

# Medical Liability for Omission under the Portuguese Criminal Law: A Critical Eye on Portuguese Jurisprudence

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*In the Portuguese legal system, criminal liability for omission can be conducted by the legal category that criminalises omission in itself, regardless of the result, or operate by equating omission with action. This is enshrined in section 10 of the Penal Code, as long as the omitting person has a personal legal duty to act as guarantor (section 10, no. 2). In medical criminal liability, the framework for a hypothetical omission by an on-duty doctor in emergency services has been controversial. In our legal system, section 284 of the Penal Code expressly stipulates that a doctor's refusal to administer care be punishable conduct. On the other hand, it is possible that the doctor on duty in the emergency room of a hospital has a personal legal duty to act as a guarantor, arising from the contract that binds him/her to the hospital. Thus, it is necessary to affirm a subsidiarity relation between the mechanism of equating omission with action resulting from section 10 of the Penal Code and incrimination under section 284 of the Penal Code. However, this has not been the major understanding of the jurisprudence of the Portuguese courts on this subject. For instance, when the refusal of assistance by a doctor causes the death of a patient, instead of convicting the doctor for homicide by omission (section 131 of the Portuguese Penal Code, ex vi section 10, numbers 1 and 2), courts are convicting as per section 284 – refusal of the medical doctor to provide medical assistance. The present work aims to critically present this jurisprudence, state the legal and doctrinal foundations that justify the inclusion of these hypotheses within the scope of crimes committed by omission and point out the practical importance of choosing this solution.*

**Keywords:** *Omission; Committed by omission; Medical liability; Duty to act as guarantor.*

## Introduction

Criminal liability is most common for the commission of a certain action. The offender develops an action which is foreseen by the Penal Code as a crime and will be charged and convicted accordingly<sup>1</sup>. However, over the years, the criminal

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<sup>1</sup>Hereinafter, the Portuguese Penal Code will be referred to as PPC and the Portuguese Civil Code will be referred to as PCC.

relevance of omission has started to make sense in some cases<sup>2</sup>. We should bear in mind that the grounds for the criminal liability of omission is not in the omission itself, but instead, in the fact that the adoption of the necessary action would have preserved the protected interest. Behind every punishable crime is the aim of the legislator to protect a certain interest. For homicide, for instance, it is meant to protect life; for theft, it is meant to protect property; for kidnapping, it is meant to protect freedom, and so on. Not every interest behind a crime should give cause to criminal liability for omission of the action that would permit the protection of such interest because, otherwise, the State would be over intervening in one's freedom of action<sup>3</sup>.

That is why the Portuguese legislature has set boundaries concerning the interests requiring protection for the criminal liability of a person who refuses to act, in order to protect those interests. We come across those boundaries implicitly in section 200 of the PPC as follows: "Whoever, in case of serious need, namely caused by a disaster, accident, public calamity or situation of common danger, which endangers the life, physical integrity or freedom of another person, fails to provide the necessary assistance for the removal of danger, whether by personal action or by providing assistance, shall be punishable by a prison sentence of up to one year or a fine as prescribed in the law".

This means that the interests we have been referring to are life, physical integrity, and freedom. Only when these interests are endangered, is admissible the existence of a legal duty to act, imposed by a principle of social solidarity. From paragraph 3 of the same section, we extract a valuable requirement for the criminal liability of the person legally obliged to act but failed to do so: "The omission of assistance is not punishable when there is a serious risk to the life or physical integrity of the omitting person or, when relevant, the assistance is not required.". If, somehow, the action which would eliminate or lessen the danger to the protected interest represents a serious risk for the one legally obliged to act, that action will no longer be demanded. If the grounds for the legal duty to act is social solidarity, this solidarity does not go so far as to put one's life or physical integrity in jeopardy.

