Conditions for the doctor's contractual responsibility for the actions of others

Smoothing and partitioning :

Since the principle of contractual liability is established as a general principle in contracts, it must also be recognized within the scope of contractual responsibility for the actions of others, as the last principle only exists to cover the mistakes of the people whom the debtor uses in implementing the contractual obligation. My original debt, this responsibility is recognized by By the legislator in several separate forms in many laws, including the French and Egyptian laws (1), Legal medical responsibility for the actions of others is only one of these forms.

From what we have previously explained, it is clear to us that contractual liability for the actions of others assumes that someone who owes a contractual obligation (the doctor) used another person as a substitute for him or as an assistant to him in carrying out what he pledged, and it happened that this third party failed to implement the obligation, which led to harm to the creditor (the patient), so in In this case, the contractual liability of the debtor (the doctor) towards the creditor (the patient) arises for the damage he suffered as a result of this breach (2) .

Accordingly, the fulfillment of this responsibility requires the availability of several conditions, which we discuss in a manner consistent with the topic of this study through three sections:

The first topic: That there be a valid contract between the responsible person (the doctor) and the injured creditor (the patient) .

The second topic: That this (doctor) entrusts a third party - the assistant or substitute - to carry out all or some of his obligations arising from this contract.

The third topic: An error occurred on the part of a third party - the assistant or the substitute - in implementing the obligation, causing harm to the patient.

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(1) Dr. Osama Muhammad Taha Ibrahim: The General Theory of Subcontracts, Dar Al-Nahda Al-Arabi, 2008, p. 263.

(2) Dr. Hassan Abu Al-Naja: previous reference, p. 65.

(The existence of a valid contract between the responsible debtor (doctor

(The injured creditor (the patient

One of the distinguishing features of contractual liability in general - that is, whether it is due to personal error or the error of a third party to whom the debtor has entrusted the implementation of his obligation - is that it is based on the breach of an obligation arising from a valid contract between the responsible person and the injured person. This is in contrast to tort liability, which is Penalty for breach of obligation There is only one law that does not change, which is the obligation not to harm others (3) .

Contractual liability is based on the breach of a contractual obligation that varies according to the obligations included in the contract. In contractual liability, the creditor and debtor were bound by a contract before the liability was realized, whereas in tort liability, the debtor - before this responsibility was realized - was a foreigner to the creditor (4).

Accordingly, the occurrence of contractual liability requires that the damage resulting from a failure to implement an obligation be the result of a valid contract, which means that contractual liability for the actions of others does not arise except during the period of the existence of the contract (5).

This condition is considered one of the most important conditions upon which contractual liability for the actions of others is based, especially in the medical field.

To clarify this, there is a contract between the doctor, on the one hand, and the patient to whom he is directed with the intention of treatment, on the other hand, called (the Lecontractmedical contract). This contract obligates the doctor to provide appropriate treatment for the patient, and to include him in care in an effective manner and in conformity with scientific principles and rules, with the aim of The success of the treatment provided by the doctor to the patient as much as possible, or with the aim of alleviating the pain that the patient suffers from (6) .

This contract - like other contracts - is based on the agreement of two wills to create one or more obligations (7) .

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(3) Dr. Hassan Abu Al-Naja: Previous reference, p. 66, Akram Muhammad Al-Baddo, Civil Liability for Private Hospitals, Dar Al-Hamid for Publishing and Distribution, Amman, no edition, no year, p. 79.

(4) Dr. Abdul Razzaq Al-Sanhouri: The Mediator in Explanation of Civil Law, Part One, The Theory of Commitment in General, Arab Heritage Revival House, Beirut, paragraph 509, p. 748.

(5) Dr. Magdy Ezz El-Din Youssef: The principle of the priority of contractual responsibility in the field of responsibility of public law persons, Journal of Law, Kuwait University, twentieth year, fourth issue, December 1996, pp. 345 et seq.

(6) Dr. Abdel Rashid Mamoun: The treatment contract between theory and practice, Dar Al Nahda Al Arabiya, Cairo, without a year, p. 13.

(7) Dr. Muhammad Al-Saeed Rushdi: Medical Treatment Contract, previous reference, p. 71.

This contract is known as the medical contract, and we will address the clarification of the nature of this contract in (the first requirement) of this section, and then we will discuss after that the existence of two compatible wills, which is expressed by consent in (the second requirement), and finally the tendency of these two wills to create certain obligations, This is what is expressed by the subject of the contract or its subject in (a third requirement).

The nature of the medical treatment contract

The Civil Code did not provide a definition of the medical contract and left it to the commentators, because - as jurists say - it is a scientific issue whose place is jurisprudence (8) , Civil law jurists defined a contract as: “two or more wills agree to create, transfer, modify, or terminate an obligation ” (9) .

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 (10).

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 (11).

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 others to be established that this contract be valid and fulfill the elements of its conclusion, such as: consent, place, and 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 (12).

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(8) Previous reference, p. 15.

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

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

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

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

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 for a doctor's liability claim arising from negligence in treatment that 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 stabilization of the damage, so the problem arose about the statute of limitations. Did Is it 3 years, as in misdemeanors, which leads to civil liability being considered tortious and is subject to 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 is within the jurisdiction of civil law? (13) .

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 (14) .

As for jurisprudence (15) , 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.

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(13) 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.

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

(15) 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.

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.

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 (16) .

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(16) 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” (17).

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” (18).

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” (19).

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 (20) .

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 (21).

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(17) 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.

(18) 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.

