

## Problems of the civil and criminal responsibility of medical doctor and his assistants

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**Abstract:** Medicine profession is one of the most noble professions on which the wellbeing of the society stands. A doctor is assigned with serving people and looking after their comfort. A doctor cannot assume such a high position in society and among people unless he fulfills his duties and obligations to his patients guided by his religion, medical career and the laws that countries make in this regard. Many of the laws do not provide full protection against the illegal practices made by some doctors and their assistants. These practices include violation of the ethics of the profession as the doctor's demand for medical checkups in some labs in order to get higher fees while these checkups are unnecessary. These practices may also include conduction of radio tests for a patient while the malignant disease has spread dangerously in his body. The negative practices also include remaking of recent medical examinations for gaining financial interests and prescribing certain medicines in order to have some benefits that are offered by the producing companies. It is well known that medicine is a sensitive profession related to the human body.

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### Introduction

Doubtless the profession of medicine stands upon clear intention, mercy of heart, and sound purpose. However, some misguided doctors deviate from these noble ideals. They practice medicine as an ordinary profession whose ultimate goal is only seeking money with whatever illegal means without giving much attention or consideration to the obligations they are committed to fulfill or the rights they have to give to their owners.<sup>1</sup>

This study attempts to discuss the obligations of the medical doctor who will be liable for disciplinary action if he fails to fulfill these obligations. The doctor's time is no longer his own ownership. People share him his time and aspects of this share include an obligation to develop himself and follow the innovations in the field of medicine and more important his commitment to cure his patients<sup>2</sup>

The importance of this study lies in the fact that one of the many aspects of medical law that presents a constant source of concern and anxiety to medical practitioners is that of legal liability for medical malpractice. Medical malpractice suits may not only have serious financial implications for the medical practitioner but may also adversely affect his professional reputation. However, a fundamental notion of and scrupulous adherence to a number of cardinal legal principles relating to the doctor-patient relationship *cango* a long way towards-avoiding medical malpractice litigation and its attendant inconvenience and embarrassment.

### Reasons of choosing the topic:

Many ancient sources bear testimony to the interrelationship between medicine and law. Hammurabi's Code and the Hippocratic Oath contain a number of legal and ethical provisions governing the legal liability and behavior expected of medical practitioners. Today the conduct of doctors and practice of medicine are regulated by a steadily increasing body of medico legal principles of diverse origin. Examples of these in the international sphere are the Declarations of Geneva, Helsinki, Oslo and Tokyo and the International Code of Medical Ethics. In the local sphere, the Saudi legal system governs a multitude of aspects relating to the practice of medicine. Some practices that contradict with the ethics of the profession have spread widely in the Arab communities. These practices have endangered the life of the patient in the long run. The issue of the liability of the doctor for the medical act has been regulated by the Saudi law for health profession practice issued by the Royal Decree no (m/59) in 4/11 (1426<sup>3</sup> this law has added to the duties of the doctor towards his patient some general obligations of the health medical doctors

### The methodology of the study

In this study I have followed the inductive approach in dealing with the duties and responsibilities of the doctor and the role of his assistants. The critical method has been used to determine the practical liability of the doctor especially with the precise nature the professional work of the doctor. Moreover, the analytical approach

has been used in the comparative of laws in order to discover how they deal with the problems of applications.

### **The plan of the research**

Section one deals with the direct criminal responsibility of doctor. In section two, we deal with the error of the doctor or the surgeon when it participates in causing the final result. Section deals with the doctor's responsibility for his assistants. Section four deals with the judicial application of the causation relationship in crimes of manslaughter or injury by mistake.

### **Problems of the civil and criminal responsibility of the medical doctor and his assistants.**

Most of the French, Egyptian and Saudi jurisprudence see that the basis of the legality of the medical work is the will of the regulator that allows doctors to deal with the bodies of their clients by virtue of the order of the law or the license of law. They have the same effect with regard to the permissibility of the act whether in the penal code or other branches of law such as the laws regulating medical professions that give doctors and surgeon the right to deal with the bodies of people with acts that are considered crimes if committed by other people who do not have the legal right with virtue of article 60 of the Egyptian penal code and article 327 of the French penal code.

### **Our assessment of this opinion.**

We cannot agree with the opinion of most Saudi, Egyptian and French jurisprudence and judiciary that the license of law is the only basis of he legality of the medical act. What is correct in our opinion is what some of the Egyptian jurisprudence believe that the license of the law is not a cause for the legality of the medical act, rather it is the academic license. Upon which the doctor is given the license to practice medicine.<sup>4</sup>

Once the basis of legality is determined, is there any possibility of criminal responsibility in case of the doctor's non-compliance with the limits of his act or perpetrating a felony.? Is he liable for accountability like any perpetrator of any other crime?. We will deal with the direct and indirect responsibility of the doctor and his assistants.