What about the medical profession? How would a doctor be criminally liable for omitting a certain action which would save a patient's life, for instance? Let us submit the following hypothesis: John is the only doctor on call in the emergency room of the hospital. Alex is admitted in that same emergency room, with severe respiratory deficiency and seizures. The nurse in charge promptly alerts John for the urgent necessity of medical assistance. However, despite the nurse's insistent alerts, John is watching the final of the Champion's League and refuses to assist Alex before the end of the match. Once the match is over, John rushes to resuscitate Alex, however with no success. The autopsy reveals that Alex's death would have been prevented if John had immediately assisted the patient at the time of admission in the emergency room. Should John be criminally liable for Alex's death?

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<sup>2</sup>See Gómez-Aller (2008).

<sup>3</sup>See Carvalho (2022) at 550-551.

The present paper aims to discuss the criminal liability, under the Portuguese law, of a medical doctor on duty who refuses to assist a patient.

First, we will start by addressing the Portuguese criminal regime of liability for the omission of assistance in general, based on sections 10 and 200 of the PPC, moving on to the particularities of the criminal liability for omission of assistance in the medical profession. We will then present some Portuguese Superior Courts Rulings on this theme and critically analyse their conclusions. We will finalise our paper with the appropriate final remarks.

## **The Portuguese Regime of Liability for Omission<sup>4</sup>**

### *Omission of Assistance or Commission by Omission?*<sup>5</sup>

Criminal liability for omission, in situations of danger to the life or health of another person, presupposes three requirements:

- 1) that someone (one person or several) is in a situation of danger to life or physical integrity (in the sense of health, whether physical or mental);
- 2) that the omitting person can provide the necessary assistance to try to prevent (or reduce) the risk of this danger resulting in actual harm or death to the life or health of the person in danger;
- 3) that the omitting party has the legal duty to carry out the action, that is, the necessary assistance to prevent the danger from materializing into actual damage to the life or health (physical integrity) of the person who is in the respective dangerous situation<sup>6</sup>.

Theoretically, under Portuguese law, criminal liability for omission of the action required to avoid a negative outcome to the protected interest of someone may occur in one of two ways: the omissive agent may be punishable under section 200 of the PPC (omission of assistance), or, eventually, if the omissive agent has a special legal duty to act, imposed by the existence of a particular relation between this agent and the person whose interest he/she is obligated to protect, the omissive agent be punished as if having acted to actually commit the omissive crime. For instance, if the omitted action would have prevented the victim from dying, in this case, the omissive agent may be convicted of homicide<sup>7</sup>. The decisive factors to choose from one of the two possible paths are: 1) the verification, in the concrete case, of the negative outcome to the protected interest; 2) the existence of the special relation between the omissive agent and the interest to protect.

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<sup>4</sup>On this subject, see Dias (2019) at 1055-1116.

<sup>5</sup>About the distinction between the two, see Silva (2012) at 65.

<sup>6</sup>About the duty to act, see Nelkin & Rickless (2017) at 199-216.

<sup>7</sup>Section 131 or 132 of the PPC.

*Omission of Assistance*

In fact, as mentioned above, under section 200, anyone who, in case of serious need, namely caused by a disaster, accident, public calamity or situation of common danger, which endangers the life, physical integrity or freedom of another person, fails to provide the necessary assistance to the removal of danger, whether by personal action or by providing assistance, is punishable, regardless of the occurrence of the negative outcome to the protected interest. If I come across a person hit by a car and bleeding out in the street, I am legally obliged to provide help likely by calling an ambulance. If I walk away, I will be committing the crime of omission of assistance, regardless of the negative or positive outcome. This means that, if another person behind me called the ambulance just in time to prevent the victim's death, I will still be held accountable for the omission foreseen under section 200.

We may find some relevance to the verification of certain outcomes, as follows: for one, if the negative outcome was impossible to prevent, the omission of assistance becomes irrelevant, because the action was not adequate or necessary to prevent the violation of the protected interest. In the hypothesis mentioned above, if the injured person was in such a state that, regardless of the prompt intervention of the medics, his death was inevitable, then, convicting the omissive agent in this case would be senseless. One other outcome that may be relevant and that should be considered, is at the time when the judge is called to determine the adequate penalty under the circumstances, if despite the absence of assistance from the omissive agent, the interest remained protected<sup>8</sup>.

One last point to reinforce, as previously mentioned, the idea that section 200 of the PPC lays its foundations in the principle of social solidarity that is binding to every member of the community, as a whole.