(19) 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.

(20) 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.

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

This is what was upheld 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 " (22) .

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 " (23) .

In 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, with the exception of 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 (24).

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 (25) .

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

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

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

(25) 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 (26) .

In this regard, most of the legislation that regulates the ethics of the medical profession - including French, Egyptian and Jordanian legislation (27) - has passed , To the necessity of respecting 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 fees owed 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" (28), 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 (29) .

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

(27) 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.

(28) 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.

(29) 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 (30) .

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 (31).

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 (32) .

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.

Obligations of both parties to the medical contract

There is no doubt that the medical contract is one of the contracts binding on both sides. The medical contract imposes reciprocal obligations on both parties, as the doctor is obligated to provide the necessary treatment to the patient and keep his secrets, in exchange for the patient's commitment to pay the doctor's fees and follow his advice and instructions (33) .

We will discuss these obligations in two sections: the doctor's obligations in (the first section) and the patient's obligations in (the second section) .

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

(31) 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.

(32) 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.

(33) Muhammad Rais: The scope and provisions of civil and disciplinary liability for doctors and their proof, Dar Houma for Printing, Publishing and Distribution, Algeria, 2012, p. 438.

The doctor's obligations towards the patient

The medical contract imposes a number of obligations on the doctor during the performance of his medical work, which can be summarized as follows:

1 -The technical doctor's commitment to diagnosing, providing and following up on treatment:

Diagnosis: is "identifying the disease underlying certain symptoms, and the explanation for a particular disease condition, in the sense that it is giving a name to the disease " (34) .

This stage is preliminary to treatment, and is carried out by conducting the necessary examinations and analyzes and using medical equipment, until the doctor forms an opinion and knows the nature of the disease (35) .

Commitment to provide treatment: This is the second stage that follows the stage of diagnosing the disease by the doctor, in which the treatment is clearly and clearly prescribed in writing - whether this is done according to a prescription provided to the patient or through a worksheet presented to the medical staff in hospitals - and the amount of treatment and the method of its use are determined, and the patient is alerted. Or his family, as the case may be, to the need to adhere to the instructions he provides regarding this treatment, and the side effects of this treatment, if any.

The legislation that regulates medical ethics with regard to providing treatment is surrounded by a set of conditions, which the doctor has a duty to adhere to, including: limiting them to what is necessary for treatment, refraining from prescribing a new treatment before conducting biological research studies on it, and conducting strict control and ensuring Of its benefit to the patient.

The doctor's obligation to follow up: The doctor's obligations do not stop at diagnosing the disease and providing treatment to the patient. Rather, the doctor is committed - especially after surgery - to two types of duties:

(a) Follow up on the patient's condition to ensure the success or otherwise of the operation, and whether any complications of that operation occurred, and take what he deems appropriate to confront any complications that may occur. The doctor is also obligated to give his patient

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(34) See in this sense, Wikipedia, the free encyclopedia:

https://ar.m.wkipedia.org,wiki

(35) Dr. Samir Abdel Samie Al-Odon: previous reference, p. 57.

All the advice and instructions that he must follow to avoid bad results, especially the expected ones, or at least to mitigate the severity of these results (36) .

(b) The doctor must inform his patient of the results of the surgical operation he performed, especially if this operation was partially successful, and it is possible to perform this operation in the future. This is because the patient's knowledge of the truth about his medical history enables him to help any other doctor with speed and accuracy of diagnosis, if necessary. The need for this, and this in turn spares the patient from harm that may arise from the doctor's ignorance of the results of the previous surgical operation performed by a previous doctor (37) .

-٢The doctor's commitment to giving insight to the patient:

The medical contract is based on mutual trust between the doctor and the patient, and one of the requirements of this mutual trust between them is that the doctor believes in informing his patient or his representative of the risks of treatment, his health condition, and the extent of his acceptance of treatment. Therefore, any concealment or lie about the patient's health condition is considered a defect of will that affects the patient's decision, which requires the contract to be invalidated (38) .

This is what is known as (in sighting the patient), and it is considered one of the most important obligations that the doctor has towards his patient. The doctor must disclose the data to the patient in an easy and accessible way, in concise, easy-to-understand phrases. The French Court of Cassation specified the characteristics of the information that the doctor is obligated to disclose to his patient, stating: To be "simple, understandable, honest and approximate " (39) , This was also confirmed by the text of Article R.4127-34 of the French Public Health Law, which required that the information provided by the doctor to his patient be "honest, clear and appropriate" (40).

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(36) See in this sense: Dr. Ahmed Shawqi Muhammad Abd al-Rahman, The Content of the Contractual Obligation of the Professional Debtor, Annual Scientific Conference of the Faculty of Law, Beirut Arab University, 2004, Al-Halabi Legal Publications, Lebanon, p. 72.

(37) See in this regard: Dr. Ahmed Shawqi Abdel Rahman, previous reference, p. 72.

(38) Dr. Alaa El-Din Khamis: Medical Liability for the Action of Others, previous reference, p. 71.

(39) Cass. Civ. 1re, 21 Fév. 1961, R. Dalloz 1965, P.531 J.
(40) whose text is as follows:

Le médecin doit formuler ses prescriptions avec toute la clarté indispensable, veiller à leur compréhension par le patient et son entourage et s'efforcer d'en obtenir la bonne exécution.
See the text of the article, on the Internet:

https://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=DE6E6198BB93E816791FF4D6D72A360D.tpdjo09v_3?idArticle=LEGIARTI000006912896&cidTexte=LEGITEXT000006072665
See also: Dr. Asmaa Ismail Al-Sayed Kamal El-Din, Civil Liability of the Anesthesiologist (Comparative Study), Doctoral Thesis, Cairo University, Faculty of Law, 2018, p. 157.

