

## **Criminal Proceedings for Medical Errors in Obstetrics and Gynecology**

### **Background**

1. “Criminalization of medical errors” refers here not only to formal criminal charges laid by government authorities but also to threats to bring criminal charges made by individuals or government authorities.
2. While exceedingly rare, there has been a perceived increase in criminalization of medical errors in many countries.
3. A crime is an act, or omission to fulfil a duty to act, that causes harm not only to another but that also harms or gravely offends the wider community, justifying punishment of the offender rather than simply compensation to an injured individual.
4. Criminalization requires two conditions to be met: (a) a harmful act or omission constituting a gross deviation from a legally required standard of care, often displayed in a pattern of conduct; and (b) a culpable state of mind, showing that the harmful act or omission was undertaken purposely to cause harm, knowing that it might cause harm, or recklessly regarding whether it would risk causing harm. The legally required standard of care must take into account limits on resources that are beyond the control of the obstetrician-gynecologist.
5. Adverse outcomes occur not uncommonly in obstetrics and gynecology, despite focused and sustained adherence to processes to ensure patient safety and quality of care. An adverse outcome, no matter how severe, does not in itself justify the conclusion that negligence has occurred, because the vast majority of adverse outcomes do not result from deviations from a standard of care, but from current scientific and clinical limitations of obstetric and gynecologic practice. The burden of proof therefore is on the individual or governmental authority that claims that an alleged medical error should be liable to punishment under criminal law.
6. Unjustified criminalization of medical errors, such as through charges of manslaughter, criminal negligence causing death or serious bodily harm, or assault, causes disproportionate harm to obstetrician-gynecologists’ reputations and self-confidence, and to patients and societies dependent on access to their professional services.

### **Ethical Framework**

1. The obstetrician-gynecologist has the professional responsibility to adhere to processes designed to ensure patient safety and quality of care.

2. Leaders in obstetrics and gynecology have the professional responsibility to create an organizational culture of professionalism that provides oversight of processes of patient safety and quality of care.
3. The ethical principle of justice precludes criminal proceedings or threats of criminal proceedings when there is no prima facie evidence that the criteria for a crime have been met.
4. The ethical principle of justice precludes issue of an arrest warrant, arrest itself, or confiscation of travel documents, when there is no prima facie evidence that the criteria for a crime have been met.

### Recommendations

1. Obstetrician-gynecologists and leaders in the specialty should observe the well-recognized, internationally accepted professional responsibility to enhance patient safety and quality of care, in order to minimize medical errors.
2. Obstetrician-gynecologists and their professional associations (where they exist) should advocate for reform of criminal law to prevent prosecutorial abuses when adverse outcomes occur.
3. To achieve this reform, obstetrician-gynecologists and their professional associations (where they exist) should advocate for the creation of mandatory pre-trial review of criminal charges alleging medical error, conducted by government-supported independent peer-review committees, whose reports would be available to parties in related criminal proceedings. This pre-trial review must involve the obstetrician-gynecologist concerned.
4. Obstetrician-gynecologists and their professional associations (where they exist) should advocate for the legal prohibition of issue of an arrest warrant, arrest itself, confiscation of travel documents, or other measures when there is no prima facie evidence that the criteria for an alleged crime have been met.
5. Obstetrician-gynecologists and their professional associations (where they exist) should support obstetrician-gynecologists to bring civil proceedings, such as for malicious prosecution or defamation, against individuals or governmental authorities that bring or threaten to bring charges when they are groundless, i.e., there is no prima facie evidence that the criteria for an alleged crime have been met. Because of the serious consequences for the individual obstetrician-gynecologist and the medical profession, timely and fair compensation should be awarded.