Medical treatment contract and its characteristics

The civil law did not provide a definition of the medical contract and left it to the commentators, because - as the jurists say - it is a scientific issue whose place is jurisprudence (1) , and the civil law jurists defined the contract as: “two or more wills agree to create, transfer, modify, or terminate an obligation ” (2). Moreover, contracts are divided into several different divisions. In terms of whether or not there is a legislative regulation for them, they are divided into: named contracts and unnamed contracts. The medical contract is considered one of the unnamed contracts. Because there was no legislative text regulating this contract similar to other so-called contracts such as the agency contract, insurance contract, etc. The medical contract is a consensual contract, and it does not have to be in a specific form - writing, because the principle in consensual contracts is that they express themselves in any way, and the specific formal form is an exception to the general principle (3) . Since a person resorts to the means of contracting to fulfill his needs in various aspects of life, he considers the preservation of his health, the safety of his body, and his survival to be among the most important of these needs, and he uses this means to freely choose the doctor in whom he places his trust to obtain his medical services (4) , Hence the need and importance of the medical contract emerged. In this context, we are not going to study the medical contract in detail, but we will briefly review the most prominent matters that jurisprudence and jurisprudence have dealt with regarding it, as it is a condition for the doctor’s contractual responsibility for the actions of a third party to be established that this contract be valid and fulfill the elements of its conclusion: consent, subject, reason, as well as conditions. Its validity, as a void contract does not entail an obligation, and the same applies if its reason was illegal, or contrary to public morals (5).

The French judiciary began to recognize the responsibility of doctors since the early eighteenth century, based on the rules of tort liability. As a result, disadvantages and difficulties emerged that resulted from the patient’s responsibility, and therefore the French judiciary settled on the contractual nature of medical liability, with the issuance of the famous decision in the Mercier case on 5/20/1936, which is considered a turning point in dealing with medical liability from the negligent circuit to the contractual circuit. This axis rotates The issue is about the practical importance of determining the statute of limitations

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(1) Previous reference, p. 15.

(2) Dr. Abdul Razzaq Al-Sanhouri: Al-Waseet, Part One, previous reference, p. 171.

(3) Dr. Alaa El-Din Khamis: previous reference, p. 196.

(4) Boulil Arabs: The Legal Nature of the Medical Contract, Master’s Thesis, Akli Mohand Oulhaj University, Bouira, Algeria, 2013, p. 5.

(5) Dr. Mahmoud Gamal al-Din Zaki: Problems of Civil Liability, Part One, Cairo University Press, 1978, p. 100.

he doctor's liability lawsuit arising from negligence in treatment falls under the penalty of the Penal Code. This is because the patient had filed her lawsuit after more than three years had passed from the date of the end of treatment and the damage had been stabilized. The problem then arose regarding the statute of limitations. Is it 3 years as in misdemeanors, which leads to... To consider civil liability as negligence that expires with the statute of limitations for a public lawsuit, or is it the civil statute of limitations (thirty years), as required by the rules of contractual liability, which are within the jurisdiction of civil law ؟ (6)

The Court of The contract concluded between the patient and his doctor, and breach of this contract - even if it is unintentional - generates a liability of the same nature, which is contractual liability (7) .

As for jurisprudence (8) , legal scholars have differed on defining the nature of the medical contract. There are those who see it as an agency contract, where the patient entrusts his doctor to carry out therapeutic work with the aim of healing him. There are those who see it as an employment contract in which the doctor is subject to the supervision of his employer (the patient), despite his being limited to the administrative aspect and remaining independent. Technically, the doctor is obligated to do work for the benefit of the patient by exerting effort and manual and mental work in exchange for a fee. A third approach sees it as a contract of contract despite the doctor's obligation to provide care only in exchange for a fee. Another approach sees it as a lease contract for people. The doctor is obligated to perform the treatment service in exchange for a fee paid by the patient, and others see it as a compensation contract.

We conclude from the above that the matter that should be considered and considered in order to determine the nature of responsibility is to ensure the existence of a valid contract between the person responsible for the actions of others (the treating physician) on the one hand, and the person who fell victim to the harm (the patient) on the other hand, as this is the basic condition. To establish this type of civil liability.

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(6) See: Dr. Suleiman Markus, Al-Wafi fi Sharh Al-Law Al-Civil, Part Two, Obligations, Volume One, Harmful Action and Civil Liability, Fifth Edition, Dar Al-Kutub Al-Qanuniyya, Cairo, 1992, p. 61.

(7) Dr. Mounir Riad Hanna: Civil Liability for Doctors and Surgeons, Dar Al-Fikr Al-Jami'i, Alexandria, 2008, pp. 72, 73.