*Commission by Omission*

So, when should we resort to the equation of omission with action? Lest us look at section 10 of the PPC:

- 1) When a type of crime comprises a certain result, the fact covers not only the appropriate action to produce it but also the appropriate omission to avoid it, unless otherwise is the intention of the law.
- 2) The commission of a result by omission is only punishable when the omitting party has a legal duty that personally obliges him to avoid that result.
- 3) In the case provided for in the previous paragraph, the penalty may be particularly reduced.

To start, we should state that the equation will only be possible when the crime comprises the occurrence of a certain result. Take the most familiar example

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<sup>8</sup>See section 72 of the PPC.

of the crime of homicide: homicide will only be committed if the death of the victim takes place. Otherwise, there is only an attempt of homicide. Paragraph 1 of section 10 specifically declares the equation of omission with action in such cases, as long as we can establish that the omitted action would be adequate to prevent the result, which consists in the violation of the protected interest. Again, taking homicide as the set example, to equate omission with action, the omitted action should be adequate to have prevented the victim's death. This section (section 10) of the PPC is systematically located in the general part of the penal code, and its function consists solely in establishing that equation.

The focal point of this section, however, lies in paragraph 2, where the law determines the cases when the equation will be imposed, by stating an indeterminate concept which consists in *the legal duty that personally obliges the omitting party to avoid that result*.

*Filling in the Concept: Sources of the Legal Duty that personally obliges the omitted Party to avoid the Result*

The grounds to the existence of a legal duty that personally obliges the omitting party to avoid the result are the following: the law, a contract, the unjustified creation of danger to a certain protected interest, the voluntary assumption of a duty of surveillance, the *dominium* over danger causes, such as a dog owner, the existence of a factual relation of mutual trust between the person in need of help and the omitted person, among a few others.

The law imposes a legal duty for parents to act to protect their children's interests, under section 1874 of PCC, between spouses, under section 1672 PCC, between cohabitants, under Statute 6/2001, 11.05.2001, and finally, for all people mentioned in section 2009 of the PCC, such as ex-spouses, descendants, ascendants, siblings, aunts and uncles, stepparents and stepchildren.

### **The Portuguese Regime of Liability for Omission when the “Omitting” Person is a Medical Doctor<sup>9</sup>**

*Crime of Refusal of Doctor (PPC, section 284)<sup>10</sup>*

This crime is based on the special duty that falls upon the doctor, who is the one who has precisely the function of seeking (trying) to save the life and protect the health of the person who is in a situation of danger to his life or to serious harm to his health (“physical integrity”). The specificity of this crime lies in the failure to provide “the assistance of one's profession”, that is, in the failure to provide medical assistance, assistance that appears, in the specific situation, likely to prevent the danger to life or health from arising, resulting in the death or serious injury to the health of the person in need of medical assistance. Therefore, this crime can only be committed by a doctor and the unlawfulness and gravity of this

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<sup>9</sup>See Domingues (2020). See also Souza (2006) at 229-238.

<sup>10</sup>For more developments on this subject, see Carvalho (2018) at 29-59.

crime lies in the failure to provide medical assistance (in the words of section 284, in the failure to provide “the assistance of his profession”). Because such a crime can only be committed by a doctor (since only a doctor can provide assistance specific to the medical profession), that is why it is designated as a specific crime.

Comparing this crime of refusal of doctor (section 284), with the crime of omitting assistance (section 200), that can be committed by anyone (hence the term “common crime”), this crime of Refusal of doctor constitutes a more serious form of “failure to provide assistance” due to the special functional duty that falls upon the doctor. As it is more serious, the penalty can be up to 5 years in prison, while the crime of failure to provide assistance is only punishable with a prison sentence of up to 1 year or a fine as prescribed by the court.

In the case where a nurse (even one with extensive professional experience) refuses to provide assistance similar to the one the doctor would provide, he/she would not be considered for that crime but would only be convicted of omitting assistance, under section 200 PPC, or, eventually, of the crime of homicide, under sections 131 and 10, paragraph 2, or serious offense to physical integrity by omission, under sections 144 and 10, paragraph 2, if the “legal duty of guarantor” falls upon the nurse, as mentioned above.