The doctor fulfills his obligation to provide insight to the patient in two cases:

The first case: At this stage, the doctor is obligated to disclose information to the patient, and this is what jurisprudence in Egypt has unanimously agreed upon, as it falls on the doctor when concluding the medical contract and before the doctor begins treating the patient (41) .

The doctor's obligation to provide insight into his patient comes at a later stage after concluding the contract. This requires the doctor to carry out initial diagnosis and examinations so that he has the necessary background on the nature of the patient's condition and methods of treating it that enable him to determine the scope of his commitment to providing insight into the patient. An example of this is the anesthesiologist, who is obligated to conduct the necessary examinations for his patient before surgery to determine his medical condition, inquire about his medical history, and whether the patient suffers from certain diseases or has taken certain medications in order to choose the appropriate method of anesthesia in the manner and amount followed regarding it, and inform the patient of Then there are some possible consequences, such as a temporary drop in blood pressure as a result of anesthesia, and he is thus given a choice between the two methods of anesthesia if it is possible to follow one of them (42) .

This obligation must be carried out by the doctor without depending on whether the patient accepts it or not, because the doctor's obligation to exercise medical care that is consistent with established principles in medical science falls on the doctor as he carries out medical work, as it is one of the contractual medical obligations arising from the medical contract and related to its implementation (43) .

The second case: The stage of beginning the implementation of the medical contract by undertaking medical work on the patient. At this stage, the doctor must inform the patient or his relatives about the patient's health condition and the risks of treatment for it. This obligation begins to be implemented after the contract, because the obligation before the contract is the doctor's obligation to disclose information, as we have previously shown. In the first case.

This trend was supported by Egyptian jurisprudence, saying: "The patient has the right to be his own master, and therefore it is not permissible to carry out any therapeutic intervention except after giving the patient full insight, obtaining his consent, and any concealment " .

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(41) Dr. Nazih Sadiq Al-Mahdi: The pre-contractual obligation to provide statements related to the contract, Dar Al-Nahda Al-Arabiyya, 1982 edition, p. 218.

(42) Voire aussi, Responsabilité civile de l'anesthésiste, p.q, sur:

http://alr.canal-medecine.com/MA/Resources/CM8086-2/frFR/Document/2010/ choquet. Responsabilite-civile-anesthesiste.pdf.

(43) Dr. Nazih Muhammad Al-Sadiq Al-Mahdi: previous reference, p. 221.

For the truth about the patient, it is a medical error that requires responsibility, because it violates the person's right to refuse any medical intervention or examination without his consent (44) .

One part of jurisprudence (45) : " The scope of the doctor's obligation to inform the patient is limited only to the expected risks, by giving the patient a reasonable idea of his condition that allows him to make an adult and wise decision".

The American judiciary also went in this direction in a Kansas court ruling in 1960: "The court recognized the doctor's responsibility on the basis that he did not inform the patient of the serious potential dangers that usually result from this type of treatment "(46) .

From the ruling of the French Court of Cassation in this regard, its ruling issued on January 20, 2011 (47) , The facts of this lawsuit take place in the patient undergoing surgery under general anesthesia on November 23, 2006, and as a result of the intubation of the anesthesia tube, she suffered damage to her teeth, which prompted her to file a lawsuit for compensation against the anesthesiologist. The court rejected her request and based this on the fact that there was no fault on the part of the anesthesiologist, as the expert's report stated that the anesthesiologist carried out his work in a manner consistent with the rules of good practice, in addition to the fact that consultation between the patient and the anesthesiologist was taken place before surgery, and that he informed the patient of all the information and the resulting risks. About this type of anesthesia, including those related to dental trauma; This is based on the provisions of Article L.1111-2 of the Public Health Law. Upon reaching the matter, the Court of Cassation found that there was a violation of Article 1147 of the Civil Code and Article L.1142-1 of the Public Health Law, as the trial court did not indicate the existence of an accidental accident resulting from the risks inherent in medical work, and in that matter referred to its ruling issued on November 8, 2000 (48) .

In another ruling issued on February 5, 2014, it held both the anesthesiologist and surgeon responsible for their failure to provide the necessary pre-operative information regarding the death of a patient. The facts of this case are summarized in that: On December 11, 2002, the patient underwent liposuction surgery.

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(44) Dr. Hamdi Abdel Rahman: The Infallibility of the Body: Research into the Problems of Medical Liability and Organ Transplantation, Ain Shams University Press, 1987 edition, p. 36.

(45) See: Dr. Alaa al-Din Khamis, previous reference, p. 85, Dr. Jaber Mahjoub, Code of Professional Ethics, 2001 edition, without publishing house, p. 44.

(46) Dr. Mustafa Adawi: The patient's right to accept or reject treatment: a comparative study between the Egyptian and American systems, p. 27.

(47) Caas. civ. 1ar, 20 janv 2011, N°.10-17.357,sur: legifrance.gouv.fr.

(48) Caas. civ. 1ar, 8 Nov. 2000, N°.99-11.735.

