand the lifting of precautionary measures as long as a bond (insurance contract) is provided for the amount of the lawsuit claims.

⁹ There is a liability of the health professional and the hospital where the patient is treated, diagnosed, evaluated or operated on. In the first case, we face medical liability and, in the second, the liability of a hospital or a health system (Supreme Court of Justice, Rad. 2008; Rad. 0046901, 2014).

supposes a particular condition of the human being and, consequently, the evaluative burden of the circumstances surrounding the patient (Andorno, 2019).

These considerations allow the administrative judge, for example, to impose compensation exceeding the regular standards of the amount of damage. This means that the victim can demand compensation up to three times the scale indicated by case law (Consejo de Estado, 2014). State liability insurance is intended to make this payment. The indicated situation allows for the special protection of the State's assets and, in turn, guarantees the patient's fundamental rights.

Pregnant women, unborn children, newborns, and the State's violation of the right to health

Since the promulgation of the 1991 Constitution and Law 100/1993, the right to health acquired a preponderant status in the Colombian legal system. The recognition as a right in Article 49 was of the nature of a simple provision of a service and did not register the status of a fundamental right. Protection was obtained in case of violation or threat due to its connection with the right to life or personal integrity. However, constitutional case law allowed its recognition as a fundamental right (T-134 of 2002, T-544 of 2002, T-760 of 2009, T-361 of 2014, T-131 of 2015, T-1030 of 2010, T -760 of 2008, among others).

The recognition of the right to health as an autonomous fundamental right and an independent non-property damage

The ruling on case law unification of non-property damages issued by the Colombian Council of State in 2014 and Statutory Law 1751/2015 strengthens its character as an autonomous fundamental right. It allows the following prerogatives: a) to increase the amount of compensation for non-property damages by up to three times the general assessment—up to three hundred current statutory monthly minimum wages—and b) the establishment of the right to health as a fundamental right of special protection. Health is a public service provided directly and indirectly by the Colombian State (Pérez Fuentes et al., 2019). Therefore, the State's liability arises when wrongful damage harms the patient's health.¹⁰

This human right represents a catalog of obligations for the Colombian State: Under no circumstances can the nation escape its fulfillment. The fulfillment of positive obligations is added to the duties of provision and protection, as well as the negative obligations—not to cause harm—and respect for compliance with regulation and satisfaction commitments (Abramovich & Courtis, 2002). The obligations of availability, acceptability, quality, respect,

¹⁰ The ordinary jurisdiction—civil specialty—hears matters in which medical liability is debated, regardless of whether the entities being sued are public or private. However, the rule operates as long as it is not possible to prove the following: that the public entity has a minimum probability of being convicted for causing the damage (Auto 1039/22, 2022).

protection, and compliance are added to the related duties. This means obligations have immediate effect and progressive performance (Parra Vera, 2003).

The vulnerable situation of pregnant women, women in labor, unborn children, and neonates

Pregnant women, women in labor, unborn babies and neonates are in a situation of extreme vulnerability, which requires special care from the State and from those who provide medical services and comprehensive health care. The service must be proportional to the patient's need for protection and assistance. The purpose is to guarantee the essential conditions of the patient for the whole and effective exercise of their rights to health and physical and mental integrity.

In relation to the health service of these subjects, they are members in the Social Security System for Healthcare and, therefore, are considered consumers or users of a public service. Therefore, taking into account the situation of obvious asymmetry in which they find themselves, their protection system is intensified.

This is why the importance of special care for women and their children is highlighted. This care comprehensively accompanies the process associated with pregnancy, childbirth, and the subsequent care of the newborn. The named subject of special protection is considered an autonomous person concerning the fundamental good of life and the biological development of the mother. This care requires a holistic approach based on human rights, which recognizes the special constitutional and conventional protection.

State and joint and several liability for injuries caused to pregnant women, women in labor, unborn children, and neonates

The care of pregnant women and newborns or unborn children requires public health policies that involve those responsible for implementing maternal and child health programs. The implementation falls on the guarantors of the administration and management of the various health centers and the associations of professionals that participate in the planning and administration processes of health services to protect the interests of the subjects of special protection. In general, these activities are carried out by health professionals and those responsible for training all this human talent.