*Crime of Homicide or offense to Physical Integrity due to Omission of Health Care, when the omitting Party has the Legal Duty of Guarantor*

A health care provider, should it be a doctor, nurse or a caregiver in a nursing home or an institution for the disabled, has a legal duty to act as guarantor of the life and health of those in need of the respective care. The failure to assure this care may induce the omitting person in criminal liability for the crime of homicide or intentional harm to physical integrity<sup>11</sup> or negligent homicide or negligent harm to physical integrity<sup>12</sup>, depending on whether intent, or only negligence, regarding the result death or injury to physical integrity (health) was present.

When a doctor is on call in an emergency room of a hospital, or on working hours in a medical office, clinic or hospital, the doctor is bound by legal duty to act when a person is at risk (life threatening or physical integrity threatening). Section 10, paragraph 2 of the PPC is applicable, because we may assume the omitting party has a legal duty that personally obliges him/her by contract to avoid a detrimental result. If the doctor is on call in a public hospital, there should be a contract that makes him/her personally obligated to act. If the doctor is on call in a private hospital, or in a private clinic or medical office, where is the binding contract to be found? Is the open emergency room ready to receive patients with a proposal of contract, or only a mere invitation to contract? The answer is not irrelevant because if we are in the presence of a proposal, when the life threatened patient enters the emergency room, he/she is accepting the proposal, and therefore a contract with the hospital and the duty to act is binding for the medical staff. Whether the patient pays for the treatment or not is an issue to be solved with tort law. But if the open emergency room is considered an invitation to contract, then

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<sup>11</sup>See sections 131, 143 or 144 of the PPC.

<sup>12</sup>See sections 137 or 148 of the PPC.

the patient's entrance is in essence making a proposal which the hospital may or may not accept. In that case, if by chance the patient is unable to pay, the hospital may decline care – refuse the proposal, and therefore, we will not assume the omitting party has a legal duty that personally obliges him/her to avoid the detrimental results.

According to what we have seen previously about the grounds of this legal duty to act, in this particular case, we cannot find another motive which may establish that particular legal duty that personally obliges him/her to avoid that result.

To simplify our line of thought, we will leave out of the discussion the cases where the doctor is on working hours in a private hospital.

### *Resolving the Hypothesis placed in the Introduction*

Let us return to the hypothesis mentioned in the introduction of this paper: John is the only doctor present on call in the emergency room of the hospital. Alex is admitted in that same emergency room, with severe respiratory deficiency and seizures. The nurse in charge promptly alerts John for the urgent necessity of medical assistance. However, despite the nurse's insistent alerts, John is watching the final of the Champion's League and refuses to assist Alex before the end of the match. Once the match is over, John rushes to resuscitate Alex, with no success. The autopsy reveals that Alex's death would have been prevented if John had immediately assisted the patient, upon admission to the emergency room.

John should be charged and convicted by homicide (section 131 *ex vi* section 10, paragraphs 1 and 2 of the PPC). John has signed a contract with the public hospital, why which he is obliged to provide care to patients, within certain time frames. The homicide in this case is intentional because, under the described circumstances, John had to foresee that the delay in the assistance to the patient could cause his death, since he was warned of the severity of the situation insistent by the nurse.

Although this is the correct way to address the issue, the Portuguese jurisprudence has been sending mixed signals.

### **The Portuguese Jurisprudence on Liability for Omission when the Case is brought against a Medical Doctor**

*Oporto Superior Court (Relação) ruling from 10th July 2013 (process number 518/06.ITALSD.P2)*

The main facts of this case were as follows: The patient was taken to the emergency room of the hospital, complaining of pain in his chest and leg. The nurse in the emergency room used the Manchester triage and assessed his condition with a yellow bracelet, at 04:30 a.m. The Manchester triage goes from blue (recommended wait for a maximum of 240 minutes), to green (maximum of 120 minutes), to yellow (sixty minutes), to orange (10 minutes) and finally to red

(0 minutes). As time went by, the patient's condition deteriorated, one of the nurses approached him and asked if he was feeling worse, to which he answered affirmatively. Nevertheless, no doctor came to assist or check on him. At 07:00 a.m. a nurse passing by found him in cardiorespiratory arrest. CPR were administered for over half an hour, alas with no success. For a period of about two hours no patient was assisted in the emergency room, nor seen by a doctor, because all doctors had gone to get some rest.