At a surgery center in Paris, the anesthesiologist injected her with two types of sedatives (Midazolam) and (Atropine). This is to dispel the patient's fears and anxiety before the anesthesia procedure, which resulted in a disturbance in the right ventricle of the heart, which led to her death. The patient's heirs filed a lawsuit against the surgeon and the anesthesiologist, claiming that they violated their obligation to provide the necessary data and information regarding the risks of medications. The Paris Court of Appeal ruled that the death was the result of a medical accident without error. When the dispute reached the Court of Cassation, it ruled to overturn the appeals court and rule that both the surgeon and the anesthesiologist were responsible on the basis of the complete absence of the necessary data on their part regarding the description of the risks of the drugs, which led to missing an opportunity to avoid harm by 30%, with the National Office (ONIMA) demanding the amount of compensation (49).

3 -The doctor's commitment to confidentiality and not revealing the patient's secrets:

Medical secret is defined as: a duty imposed by legal rules on the doctor to remain silent about his patient's condition. Some jurisprudence is not safe (50) The fact that the medical secret is merely a duty of silence or silence, rather it is a movement like the movement of breathing creates a kind of balance between movement and stillness, both for the one who confided it (the patient) and for the one who received it (the doctor) (51) . The obligation of confidentiality means the obligation that imposes on the doctor to remain silent regarding everything he comes to know or discovers during the practice of his profession, of course, with the exception of cases in which the law authorizes him to reveal or divulge.

If this is the case, then the known and confirmed facts that everyone knows are not considered a secret, and the doctor will not be held accountable for revealing them. However, it is difficult to accept this opinion, because it misses the public interest that accrues from preserving professional secrets in general, and medical secrets in particular, which It is represented by the trust imposed in some professions (52) .

The facts may not be a secret in themselves or by their nature, but they are considered so due to the circumstances surrounding them, and thus it is the responsibility of the doctor who was called to save a patient from a heart attack, and he was in a place where he should not have been.

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(49) Cass. Civ. 1er, 5 Féb. 2014, N°. 12-29.140Sur:
https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000028574802

See also: Dr. Asmaa Ismail, previous reference, p. 165.

(50) Merle et Vitu, trairé de criminele, droit pénal spécial 1982 T.2 No 981; Floriot combaldieu, le secrét professio-nnel 1973, p. 11.

(51) Dr. Ali Hussein Nageida: The Doctor's Obligations in Medical Work, Dar Al-Nahda Al-Arabiya, Cairo, 1992, p. 148.

(52) Dr. Ghanem Muhammad Ghanem: Criminal Protection of Individual Secrets of the Public Employee, Bela Publishing House, 1988, p. 19

-At his girlfriend - and he died minutes after his arrival - to conceal the circumstances in which the death occurred, especially since the mayor of Paris told the deceased's family - falsely - that the crisis had surprised him on the public road (53) .

It is also considered a secret that requires protection: the news that relates to the patient, whether it is clear, or leaves the listener to make an implicit conclusion. In this regard, it was ruled in France that a doctor who declared that a person had entered a specific hospital, and it was known that this hospital is designated for the treatment of mental illnesses, is considered a secret that requires protection. He revealed this person's secret even though he did not mention that he had a mental illness (54) .

In the legislation, we find that the French legislator has singled out some texts related to the doctor's obligation to confidentiality of the information he learns at any stage of treatment, or on its occasion. Article (378) of the French Penal Code obligates surgeons, pharmacists, and all professionals working in the field of public health to maintain medical confidentiality, with the exception of In the cases specified in the law, violating this exposes them to a penalty of imprisonment and a fine (55) .

On the other hand, the Egyptian legislator indicated the necessity of doctors' commitment not to disclose the secrets of their patients that they learn through their medical practice, and that is through the text of Article (310) of the Egyptian Penal Code, which stipulates that: "Anyone who is a physician, a surgeon, a pharmacist, a midwife, or Someone else to whom, by virtue of his industry or job, a private secret entrusted to him has been entrusted, and who divulges it in circumstances other than when the law obliges him to do so, he shall be punished by imprisonment for a period not exceeding six months, or by a fine not exceeding five hundred Egyptian pounds " (56) .

As for Jordanian law, paragraph (1) of Article (14) of the Medical Constitution stipulates that: "When preparing medical reports, the doctor must not forget that he is bound by professional confidentiality, except in cases specified by the law " (57).

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(53) R. Floriot et R. combaldieu, Le secret professionnel 1983, p. 31.
See also: Dr. Ali Najida, previous reference, p. 155.

See also: Dr. Abdul Rashid Mamoun, previous reference, p. 75 et seq.

(54) Trip. gr. Inst. Bobigny. 20 oct. 1980 juris. Class. Penal mise à jour 1981, médicine.

For details, see: Dr. Abdel Fattah Bayoumi Hegazy: Medical Liability between Jurisprudence and the Judiciary, Dar Al-Fikr Al-Jami'i, Alexandria, 2008, p. 112.

(55) See the Internet:

https://www.ligifrance.gouv.fr/affichcodeArticle.do?cidTexte=LEGITEXT000006071029&idArticl=LEGIARTI0000069490249.

(56) Encyclopedia of Egyptian Legislation issued by the General Syndicate of Lawyers, 2014 edition, p. 648.

(57) The Medical Constitution, Doctor's Duties, and Professional Ethics, 1989, op. cit.

There are cases in which this act of breach does not occur, including in the case of the doctor's obligation to report births, deaths, and infectious diseases, and in the case of presenting judicial testimony, and finally in the case of the consent of the patient who has the medical secret, in compliance with respect for the will of his patient.