Consequently, the system requires indispensable physical resources and suitable and competent personnel, since the Colombian State must respond for the damages caused by those who intervene in the provision of health services. This is a joint and several obligation

for the damage caused to the patient (Political Constitution, 1991, Art. 90; Civil Code, 1887, Art. 1244).¹¹

The provision of medical services is part of unique relationships regulated by consumer law. Therefore, they require an interpretation per the guidelines of the *pro consumatore principle* (Iboleón Salmerón & García-Villanova Zurita, 2014). Based on market parameters, pregnant patients and newborns receive medical health services offered by a health operator or provider. The parameters, above all, of the public health provider allow us to ignore the particularities of certain patients: a pregnant woman who is a life carrier, for example, and a human being who has a life expectancy. Both require special constitutional and conventional protection.

State liability for the absence of information to the patient and user of health services

The state healthcare entity must report on the patient's medical situation truthfully, timely, and sufficiently (Congress of the Republic of Colombia, 2015). Otherwise, the State incurs potential liability for failure in service resulting from non-compliance with this health protocol.¹² The medical user demands information about the procedures and risks inherent to medical action. The patient—pregnant woman and father of the newborn—must receive this information in a way they can reasonably understand: A patient's right allows them to accept or reject any diagnosis, indication, procedure, or medical intervention.¹³

The duty of information is tied to informed consent. The mother's consent must be a consequence of the dialogue that exists between her -or her representative- and the physician. Through comprehensive language, the patient receives the necessary explanations about the relevant aspects of the diagnosis and, likewise, the solution to the medical anomaly (Sateler & Lorenzini, 2011).

The information that health professionals must provide to patients must be sufficient and explicit so they can decide on the care process to receive. Reference is made, then, to the

¹¹ In this regard—in civil proceedings—to guarantee the rights of the procedural subjects, the General Code of Procedure (2012, Art. 590) has established rules regarding precautionary measures when the damage is caused by a private service provider. It is possible to request the judge to decree the precautionary measure called registration of the claim on the assets of the defendant, in this case, the health service provider.

¹² The tensions in medical practice are debated within the framework of a declaratory process of direct reparation, with the application of the title of the imputation of failure in service. In the process, the preponderance of the principle of freedom of proof, indicated in the General Code of Procedure (2012, Art. 373), stands out.

¹³ Generally, the technical language used in medical and health liability processes is not common knowledge of the judge or the patient who is the victim of the damage. That is, the judge does not have the technical and scientific knowledge that contributes to forming an evaluative criterion of the facts. For this reason, it is necessary to perform tests, such as expert tests (Jiménez Quiceno, 2021). However, the evidence must be evaluated as a whole. Expert opinion is one of the means of proof necessary to resolve the conflict in cases with a certain complexity and specialty (Nieva Fenoll, 2010).

autonomy of the surrogate mother and the possibility of her participating in decision-making, which is typical of a healthcare process. The process is based, unfortunately, on the existence of a relationship of profound asymmetry: A possible solution is to consider the patient as a consumer of a service, with the express application of the legislation that safeguards the rights of this type of vulnerable contractual ends (Congress of the Republic of Colombia, 2015; López Oliva, 2014).

The patient with special constitutional and conventional protection in his capacity as victim and beneficiary of liability insurance

Article 1082 of the Code of Commerce of Colombia, based on the risk covered in the insurance contract—classifies insurance as damage or general insurance and personal insurance. In this last policy, the object of the risk covered is the person. Damage insurance, in turn, aims to prevent damage to the assets of those who could suffer the risk (Fernández Muñoz, 2017). Protection is granted through three alternatives: real insurance and property insurance, including, in the last case, state liability insurance for the illegal damage that it causes in the provision of health services.

Therefore, insurance satisfies a particular basic need and, in turn, contributes to the functioning of the economic system (Isaza Ramírez, 2016). The insurance operation has special surveillance and supervision by the State as general director of the economy (Art. 334 and 335 of the Criminal Code).

State liability insurance and the protection of the rights of the patient and the public health entity causing the damage

Property damage insurance and, specifically, the state liability policy protects two fundamental guarantees: the human rights of the patient and the safeguarding of the assets of the person providing the medical service in their capacity as policyholder-insured. The insurance protects the assets of the policyholder and, in addition, guarantees compensation for property and non-property damages caused to the beneficiary of the policy. Damage can occur to the victim of a medical procedure related, for example, to the specialty of gynecology and obstetrics (López Oliva, 2014).¹⁴

The obligation to compensate is due to a legally and jurisprudentially recognized principle: Whoever causes damage through fault or fraud to a direct or indirect victim must provide full

¹⁴ In medical and health liability proceedings, the following means of proof are relevant: testimony, judicial inspection, expert opinion, party statement, documents, evidence, and, in general, any other means of proof that is useful and necessary for the conviction by the administrative judge. However, this evidentiary freedom can also be extended to two additional aspects: the freedom to evaluate the evidence and decree certain types of judicial evidence (Canosa Suárez, 2013).

and comprehensive reparation (Télez, González & Jurado Carrillo, 2023). The obligation is a risk that the State can directly take on or transfer to an insurance company. The obligation translates into the following: whoever generates the damage has the duty to respond for the damages caused to the victim through the payment of compensation that allows reestablishing the balance that—prior to the damage—the victim had (Sandoval Garrido, 2013).