### **Section one: The direct criminal responsibility of medical doctors.**

#### **The legal framework of The relationship between doctor and patient**

The legal relationship between doctor and patient is primarily based on contract,<sup>1</sup> but may also be based on a duty of care (e.g. where a seriously injured unconscious patient is brought to a casualty ward for emergency treatment). In the ordinary course of

events, the parties enter into an express or tacit agreement: the patient consults the doctor about his complaint, and the doctor undertakes to diagnose the patient's ailment and treat his condition in return for payment of his professional fees. Moreover, since in terms of the fundamental principles of freedom of contract both doctor and patient are free agents, this means that medical practitioners have neither a professional right (on the basis of their ethical duty to heal and act in the patient's best interest) nor, generally speaking, a legal duty to intervene medically. As regards the latter, a legal duty to administer treatment will, as an exception to the general rule, be incumbent upon a medical practitioner in the following categories of instances:

1. **Where he assumes control over a potentially dangerous situation and/or object.** Thus a failure by hospital staff to properly set the patient's ankle fracture and mould the plaster, initially check the fracture dislocation by means of radiographs; and subsequently correct the fracture position, resulted in the hospital being held liable for deranges. Likewise, a failure by anesthetist constantly to monitor the patient and to ensure that the endotracheal tube remained correctly inserted, resulted in the anesthetist **being** convicted of culpable homicide.
2. **Where he is under a statutory duty to act.**-Failure by a district surgeon to vaccinate patients who present themselves for compulsory immunization against a communicable disease may render him civilly & or criminally liable.
3. **Where he is under a contractual duty to act.** Failure by a doctor to respond to an urgent call from one of his regular patients, who is **being** treated by him for a serious condition, which results in harm to the patient, may render him civilly and/or criminally liable.
4. **Where an emergency situation exists.** Failure by a medical practitioner to render assistance in cases of a bomb blast or traffic accident may render him civilly and/or criminally liable.

It must be pointed out, however, that these categories of *cases* in which legal liability for an omission may be incurred, do not represent a closed list. The courts are at any given time free, should these categories prove to be inadequate to cater for new situations that may arise, to extend them in accordance with the prevailing juristic notions of society. In such *cases* the test of legal liability will be whether the omission in question was objectively unreasonable in terms of society's notion of what might be expected of medical practitioners in the circumstances. Whether or not an omission to act will be considered objectively unreasonable, will depend upon all the surrounding circumstances of the case on hand, inclusive of factors such as the doctor's actual knowledge of the patient's

condition; the seriousness of the patient's condition; the professional ability of the doctor; the physical state of the doctor; the availability of other doctors, nurses or paramedics; the interests of other patients; and professional ethical considerations. However, it is important to note that in the absence of negligence on the doctor's part, legal liability for omissions is out of the question.

#### **Civil law and negligence:**

Negligence is the breach of a legal duty to care. It means carelessness in a matter in which the law mandates carefulness. A breach of this duty gives a patient the right to initiate action against negligence. Persons who offer medical advice and treatment implicitly state that they have the skill and knowledge to do so, that they have the skill to decide whether to take a case, to decide the treatment, and to administer that treatment. This is known as an "implied undertaking" on the part of a medical professional.<sup>5</sup>

" Civil Malpractice," It is a malpractice in which patients bring suits for damages, which they have or think they have sustained through want of skill, or from negligence on the part of their attending physician.

Civil Malpractice may be either active or passive. It is active when a certain course of treatment is adopted and followed which is not sustained by authority ; it is passive when those things, in the treatment, are omitted, which should have been done, in order to obtain a result approximating to perfectness.

In declarations the plaintiff usually alleges that the defendant's either ignorant, that is unskillful; or negligent, that is careless; or that he is both. The law on responsibility of physicians and surgeons is well laid down in Law of Torts, As it covers pretty generally all the points alleged in cases of malpractice, I will transcribe it in full. He says: "Under some circumstances, a physician or surgeon will be held very strictly answerable for the consequences of his professional action or neglect. Thus it is held, that where medicine is administered to a slave without the consent of his owner, the physician is responsible for all the evil consequences which result from his act. So an action lies against a surgeon for gross ignorance and want of skill, as well as for negligence."<sup>6</sup>

The French jurisdiction has a different attitude in this regard. It decided that the law requires in these crimes the relationship of causation and the case.<sup>7</sup> To sum up, French jurisdiction in the scope of non-international crimes such as murder and injury by mistake do not reject the relationship of the causation if some other factors interfered with the act that participated in effecting the same result.