In this regard, the French Court of Cassation, in its ruling issued on December 7, 2004, stated that health facilities cannot be forced to provide confidential information without the consent of the person concerned or his assignee. The facts of the dispute are summed up in the death of a patient in one of the treatment institutions on April 23, 1995, as a result of Her husband filed a claim for compensation.

In a ruling issued by the Paris Court of Appeal on June 20, 2000, the court ordered the submission of the medical file for the deceased, and directed this request to the hospital director, threatening punishment in the event of a violation. The State Counselor objected to this request, which led to her exclusion, and the court repeated its request to force the hospital director to submit The medical file, based on the text of Article 10 of the French Civil Code.

Claiming that medical confidentiality does not constitute a legitimate obstacle, in addition to the fact that Article L.113-8 of the Social Insurance Law allows the insured to seek medical expertise in providing evidence of the insured's bad faith; In order to ensure his health condition, this can only be achieved by abandoning the emphasis related to the importance of medical confidentiality, and in addition to Article 247 of the new Code of Civil Procedure, which stipulates that technical expertise will be forced to reveal privacy or other legitimate interests that cannot be used except with the permission of the judge. Or with the consent of the parties concerned.

Moreover, to protect confidentiality, the Court of Appeal guaranteed that it would appoint an expert of its own who had the professional ethics of the treating physician, so the hospital director was not entitled to rely on a legal impediment for his refusal to comply with the judge's order. When the matter reached the Court of Cassation, the latter ruled that if the judge has the right to order a third party (the hospital director) to submit the medical file to accomplish his mission, he cannot do so in the absence of a specific legislative text that permits the act without the consent of the person concerned or his assignee, and the medical institution. The right to rely on the obligation of confidentiality for rejecting the aforementioned request, even if the judge was inclined to impose a legitimate interest in favor of or against the evidence, in which case the Court of Appeal would have violated the aforementioned provisions (58).

From the above, we conclude that the obligation imposed on the doctor to adhere to the confidentiality imposed on the doctor regarding everything he comes to know or discovers during the various stages of practicing his work, is based on the consideration

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(58) Cass. Cive. 1re, 7 Déc.2004, N-02-12539, Sur:

https://www.ligifrance.gouv.fr/affichjurijudio.do?idTexte=JURITEXT000007052646.

The public interest that requires the doctor to perform his profession in the best possible way for the public good. This obligation is also based on the private interest of the patient who wishes not to divulge his secrets. The doctor's commitment to confidentiality is based on two considerations: the public interest and the private interest.

4 -The doctor's commitment to ensuring the patient's safety:

Part of jurisprudence goes to define the obligation to ensure safety by saying: "The obligation to guarantee safety requires the fulfillment of a number of conditions, namely that one of the contracting parties turns to the other contractor in order to obtain a specific product or service, and that there is a danger threatening the contractor requesting this service or product, and that The person committed to providing the service or product must be professional and qualified (59).

In a different direction, some believe that: "The obligation to ensure safety is the exercise by the debtor (obligor) of actual control over all elements that could cause harm to the creditor who benefits from the good or service, and it is an obligation to achieve a goal and a result, and not to exercise care " (60) .

With regard to the medical field, we believe that what is meant by ensuring safety is an obligation that falls on the treating physician, as he has actual control over all elements, including his control over the actions of the assistants whom he uses to implement his obligation towards the patient he has contracted with, who is obligated to carry out what is his responsibility. Obligations to provide the agreed-upon medical service, and therefore his obligation is to provide care and ensure the patient's safety as well.

Regarding the judiciary's opinion, we note that the French judiciary did not include the obligation to ensure safety within the framework of the medical contract for a period of time, as the doctor did not commit to the patient except by the obligation to provide care, and the French Court of Cassation, in its support of this opinion, went to say that the hospital doctor who provides The medicine has no obligation to the patient except to provide him with care and care, excluding any obligation to safety (61) .

But after that, there was a change in the position of the French judiciary. The French Court of Cassation introduced the commitment to safety in the field of the treatment contract, and placed it on the responsibility of the hospital doctor, with regard to the treatment that was given.

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(59) Dr. Ashraf Jaber Al-Sayyid, Responsibility for Doing the Things Used in Implementing the Contract, an article published in the Helwan Rights Journal for Economic Legal Studies, Issue (5) of 2001, p. 71.

(60) (F) Defferrad: une analyse de L'obligation de sécurité a L'épreuve de la cause étrangére. Dalloz revue 1999. P3685 Ibid, p355.
:See this in detail
Mawaqi Bennani Ahmed: Commitment to ensuring safety, Hajj Lakhdar University, Batna, Algeria, Al-Mufakir Magazine, Issue 10, pp. 413 et seq.

(61) Cass. Civ. 6Mars 1945, Dalloz 1945, P.217 .

He provides it, and also with regard to the tools he uses, the patient is no longer obligated, as was the case in the previous judiciary, to prove the negligence that occurred on the part of the doctor by providing defective treatment.

An example of this is what the French Court of Cassation ruled in a relatively recent ruling (62) , It was stated in this ruling that: “The ruling was overturned due to a violation of Article (1147) of the Civil Code. That ruling that was overturned, which in order to confirm the responsibility of the anesthesiologist in the accident that occurred to the patient, was made clear due to the failure to confirm the poor execution of the tube insertion process. It should be considered that the anesthesiologist has violated his obligation to ensure safety, which he is obligated to towards the patient in accordance with his obligation to provide care, and this must oblige him to compensate for the damage to which the patient was exposed, thus confirming the doctor’s responsibility on the basis of the obligation to ensure safety and achieve the result, even if that The obligation has been defined as a subsidiary obligation in relation to the obligation to exercise care " .