The doctors who were in the hospital were prosecuted of refusal of doctors to act (section 284 of the PPC). In this case, homicide for omission of care was not even considered. The court convicted one of the doctors for violating section 284, on the assumption that if the doctor was on call in the emergency room, he had access to the listing of patients present who needed assistance, he was aware of the expected maximum wait time for each patient. Therefore, when deciding those patients could wait, the doctor was willingly accepting the risk that the waiting could result in a negative outcome for the patient. The Court considered that intent was present, if not direct or necessary, at least eventual. This means that the doctor had to foresee the fact that the delay in administering care could result in negative consequences to the health, or even to the life of the patient, and the decision to rest, regardless, was a gesture which demonstrated the conformation with that possibility.

However, this was not the view of the Oporto Superior Court which dealt with the appeal. In fact, not only was the crime of homicide by omission not considered (sections 131 and 10 of the PPC), but also this superior court was not convinced of the existence of intent of any kind. This meant that, since the refusal of a doctor is a crime solely punishable when intentional refusal of assistance was established, it led to the acquittal of all doctors. The Court found the doctors' behaviour merely negligent.

We cannot accept the understanding of this Superior Court. In my view, if a doctor is on call in an emergency room of a public hospital (or, for that matter, also in a private hospital), he has the duty to act. If the death of the patient was due to the high abundance of patients with higher priority, according to the Manchester triage, the omission of care would not be a criminal liability issue, since his omission would be justified by a cause of exclusion of illegality (*conflict of duties*, see section 36 of the PPC). However, in this case it was proven that there was not an overflow of patients, but that the doctors decided to take a break to rest (for about two hours). We find this behaviour completely unacceptable. Although it was nighttime, the doctors should only stop to rest if the emergency room was empty. During the day, doctors are not allowed to stop for two hours to rest. So, why should these doctors be any different? Their time to rest would arrive, as soon as their shift was completed. Going to sleep in these circumstances cannot be seen as a mere negligence, if due to the delay in assistance a patient dies or suffers permanent damages to his health. The Court should, at least, have convicted the doctor for committing the foreseen crime as per section 284.

However, having presente all the above, we find that the proper frame for this case was to consider that the doctor had committed a homicide, under section 131 or even 132 of the PPC, for omission of care (section 10 of the PPC) because,



under the circumstances, the doctor was contractually required to assist patients in need. He had a legal duty of guarantor. Therefore, omitting care should be adequately equated to the action of depriving someone of his or her life.

*Oporto Superior Court (Relação) ruling from 12<sup>th</sup> November 2008 (process number 0813421)*

Luckily, not all superior court rulings contradict the basic principles of criminal law. Let us look at another Superior Court ruling which properly framed the facts and convicted the omitting doctor for homicide in the following scenario.

A woman was hit by a car and rushed to the emergency room of the hospital. Once there, the doctor in charge ordered a series of exams he thought adequate. The woman complained of high levels of pain, but after assessing the case, she was discharged and sent home approximately after nearly six hours. She never stopped complaining about her severe physical pain. Less than 24 hours later, she died.

The first court ruling acquitted the doctor, on the grounds that it was not possible to conclude unquestionably that the death of the patient was caused by the lack of adequate medical treatment.

Oporto's Superior Court then maintained that, "As is clear from the sentence and the appeal, it is accepted that the defendant acted negligently, which is evident from the facts transcribed about what he should have done and did not do, through his own fault (from the investigation from the causes of the accident until the detection of the fracture of the D12 vertebra noted on the X-ray and period of observation), what is questioned is whether the cause of the deceased's death was the lack of adequate medical treatment." The Court acquitted the defendant sustaining the principle *in dubio pro reo*. Now, taking into consideration that a road accident occurred, which caused traumatic injuries and bone fractures, which required medical treatment, and that it was not demonstrated that those injuries alone caused death, as during the autopsy, no injury was found that, in itself, would justify death.