So long as these factors are expected by themselves, and the perpetrator can expect them even he did not expect them actually. But if some unexpected factors have participated, the relationship of causation is absent. Accordingly it has been decided that the error of the victim whether voluntary or non-voluntary does not reject the relationship of causation. But if it takes the form of an intentional act for example if a pharmacist gave someone a poisonous substance and the victim used it for committing suicide, there is no causation relationship between that act of giving the poisonous substance and the death of the victim as the intentional act that is subject to the motives of its perpetrator is outside the scope of expectation.<sup>8</sup>

It appears that the prevalent trend in the Egyptian jurisdiction applies the theory of the appropriate cause or the suitable cause when there are many factors or the sequence of indirect results such as the case of error of the victim even through there are some other factors that make the result whether they are natural such as the illhealth of the victim or related to the action of a third party like the error of someone who is not a doctor or the action of the victim himself. However this is restricted to the fact that these factors are familiar and expected and the result of the error come within the scope of what is expected.<sup>9</sup>

Accordingly the court of cassation has decreed that the accused of manslaughter by mistake is criminally responsible for all the probable results due to the injury he has made by mistake or on purpose even indirectly such negligence or recklessness of treatment unless it was proved that he intended to aggrandize the responsibility and the sickness of the victim and his old age are minor factors that do not prove the relationship of causation between the act of the accused and the result of the status of the victim due to his injury.<sup>10</sup>

But if an abnormal factor interferes or the results cannot be imagined, the results of the error are limited and the relationship of causation is absent and ceases to exist. It was ruled in a case of a man who was sleeping on the railways and was overrun by a train. He was extremely careless by sleeping on the rails and this act is abnormal and contrary to the reason and it cannot be expected by the train driver, so the relationship of causation is absent and cannot be taken into consideration.<sup>11</sup>

The court of cassation has also ruled that the relationship of causation as one of the corners of the crime of murder by mistake requires attributing the result to the offender as it goes with the normal nature of affairs. The error of the third party including the victim himself affirms the relationship of causation so

long as the error of the offender was great and enough in itself to cause the result.<sup>12</sup>

### **Section 2:**

#### **The error of the doctor or the surgeon when it participates in effecting the final result.**

One of the probable forms of the role of third party's error with a criminal activity perpetrated by a former offender in causing the final result, the participation of the error of the doctor or the surgeon in increasing the gravity of the injury of the victim in a former assault or an injury by mistake or if the state is deteriorated to the death of the victim due to maltreatment or the wrong surgery.

#### **The effect of the error in causation:**

The issue of attributing the final result to the action of the offender if the error of the doctor or the surgeon interfered between them is not necessarily related to the topic of the responsibility of the doctor or the surgeon for his error.

If the doctor's error is minor and does not make him liable to criminal responsibility, it does not attribute the final result to the action of the wrongdoer even there is interference between them. The minor error of the doctor or the surgeon comes within the familiar factors which the wrongdoer must suppose their occurrence. This does not prove the relationship of causation between his activity and the final result.

In this regard the Italian scholar Philpo Grespeni says that if two patients quarreled in a hospital and one of them hit the other with a knife and the hospital doctor does not give the victim the first aid and he died because of excessive bleeding. In this case there is no causation relationship between the injury and the death as the injury is not the direct cause of death rather the causation stands between the death and bleeding due to the doctor's negligence.

The stance of the Egyptian Criminal Judiciary:

One of the cases that were considered by the Egyptian Judiciary the case of a young boy who was bitten by a mad dog. He contacted rabies and died afterwards. The young boy received a wrong treatment by his doctor who did not diagnoses the injury as rabies. He did not send the patient to the Rabies hospital according to the circulation of the ministry of interior no 23 issued in 29/12/1927 but cured him himself. The court of cassation ruled that both the owner of the dog and the treating doctor are responsible in collaboration for the death of the victim. The two errors together are not enough to affirm the relationship of causation between the error of the owner mad dog who left his dog at large without guard or control and the death of the victim. The case was considered as manslaughter by mistake by the owner of the dog not injury by mistake. It was also considered manslaughter by the doctor. The

responsibility of both of them for the death does not exclude the responsibility of the other.<sup>13</sup>

### **Section 3: The medical doctor's responsibility for his assistants.**

The general rule is that man cannot be criminally accountable for the damage that afflicts third party due to the error of his subordinate unless certain error is attributed to his person that is mentioned in articles 238, 244, of the Egyptian legal code. The doctor is accountable only when his subordinates are carrying out his orders without committing any error. If the assistant or the nurse committed the error without any interference by the doctor there is no criminal responsibility on the doctor. If any one of them commits an error in the field of his specialization, he will be accountable for it.