The patient's obligations towards the doctor

The patient's obligations towards the doctor are summarized in several obligations, including:

1 -The patient’s commitment to assisting the doctor and giving him complete and accurate information about his medical history:

The patient’s obligation to assist the doctor is not limited to the treatment contract only. Rather, the patient who resorts to the doctor is obligated to provide all the information requested by the doctor, which is considered necessary so that the doctor can carry out his duty of treating the patient. The patient will not fulfill this obligation unless he provides all Details that the doctor asks about (63) .

Some patients may deliberately hide some medical facts from doctors, which may affect the quality of treatment provided to them, or sometimes result in some complications during treatment, and despite the doctor asking about

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(62) See this:

La faute du médecion doit étre p'rouvée, arrét rendu par cour de cassation, lre civ, 04-01-2005, no 13579 (no 17F-p+B), Recueil Dalloz 2005 p. 170.
See also: Dr. Hoda Abdel Basset Mahmoud, Responsibility for Medical Acts in Islamic Jurisprudence, PhD thesis, Cairo University, 2014, pp. 32: 35.

(63) Dr. Abdul Rashid Mamoun: The treatment contract between theory and practice, previous reference, p. 86.

See also: Nazih Muhammad al-Sadiq al-Mahdi, previous reference, p. 216.

See also: Dr. Suhail Suwais, The Doctor’s Responsibility between the Patient’s Rights and the Requirements of Modern Law, Azmana Publishing and Distribution, Amman - Jordan, 2004, pp. 144 et seq.

Medical history or chronic diseases and the type of medications. Some patients may sometimes hide the truth of the information from the treating doctor, and this may affect the appropriate treatment plan that the doctor develops for his patient (64) .

Likewise, the patient's concealment of information related to his illness or his lying to the doctor is considered a reason for the absence of the doctor's responsibility, and thus the doctor's right to cancel the contract is established, taking into account the state of necessity (65).

2 -The patient's obligation to pay the doctor's fees:

In exchange for the doctor's commitment to treatment, the patient is obligated to perform the compensation (66) , which corresponds to the intellectual and sometimes muscular effort that the doctor makes in order to implement his commitment (67) , which is to treat the patient and strive for his recovery.

3- Commitment not to assault the doctor or any member of the medical staff. The occurrence of such actions by the patient or his family would constitute serious consequences, as one of the doctor's well-known duties is to provide health care to the fullest extent. These negative aspects of assaulting the doctor could lead the doctor to become distracted from performing his duties and duties towards the patient, which may constitute Risks that may threaten his life or the life of other patients (68) .

4 -The patient's commitment to the hospital:

The Saudi International Medical Center listed a number of obligations that the patient must adhere to while he is in the hospital, including: taking into account the rights of other patients, taking into consideration the hospital staff, filling out forms for performing surgical operations or laboratory tests, and pledging to take all necessary precautions to prevent harm to others or Causing the transmission of any infectious disease (69) . The bottom line: The existence of a valid and enforceable contract between the creditor and the debtor is an a priori condition for the possibility of contractual liability being established in general, and once this contract is concluded correctly and enforceable, it can be said that liability is established.

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(64) Dr. Muhammad Al-Masry: The doctor's right over the patient, Al-Anbaa Kuwaiti newspaper, published on: 8/17/2017 AD. See the website link:

https://www.alanba.com.kw/ar/arabic-international-news/egypt-news/768152/17-08-2017.

(65) Karim Aichouch: The Medical Contract, Master's Thesis in Private Law, Faculty of Law and Administrative Sciences, Ben Aknoun, University of Algiers, 2000-2001, p. 108.

(66) Dr. Abdul Razzaq Al-Sanhouri: previous reference, vol. 1, p. 18.

(67) Karim Aishoush: previous reference, p. 107.

See also: Dr. Abdul Rashid Mamoun, previous reference, p. 87 et seq.

(68) Yasser bin Ali Al-Maarik: The doctor and the patient have rights and duties, an article published on the Saudi Arabia website. See the website link:

https://www.alarabiya.net/ar/saudi-today/2017/09/12.

(69) International Medical Centre: Patient Rights and Duties, see website:

http://www.imc.med.sa/ar/حقوق-وواجبات-المَريض.

Contractual liability if there is a breach of the obligations created by that contract, and it is known that every contract creates obligations, some of which are major and some of which are accessory, and there is no difficulty in determining contractual liability when we face an explicit obligation in the medical contract - such as providing treatment - and the same applies in determining the accessory obligation arising from the contract - Such as the obligation to ensure the patient's safety - this obligation is closely linked to the original obligation of treating the patient and to the result. If a breach occurs in a principal obligation or a subsidiary obligation, then in both cases the debtor's contractual liability for the act of a third party arises if a causal relationship is established between the damage that befell the creditor and the act of the third party that he committed. The debtor is asked about him (70).

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(70) See in this sense: Dr. Wafa Ahmed Hilmi, previous reference, p. 49.