The risk transferred to the insurance company involves the medical act and all the care required by the patient. It also includes the diagnosis and treatment phases that comprise all the previous, concomitant and subsequent actions, from the time the pregnant woman attends or is brought to a state medical center, until all the interventions of the gynecology and obstetrics professional and the pertinent medical and administrative personnel are completed (Consejo de Estado, 2006).

The considerable amount of comprehensive compensation for the moral damages caused to pregnant women or unborn children in the provision of the state medical service

For the maternal population, unborn babies, and neonates, care, good practice, and due health attention deserve extraordinary diligence. As they are subject to special constitutional and conventional protection—due to the situation surrounding their condition—medical and health personnel must attend to all health measures and diligently follow care protocols. By violating the provisions mentioned above, wrongful damage may be generated to the subjects above of special protection: Its violation causes the payment of compensation for moral damages, in principle, established up to approximately three hundred million Colombian pesos.

Non-compliance with the guides, manuals, and technical standards issued by the Ministry of Health and Social Protection in the various territorial entities can also externalize damage. The provisions must be strictly observed to avoid wrongful damage and, in turn, reach the standards required by the Mandatory Quality Assurance System (SOGC; SC9193-2017, 2017; Council of State of Colombia, 2014).

In a legal process of direct reparation for failure in the service, payment of compensation to the victim may also be ordered for non-compliance with the technical standard for the early care of pregnancy disorders or with the preconception care protocol. The care protocol for pregnant women under 15 years of age and the Clinical Practice Guides for preventing, detecting, and treating pregnancy, childbirth, and puerperium complications are also included.

The title of the imputation of failure in the medical service can also be applied to the transgression of the protocols for public care in nursing, aimed at managing the sexual and reproductive health of women and the safety model for the care of an obstetric emergency in health institutions. Finally, the technical standard for childbirth care may be unknown, and Law 2244 of 2002 orders the provisions of a dignified and humanized birth in Colombia: The State or its insurer would be obliged to pay a hefty compensation to both the direct and indirect victims.

The alleged failure of the public health service arising from gynecology and obstetrics procedures: The State in its capacity as guarantor of health protocols

In state healthcare, liability follows the principle of proven failure of service. However, applying the alleged service failure is viable when the health entity is obligated to comply with health protocols. This means that the same provisions established for obligations of result apply. Generally, obligations are established between the doctor and the patient. However, in the event of non-compliance with medical protocols, it is up to the State—with the lawyer assigned by the insurer—to accredit the diligence, expertise, and observance of the public official who cared for the surrogate mother or the newborn, for example.

The General Code of Procedure (2012, Art. 167) perfectly applies to declaratory processes of direct reparation for damage caused in the activity of gynecology and obstetrics (Supreme Court of Justice, sent. SC7110-2017). The *onus probandi* indicates the procedural extreme that must prove the fact in tension. However, the official of the contentious administrative jurisdiction may notice that the State is in better conditions, and to demonstrate its absence of liability, the justice operator proceeds to assign the duty above (Supreme Court of Justice. Rad. SC12947- 2016).

1.3. Coverage of property and non-property damages due to wrongful damage caused by the State in gynecology and obstetrics procedures in public liability insurance

In gynecology and obstetrics, obligations in medical care are classified as means and not results. However, any damage caused to a pregnant mother, *unborn child*, or neonate due to improper, reckless, or negligent healthcare may cause the burden of proof to be reversed¹⁵. In this case, the State—with the support of the lawyer assigned by the insurance company—must prove its diligence and prudence to avoid paying compensation for the material and non-property damages caused to the surrogate mother and the indirect victims. It is relevant

¹⁵ Solorzano (2011) points out that there is fundamental evidence in the processes for medical and health liability: the expert opinion. It is a mandatory means of proof in this type of process. The aforementioned means of proof make it possible to prove the existence or not of the deficiencies or errors presented in medical-hospital care. That is, the objective of practicing this means of proof is to establish the behavior of the health professional. Everything, under the *lex artis* or the law of medical ethics, which allows evidence of the existence of damages that are the product of inadequate medical treatment - intended for pregnant women or the newborn, for example, Toro Cortés and Vásquez Lara (2016).

that the insurance policy establishes full coverage of this type of damage. About the first damages, the legislation is clear: the Colombian Civil Code (1887, Art. 1614) indicates that this type of damages corresponds to consequential loss or damages. These are damages of a compensatory nature.