Considering that those injuries do not heal on their own but need to be treated, it seems obvious that the cause of death was both the injuries sustained in the accident as well as the lack of adequate medical treatment. It is the logical, immediate conclusion to take from experience, because a victim of a road accident, with those injuries, will most likely (almost certainly) die if not treated, given that the (treated) injuries alone would not lead to death, but to other effects such as quadriplegia. Thus, due to the injuries and the lack of treatment the victim died, the cause of death being the injuries on the one hand and the lack of treatment on the other."

In other words, the Court found that there was an obvious connection between the lack of adequate treatment and the death of the woman. The injuries she had suffered with the accident were not sufficient to cause her death, if properly treated. Therefore, it is evident that the omission of proper care caused the woman's death. The court convicted the doctor of negligent homicide (section 137 of the PPC), *ex vi* section 10, §1 and 2. In this case, the doctor had a legal duty to

act, based on section 284, *a contrario sensu*, and, of course, because of his contract celebrated with the medical institution where the doctor provided care.

One final remark to express that intentional homicide was never considered in this case because the attending doctor most likely did not foresee such an outcome. If he had, considering the average doctor's pattern of action, the doctor would probably have ordered further exams and would have paid more attention to the patient's complaints to get to the proper diagnosis and treatment.

## Conclusions

Throughout this paper, we learned that in the Portuguese legal system, in general, criminal liability for omission can be conducted according to the legal category that criminalises omission in itself, regardless of the consideration of the result, or operate by equating omission with action, enshrined in section 10 of the Penal Code, as long as the omitting person has a personal legal duty to act as guarantor (section 10, no. 2).

When medical professionals are concerned, the framework for criminal liability for a hypothetical omission by a doctor who is on duty in an emergency service is controversial because, on the one hand, section 284 of the PPC explicitly stipulates that a doctor's refusal to assist in itself be deemed punishable conduct. It is possible to understand that the doctor on duty in the emergency room of a hospital has a personal legal duty to act as a guarantor, arising from the contract that binds him/her to the hospital, and, eventually, from section 284, *a contrario sensu*.

Thus, if theoretically both solutions are overlapping, in reality the court will have to make a choice. The correct choice, for this matter, is claiming the subsidiarity relation between the mechanism of equating omission with action, resulting from section 10 of the PPC, and the incrimination under section 284 of the same code.

However, this has not always been the understanding of the Portuguese jurisprudence. When the refusal of assistance of the doctor caused the death of the patient, for instance, instead of convicting the doctor for homicide by omission (section 131 of the Portuguese Penal Code, ex vi section 10, numbers 1 and 2), the majority of courts have been convicting as per section 284 – refusal to render treatment. To demonstrate this, presented here is the example of the Oporto Superior Court ruling from 10th July 2013 (process number 518/06.1TALSD.P2), in which the Public Prosecutor, first court and Superior court, all preferred to apply section 284.

Luckily, not all jurisprudence misuses section 284 of the PPC and the mechanism of equating omission with action, resulting from section 10 of the PPC, where criminal liability of medics is concerned. And here is a good example: Oporto Superior Court ruling from 12th November 2008 (process number 0813421). In this case, the doctor was convicted for negligent homicide (section 137 of the PPC), ex vi section 10, §1 and 2.

This last interpretation is the only one which respects the basic principles of the criminal law and the community sense of justice. Since the penalties are substantially different, letting the first choice prevail (using section 284), make us doubt the true fulfilment of the purposes of the penalties, such as of general and specific prevention in those cases. We do not intend to crucify the medical profession for their faults. However, we must not forget that these professionals hold the lives of people in their hands and, for that matter, have to be held accountable for their omissions when they lead to unfortunate outcomes, such as death or serious, permanent injury. Convicting a doctor for section 284 of the PPC, in circumstances like those mentioned above does not provide for proper accountability and does not pay a good service to Justice.

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