Accordingly it was decided that the assistant who carries out wrong orders of the doctor, commits no error but the doctor will be responsible for the injury resulted from this error.

However when the doctor prescribes a treatment without any error the assistant who commits an error while carrying out the instructions of the doctor that falls within the domain of his job without any control by the doctor is only accountable for this error.

Moreover the surgeon is not responsible for the errors of his crew before the surgery or after it. He has the right to guide and follow them up during the surgery. With the exception of this, the responsibility falls on the supervision or follows up agency whether it is the hospital or the clinic where they work<sup>14</sup>.

But the doctor who assigns a person who does not have the required medical qualifications to carry out a medical act such as instructing an assistant to perform a surgery of circumcision while he does not receive the required education or training.

It must be proved that the injury that afflicts the patient is due to the lack of experience of the person who rendered the assistance. Similarly the doctor who lets his assistant to perform a job that is exclusively his specialization.

In France, it was ruled that the practice followed by some doctors to let their female nurses carry out some treatments following the operations does not exempt them from responsibility. Accordingly, the surgeon is responsible for the injuries that resulted from his not staying close to the patient before he recovers his conscience or if the doctor does not fulfill all his duties towards the patients, or not follow up completely his assistant while executing his instructions. Consequently, the doctor is responsible for the burns that affect a patient who performed a surgery to him and left him under

the influence of anesthetic drug if these burns resulted from the container of hot water that he ordered the assistant to put without making sure of its temperature.<sup>15</sup> A doctor is also accountable if the treatment requires his guidance and control and the assistant commits an error due to the doctor's carelessness in guiding and controlling him, particularly if the job to be performed by the assistant is of dangerous nature and the doctor has to make sure of the validity of the procedures. Accordingly it was ruled that the accountability of the doctor who is careless in making sure of the compatibility of the medicine to the standard rules. If the medicine was poisonous and he left preparing it to the nurse and the patient die. The doctor is also responsible if the assistant who used to be negligent in serializing injections and the patient dies

If the condition of the patient requires resorting to a group of specialists and the doctor refused to do so, he will be responsible.

It is natural that the doctor is exempted from this obligation in cases of urgency and necessity. The Egyptian judiciary acquitted a doctor who performed a delivery operation without seeking the assistance of his specialized colleague in difficult condition and a few means. That resulted in some injuries to the mother as the doctor has no other option as the life of the mother was dependent on this intervention.<sup>16</sup>

#### **Section 4: Judicial application of the causation relationship in crimes of manslaughter and injury by mistake.**

The relationship of causation in criminal matters brings about a material relationship that begins with the act of the causer and linked to what one expects of the familiar results of his action if he commits it on purpose or his deviation from the procedures of insight of the consequences of his action and realization that his act will cause injury to others.

If the anatomical report has proved that the dose of the anesthetic medicine violated the medical instructions and has resulted in the death of the female patient after minutes of injecting her of the poisonous medicine. This affirms the existence of the relationship of causation. It is no use arguing that the death was expected due to the fact that the patient was suffering from allergy as the death was a direct result of the anesthetic dose.

Sometimes experimental tests may be done of a new remedy without the awareness of the patient or on patients who do not enjoy the ability to express their wills.

#### **The experimental medicine is approved on two conditions.**

**Firstly:** the proportion of the risk with the expected advantage. The experimental medicine is legitimate only unless its benefits are greater than the risks

resulting from it. The ratio of the risks and the benefits must be in favor of the patient.