(8) See in this regard: Dr. Suleiman Markus, Al-Wafi fi Sharh Al-Law Al-Khuan, Part 2, In Obligations, Volume One, In Harmful Action and Civil Liability, Section One, Volume One, Fifth Edition, 1988, without a publishing house, p. 383.

On this basis, if a third person - substitutes or physician assistants - intervenes in concluding a contract, it is rare for us to find ourselves facing contractual responsibility for the actions of others (9) .

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(9) Dr. Hassan Ali Al-Dhanoun: previous reference, p. 50.

Characteristics of the medical contract

The medical contract is established by mutual consent first, and the two parties are subject to consideration second.

First: The medical contract is a consensual contract:

Article (89) of the Egyptian Civil Code stipulates that the contract: “The contract is concluded as soon as two parties exchange the expression of two identical wills, taking into account what the law stipulates above that regarding certain conditions for concluding the contract ” (10) .

Article (1101) of French law also stipulates the definition of a contract as: “An agreement by which a person or several persons commit themselves towards one or several other persons to perform something, or to carry out an act, or to abstain from performing an act ” (11) .

Regarding the medical contract, Al-Sanhouri defined it as: “an agreement between the doctor and the patient that the former will treat the latter in exchange for a known fee " (12) .

Accordingly, when the patient chooses the doctor, there is an implicit contract between them, which may be written or unwritten (verbal), in which the work and wages are determined. As for the specifications and conditions of the medical work that is the subject of the contract, they are subject to the principles, customs, rules and traditions of the medical profession (13).

This previously mentioned choice is known as the patient’s consent. However, the patient’s consent to the doctor touching his body to perform medical work is not considered one of the reasons for permissibility of crimes that affect the human body, because the safety of the human body is a matter required by the interest of society, is considered part of the public order, and must be protected (14).

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(10) a. Ahmed Muhammad Abdel-Sadiq: Civil Codification, Explanation of the Provisions of Civil Law, Volume One, Dar Al-Qanoon for Legal Publications, Second Edition, 2015, p. 351.

(11) The French Civil Code in Arabic: Dalluz Edition, 2009, 108 in Arabic, Saint Joseph University, Center for Legal Studies in the Arab World, Lebanon, 2012, p. 1005.

(12) Dr. Abdel-Razzaq Al-Sanhouri: The Mediator in Explanation of the New Civil Law, Part 7, Contracts Containing Work, Volume One, New Third Edition, Al-Halabi Legal Publications, Beirut - Lebanon, 2000, p. 18.

(13) Ahmed Hassan Al-Hiyari: The civil liability of the doctor in light of the Jordanian legal system and the Algerian legal system, Dar Al-Thaqafa for Publishing and Distribution, Jordan - Amman, 2008, first edition, p. 59.

(14) Dr. Alaa El-Din Khamis: Medical Liability for the Action of Others, previous reference, p. 49.

This is what was supported by the Egyptian Court of Cassation in its decision, as it ruled that: “The crime of causing a beating or wound is committed legally by committing the act of beating or wounding against the will of the perpetrator and with the knowledge that this act would result in harming the victim’s body or health, and therefore it does not affect the perpetrator’s performance.” This crime is the consent of the injured person to the beating or injury that occurred to him " (15) .

It also decided in another ruling that: “In principle, any harm to the victim’s body is criminalized by the Penal Code and the Law on the Practice of the Medical Profession. Rather, the law permits the doctor’s action because he has obtained a scientific license, in accordance with the conditions regulated by the laws and regulations, and this license is the basis for the license that the laws require.” For professions, obtaining it before actually practicing it is based on the statement that the basis for a doctor’s non-responsibility is the use of the right established by the law, and that whoever does not have the right to practice the medical profession is responsible for the wounds and the like he inflicts on others, as he is considered an aggressor, that is, on the basis of intentionality, and is not exempt from Punishment except when the state of necessity fulfills its legal conditions, which is not the case in the circumstances of this case ” (16) .

n order for the patient’s satisfaction to be valid, it is the doctor’s responsibility to inform the patient of the type of treatment, its nature, and its risks, if any. Otherwise, the doctor will be responsible for all harmful results that occur to the patient, except for the dangerous situation resulting from some treatment materials, which varies from one case to another. As a result of the different reactions of patients’ bodies from one body to another, depending on the psychological and health condition of each individual patient (17) .

In addition, consent in a medical contract must be double consent, that is, by the doctor and the patient at the same time, and not just the patient alone. The medical contract, like other contracts, requires the consent of both parties to be established, as it is a basic pillar for the establishment of the contract. While some believe that the mere fact that the patient chooses his doctor and calls him to his home for treatment is considered acceptance as long as it matches the doctor’s offer, as the doctor is considered to have a permanent offer (18).

In addition, jurisprudence and jurisprudence require several conditions for the patient’s consent to be valid, the most important of which are:

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(15) Egyptian Cassation: March 28, 1983, Collection of Legal Rules, Part 4, No. 188, p. 184.