The debtor's contractual liability does not arise for the actions of others unless he instructs others (71) , To implement all or part of his contractual obligation towards the creditor, and this third party committed an error that led to failure to implement the contractual obligation or led to defective implementation of this obligation, which caused harm to the creditor. The general rule is that the debtor can seek the help of others - whether substitutes or assistants - to implement his contractual obligation, because the basic principle is that fulfillment is permissible by someone other than the debtor, unless the debtor's personality is taken into account and the agreement stipulates that the debtor is obligated to implement the obligation himself, and an example of this is the medical services contract (72) . The doctor's contractual responsibility for the actions of others does not exist unless he entrusts the latter (assistants and substitutes) to carry out his obligation in his place, or seeks his assistance in implementing this obligation (73) , by delegating the doctor's obligation to one of his assistants. In the ruling of the Egyptian Court of Cassation on July 3, 1969, the court said: "The matter does not change in this case, because the debtor of a contractual obligation is not responsible for the work of another person unless he used it to implement his contractual obligation, which requires that the surgeon should not be accountable for an error made by one of his assistants." Doctors cause harm to the patient, unless he chose this assistant to assist him in the operation, or let him interfere in it while being able to prevent him from this intervention, which is not the case in the case of the appellant " (74) . Accordingly, contractual responsibility for the actions of others is only exposed by the intervention of a third person in implementing one of the obligations of that contract (75) . This interference may take one of three forms, which we present in three demands. Third-party interference may occur without authorization from the debtor, and we discuss it in the first demand, and with authorization from the debtor in a second demand. This interference may also occur at the request of the creditor in the third and final demand.

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(71) What is meant by third parties here: the third party charged with implementing the debtor's contractual obligation under an agreement with him (such as the assistant and the substitute), and we will discuss them in the third chapter of this chapter.

(72) Dr. Mahmoud Gamal al-Din Zaki: Al-Wajeez fi the General Theory of Obligations in Egyptian Civil Law, Cairo University Press, third edition, 1978, p. 374, Dr. Abbas Hassan Al-Sarraf, previous reference, pp. 203, 204. Dr. Jaber Mahjoub Ali, Responsibility On the actions of others within the framework of religious groups, a comparative study, Lawyer Magazine, Twenty-Third Year, April/May/June 1999, p. 145.

(73) This is what we discussed in the introductory chapter of this study.

(74) Egyptian Civil Cassation 7/3/1969, Collection of Cassation Rulings, Year 20, No. (417), p. 1094.

(75) Dr. Hassan Ali Al-Dhanoun: previous reference, p. 51.

The ruling on the automatic intervention of others without assignment

If a third party intervenes on its own initiative in implementing a contractual obligation, and this interference prevents the contracting debtor from carrying out his obligation, then this interference will be a reason to exempt this debtor from responsibility in all cases in which this interference is considered a (foreign cause); That is, force majeure or a sudden accident. However, in this case, the debtor must work to prevent the interference of this person. If he does not do that and does not prevent him, and he was able to do so, then the responsibility falls on him, but we are dealing with the debtor's personal responsibility based on the debtor's mistake and negligence, and we are not dealing with his responsibility for The verb of the third person (76) .

Here, the doctor's contractual responsibility for the actions of others does not exist unless the latter assigned someone else to carry out his obligation towards the patient or part of it, or sought the help of someone else or a substitute for him.

If someone other than the medical staff - assistant doctors or nursing staff - who is affiliated with the treating physician who is bound by a contractual relationship with the creditor patient intervenes, then here we are not subject to contractual responsibility for the actions of others, and if this person's intervention does not amount to force majeure or a sudden accident In view of the duty of care or caution imposed on the doctor by laws and legislation, the latter must work to prevent the intervention of this person. If he does not do that, then responsibility is imposed on him, but in this case we are dealing with a direct contractual responsibility based on The treating physician's error and negligence, as long as this treating physician - who owes the contractual obligation - could not prove that this person's intervention was a force majeure or a sudden accident for him (77).

Ruling on the intervention of a third party, upon authorization of a doctor, in carrying out a medical obligation

The normal situation in which the debtor is responsible for other people is when the debtor entrusts a third party to carry out the obligation in his place or when a third party assists him in implementing it (78) .

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(76) See in this sense: Dr. Hassan Abu Al-Naja, previous reference, p. 74.

(77) Dr. Hassan Ali Al-Dhanoun: previous reference, p. 52.

(78) See: Dr. Abbas Hassan Al-Sarraf, previous reference, p. 203.

The various legislations stipulate this matter. The general text refers to this principle in the legislations that mentioned such a text, including: (Article 278 AD, German). Some legislations also mentioned this principle in various texts (79) . The intervention of third parties must also be based on an assignment from the debtor, and the assignment may be an agreement based on the authorization of medical work (80) , Or it may be based on what is being done in the profession, and the assignment indicates that the debtor is the one who is originally charged with performing the obligation for which someone else was included with him in its implementation (81) . In our case, for example, the surgeon cannot anesthetize the patient himself in all cases, so he must seek help from someone else for anesthesia (the anesthesiologist), and the latter does not implement the contract on behalf of the original contracting doctor, but rather his role is limited only to assistance or cooperation in implementation. Because the surgeon's implementation of his commitment will not be achieved without the intervention of this third party (the anesthesiologist) (82) .

To explain more precisely, the surgeon who chooses the members of the surgical team, and is unique in this choice, has undertaken before the patient everything related to the surgical operation, and has included those he has chosen from the medical team (others) in the implementation of some of the obligations that he has committed to the patient, which requires that He will be asked about any negligence on the part of the people he turned to implement his commitment (83) . Accordingly, contractual liability arises for the actions of others in this regard. The French Court of Cassation ruled that: "The patient who chooses a surgeon is obligated, in accordance with the contract, to provide treatment and due care in relation to all procedures of the operation carried out, and to describe the treatment in accordance with the medical data reached by science, and he is asked The surgeon for the mistakes of the doctor who is part of the medical team, who chose him voluntarily, who resorted to him for anesthesia, and who replaced him without his patient's consent to fulfill part of his obligation (84) . In order for the doctor's contractual responsibility to be held for the actions of another person, the patient must not interfere in choosing this other person, because if that had happened, we would be facing two contractual responsibilities: The first is towards the debtor, and the second is towards others, and in this study

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(79) See: Chapter One, the legal basis.