**Secondly:** Experimental remedy has to be done under the control of the state. Control agency in the state responsible for the health system has to be notified and violation of this condition resulting in the criminal and disciplinary responsibility of the doctor.<sup>17</sup>

The Egyptian court of cassation has ruled on January 1968 that the permissibility of the doctor's work is conditioned to the fact that what he conducts is compatible with the acknowledged scientific standards. If he neglects following these basic elements or violates them he will be liable to criminal responsibility because he did the act on purpose and fall short in not taking the necessary precautions<sup>18</sup>

Concerning different methods of remedy and the new theories and modern methods that are controversial scientifically, the doctor is not responsible criminally if his work resulted in harmful consequences on condition that his efforts will be sincere for the benefit of the patient, and the expected benefits of the treatment is proportional to the risk<sup>19</sup>

If it is proven that the doctor violated his social function of treating patients and relieving their pains or abused the right given to him to treat patients by committing acts that are considered crimes if they are practiced by other people or constitute a major error that indicates its results as intentional or non intentional crimes such as a doctor who beats a patient during an operation to prevent him from moving and he dies or have blood transfusion without doing the clinical tests.<sup>20</sup>

#### **Conclusion**

Through our study of the medical error in the field of civil responsibility we concluded that the medical error may be either a normal error resulting from negligence and lack of insight that everyone should avoid or it may be a professional error that resulted from violation of the professional fundamental rules and in both cases the medical doctor is responsible whatever his responsibility may be.

However, the commitment of the doctor in cure is to exert due care. The judiciary in protecting the patient tended to impose strict measures of the doctor's responsibility through suggesting the adherence to safety and adopting the theory of the hidden or implied error. This is clear in the cases where the liability of the doctor is proven when there is an injury that affects the safety of the patient such as cases of blood transfusion and use of medical tools and equipment.

We have dealt with the methods of proving this medical error which differs according to the nature of obligation whether it is exerting due care or effecting a result.

We have also death with the most important forms of the medical error that are familiar to medical professionals. The forms of medical error were defined according to stages of medical practice as there are of error forms during the phase prior to treatment, some during the phase of treatment as some forms of medical error in the phase after cure.

When a medical error occurs, it is difficult to determine the civil responsibility and prove the error. This may be due to the lack of legal method of proof or the citizen's ignorance of the applicable law in the medical field. This may make him drop his right of legal follow up. The patient may not raise the legal suit or the civil claim due to the absence of legal education. Belief in the fate and destiny plays an important role in not moving such cases before the judiciary.

As a result, we have found a great shortage of the suits raised against public hospitals or private clinics or even against the practitioners in the Arab world, compared to other countries.

Although there is a law that regulates the profession of medicine, there is no legal system that regulates the private clinics especially in the field of making evidences of error whereas the patient can prove errors with all possible means. However the criminal responsibility has to be tightened by stipulating some deterrent articles against whoever commits an error against any man. Moreover, the concerned agencies have to launch an awareness campaign in the media in order to inform the public of their rights in the field of medical responsibility and the measures to be taken in order to save guard there rights.

In the end we conclude the following.

- 1- The doctor's rendering assistance to those who are in danger is a duty in the Arab laws and the Islamic jurisprudence, yet the views of the Islamic scholars are much wider and more comprehensive.
- 2- The doctor's diagnosis with the due care is an obligation in the jurisprudence and the law according to the practiced rules.
- 3- The doctor's explanation to the patient of what he is going to do is an obligation in the doctrine and the law with some exceptions.
- 4- Taking permission of the patient by the doctor for medical intervention is a duty in the Islamic doctrine. There are rare cases where the doctor can be exempted from this duty.
- 5- Manslaughter is prohibited by law and Islamic doctrine.
- 6- Exploitation of the patient is prohibited in Islamic doctrine and Arab laws.

- 7- For the doctor to gain any illicit benefit from the patient is totally prohibited by Muslim scholars and Arab laws.

#### **Recommendations:**

- 1- The doctor's responsibility for error in diagnosis, cure and supervision of the assisting staff have to be stipulated in the law of practicing profession instead of the general term of doctor's responsibility for negligence or lack of insight etc. once the error is committed and the injury is proven.
- 2- There must be a clear cut determination of the doctor's responsibility especially differentiating between the error in diagnosis and the error in treatment. The doctor must also be responsible for any medical recommendation that merely aim at draining the financial resources of the patient.
- 3- A general framework for the responsibility of the doctor for the errors of the nursing staff in carrying out cure has to be made.
- 4- Penalties for crimes of abstention in cases of doctor's negligence in performing their dillies should be tightened.
- 5- Unification of laws and regulations governing the practice of medicine in one law has to be made so as to make it easy to determine cases of negligence in performing professional duties.
- 6- Clearly defining the legal terminology related to cure functions especially assisting jobs.
- 7- Forming the committee of experts in a manner that comprises the technical element; doctors and the legal element for the sake of neutrality.
- 8- The fines for crimes of doctors and assistants have to be increased.
- 9- Penalties for crimes of hiding evidence have to be tightened especially that in crimes of doctor's evidences and results can be easily hidden.

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