(16) Egyptian Court of Cassation, criminal cassation dated March 28, 1938, in Appeal No. 959 of 8 BC, Technical Office Collection, Fourth Year, p. 184.

(17) See: Dr. Muhammad Hussein Mansour: Medical Liability: The Doctor, the Surgeon, and Others, op. cit., p. 37 et seq.

(18) Khalil Magdy Hassan: The extent of the effectiveness of patient satisfaction in the medical contract, Journal of Legal and Economic Sciences, Issue (1), Ain Shams University, Cairo, Egypt, 2001, pp. 376-377.

1 -The person giving consent must be an adult, sane, aware, and aware of his words and actions, or someone legally acting on his behalf in the event of a minor who has not reached the age of majority.

2 -The patient's consent must be free and free from defects of will, such as error, fraud, deception, deception, and coercion.

3- The consent of the patient or his guardian must be explicit, legitimate, and issued by a person of legal capacity (19) . In this regard, most of the legislation that regulates the ethics of the medical profession - including French, Egyptian and Jordanian legislation (20) - has passed The need to respect the patient's will whenever possible, and in the event that the patient is unable to express his will, the opinion of his relatives must be taken, of course, except in cases of necessity and urgency. We conclude from the above that the patient's satisfaction creates a contract under which the patient undertakes to provide truthful information about his medical history to the doctor, so that the latter can increase the patient's chances of success, and the patient is committed to paying the wages due to the doctor, in exchange for the doctor's commitment to make honest and vigilant efforts, and to treat him in accordance with professional principles, in addition to... Obtaining the patient's prior consent before performing any surgical or therapeutic intervention.

Second: The medical contract is based on personal consideration:

It was stated in the decision of the French Court of Cassation in its famous decision (Mercier), mentioned above, that: "A real contract is established between the doctor and his patient, according to which the doctor is obligated to give him treatment that is attentive, cautious, and consistent with scientific principles " (21) , The patient is the one who turns to the doctor and chooses him to obtain treatment on the basis of the trust he inspires in him (22) .

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(19) Dr. Alaa El-Din Khamis: previous reference, p. 47.

(20) French Public Health Law, see the full text of the law at:

https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006072665
Egyptian legislation: Law No.: (415), of 1954, regarding the practice of the medical profession. This law was amended to Laws No.: (491 of 1955, 319 of 1956, and 29 and 46 of 1965) .

And Jordanian legislation: The Jordanian Medical Constitution, 1989, issued in the Official Gazette, Issue (3607) dated: 2/16/1989, based on Article (18/1) of the Jordanian Medical Association Law No.: (13) of 1972 and its amendments, and was approved. The Syndicate Council, at session No. (18), date: 9/7/1987.

(21) See the French cassation ruling at the following link:

https://www.revuegeneraledudroit.eu/blog/decisions/cour-de-cassation-civ-20-mai-1936-mercier/
See also: Dr. Mamoun Abdel Karim, previous reference, p. 60.

(22) Dr. Abdul Latif Hosni: Civil Liability for Professional Errors, Doctor, Architect, Contractor, and Lawyer, International Book Company, first edition, Lebanon, 1987, p. 155.

The medical contract is based on the personal consideration that the patient takes into account when he approaches the doctor to contract with him. The patient's choice of a general practitioner or specialist is based on several considerations, including: the doctor's personality and skill, the extent of trust that he can place in him, or the doctor's qualifications. The patient also bases his choice on the extent to which the doctor has reached a degree of scientific competence that makes him place his trust in him to perform surgical intervention (23) .

The trust that exists between the patient and the doctor allows the patient to reveal to his doctor all his secrets and details of his illness, and he is confident that he will keep this secret, and that he will take into account the interests of his patient and respect the trust placed in him (24).

One of the manifestations of the personal nature of the medical contract is that each doctor remains personally responsible for the errors he commits, even if he is performing his duties within a medical team (25) .

The doctor also has a personal obligation to treat the patient himself. He may not replace another doctor himself without the patient's consent, or without the availability of a state of necessity if the need arises for that.

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(23) Dr. Samir Abdel Samie Al-Odon: previous reference, p. 19.

(24) Hamisi Reda: Protecting the patient's private life under medical law, Journal of Legal and Administrative Sciences, Issue (3), Faculty of Law, Djilali Lebas University, Al-Rashad Library for Printing, Publishing and Distribution, Algeria, 2005, p. 159.

(25) Boudali Muhammad: Medical law and its relationship to the rules of responsibility, Journal of Legal and Administrative Sciences, Issue (3), Faculty of Law, Djilali Sidi Bel Abbes University, Al-Rashad Library for Printing, Publishing and Distribution, Algeria, 2005, p. 34. See also: Boulil Arab, previous reference, p. 46.