The legislation does not register the same clarity regarding extra-property damages.¹⁶ However, the case law unification ruling issued by the Colombian Council of State (2014) strengthens the legal certainty required by issuing a particular scale. The scale establishes, in principle, that the moral damage caused to the injured pregnant woman or newborn corresponds to three hundred current legal monthly minimum wages (Navia Arroyo, 2007).¹⁷ These are very personal assets of special constitutional protection.

The coverage of non-property damages in state liability insurance can be considered in two dimensions. The first, social dimension, arises from protecting the person's relationships with their environment—honor and reputation. The second is represented in the coverage of everything that psychologically affects, in this case, pregnant women or newborns. The last dimension is unrelated to the victim's social environment—convictions, beliefs, feelings, and intimate affections. In the face of these damages, reference cannot be made to reparation, in the strict sense, but rather to compensation due to the impossibility of placing the injured patient in the state prior to the wrongful damage caused (López Mesa, 2009).

1.4. The compensation principle in state liability insurance for damage caused, among others, to the surrogate mother

The Colombian State Service Entity contracts state liability insurance to protect public assets. In this type of contract, the preeminence of the compensation principle, indicated in the Colombian Commercial Code (1971, Art. 1088), is essential. The policy seeks to comprehensively repair the property and non-property damages caused to the surrogate mother or her child. The public health official's intentional or negligent action or omission causes the damage.¹⁸

¹⁶ Concerning compensation for non-property damages, it is necessary to be precise regarding the ethical connotation these entail. Fernández (2019) points out that this reparation reinforces the recognition of human dignity and, consequently, allows the individual to return to “occupy their place within a society that has recognized that their person, body, and soul are infinitely valuable.”

¹⁷ In this sense, the Colombian Supreme Court of Justice issued two rulings: the first on July 21, 1922, and the second on August 22, 1924.

¹⁸ Precautionary measures have been considered procedural instruments that ensure the effectiveness of rights that have been or can be declared through a judicial process (Forero Silva, 2013). The Colombian Supreme Court of Justice has indicated that precautionary measures are procedural instruments that ensure the guarantees of a right in a provisional or temporary, variable or modifiable manner. The aforementioned measures are accessory to the main process (STC3917-2020, 2020).

However, the insurer's obligation is conditional. Conditionality represents a limit because the insured or the victim of the incident cannot enrich themselves through the insurance. For example, when the surrogate mother, in her capacity as beneficiary of the policy, claims payment for an alleged consequential damage canceled by a third party. The third may be the General Health Security System, among others.

The insurance company is obliged to pay the compensation established in the policy. The damage experienced by the patient and the other accident victims causes damage, which must be mainly established in the insurance cover (Ordoñez Ordoñez, 2001). It is essential to check that the policy includes protection for property and non-property damages. For example, when noting the exclusion of moral damage, any non-property damage, or loss of profits in the policy, it is relevant to request its protection. The purpose is to obtain suitable protection of the State's heritage (Díaz-Granados Ortíz, 2012; Isaza Posse, 2011).

Conclusions

The academic exercise of this research article allowed us to prove the existence of significant advances concerning protecting the human rights of patients, especially pregnant women, unborn children, and neonates. The above is in the process of diagnosis, care, assessment, and medical-health intervention. Medical service users are considered subjects of special constitutional and conventional protection.

Furthermore, it was identified that victims of wrongful damage have the possibility of suing the Colombian State, in a declaratory process of direct reparation, for the failure in the service in medical provision. The situation may violate public assets due to the need to pay comprehensive compensation at their expense.

For this reason, the importance of contracting a state liability policy was highlighted. This policy has two fundamental purposes: guaranteeing the payment of total compensation to the victim of the damage and protecting the State's assets. In the presence of an adverse event, the administrative judge orders payment of the property and non-property damages caused to the patient.

Finally, it was evident that, due to the special conditions of patients damaged in the healthcare process, they could require payment of moral damage, up to three hundred current legal monthly minimum salaries. In addition, other damages of a property nature include consequential damage and loss of profits. For this reason, it is reiterated that the Colombian State must subscribe to a state liability policy.

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