(80) See this: Introductory chapter, Delegation of medical work.

(81) Dr. Hossam El-Din Kamel Al-Ahwani: The doctor's contractual responsibility for the actions of others, Annual Scientific Conference of the Faculty of Law, Al-Halabi Legal Publications, Beirut, Lebanon, p. 380.

(82) In this sense: Moaz Yaqoub, previous reference, p. 62, and in an opinion contrary to this trend, see Dr. Asmaa Ismail Al-Sayyid Kamal Al-Din, previous reference, p. 32 et seq., p. 66 et seq.

(83) Dr. Jaber Mahjoub Ali: The role of will in medical work, a comparative study, Dar Al-Nahda Al-Arabiya, Cairo, 1996, p. 111.

(84) Cass.Civ.9-10-1984,Sur:
https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007014186

See also: Moaz Yacoub, previous reference, p. 91.

In order for the doctor to be responsible for the actions of those assisting him - that is, for the surgeon to be responsible for the anesthesiologist - it is required that the creditor patient not interfere in the choice of the third party (the anesthesiologist) (85).

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(85) Dr. Alaa El-Din Khamis: previous reference, p. 259.

The intervention of third parties, at the request of the patient, in implementing the doctor's obligation

In order for the contractual responsibility to be enforced for the actions of others, it is necessary for the doctor to be independent in his choice of a third party (assistant or substitute), in other words: that there be no interference from the patient in this choice (86), But if the creditor interferes in choosing this third party, what is the effect؟

One side of jurisprudence believes that: If the creditor forces the debtor to seek the assistance of a specific person to assist him in implementing the contractual obligation, and an error is made on the part of this assistant that leads to a breach of the obligation, then the responsibility resulting from this breach falls on the creditor and not the debtor (87).

Some jurisprudence believes that acceptance leads to the emergence of a contract between them, and thus the principal becomes a stranger to this contract, because the bond that was between him and the patient is no longer available because a new bond replaces it with the substitute doctor, and then the principal's responsibility ends (88).

The responsibility of the original treating doctor towards the alternative doctor is determined by the intervention of the patient's will, so if the patient chooses the (other) alternative doctor, the contractual responsibility of the original doctor is removed. However, if he is unable to choose due to his medical conditions, such as the condition he is in when undergoing surgery, and a health condition or emergency occurs for the principal, during which he is forced to seek the help of an alternative doctor, then this situation, despite its severity, keeps the principal contractually responsible for the alternative doctor (89).

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(86) See in this sense: Dr. Hassan Abu Al-Naja, previous reference, p. 84.

(87) Dr. Muhammad Hanoun Jaafar: The contractor's contractual liability for the actions of others: a comparative study, Modern Book Foundation, Lebanon, first edition, 2011, p. 227. See also: Moaz Yaqoub, previous reference, p. 94.

(88) Dr. Abdel-Radi Muhammad Hashem Abdullah: The civil liability of doctors in Islamic jurisprudence and positive law, doctoral dissertation, Cairo University, 1994, p. 270.

(89) Dr. Alaa El-Din Khamis, previous reference, p. 273.

The error of others when carrying out the doctor's obligation

The element of error is considered one of the most important pillars upon which the debtor's contractual responsibility for the actions of others is based, as it arises despite the debtor's (the treating physician) being free of all personal error (90) , The debtor's responsibility varies in the event that a mistake was committed on his part, or that the mistake was caused by a third party. In the latter case, it is not necessary to prove the debtor's mistake, and it is the same as whether the third party was followed up or supervised or not (91).

If we look at the legislative texts in this regard, we will find that some legislation requires the character of error in the action of the third party entrusted with the implementation of the obligation, in order for the debtor's contractual responsibility for the action of the third party to arise, including Article (278) of the German Civil Code, which stipulates: "The debtor shall be liable for a mistake." His legal representative, and the mistake of the people he uses to carry out his obligation, in the same way that he is held accountable if the mistake occurred on his part personally".

Egyptian Civil Article (217/2) also stipulates: "However, the debtor may stipulate that he will not be held responsible for fraud or serious error that occurs from people he uses to carry out his obligation".

By reviewing the above, we find that the German legislator explicitly stipulated the character of error in the action of others in order to establish this type of responsibility. It also implicitly concludes that the Egyptian legislator required the character of error in the action of others.

In contrast to this, we find that the Swiss legislator, in Article (101) of the Swiss Code of Obligations, did not require the element of fault in the actions of others, but rather released the debtor's responsibility for the actions of others as long as they caused harm (92).

This responsibility is based on an error committed by a third party (assistant or substitute) in carrying out the treating physician's obligation that led to harm to the patient. In order for this responsibility to exist, the elements of responsibility must also be present: error, damage, and a causal relationship between them against the third party. In fact, the rest of the elements are Liability for harm and causal relationship is not affected by special provisions related to the subject of this study, and therefore one can refer to general references for more detail (93).

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(90) Dr. Hassan Abu Al-Naja: previous reference, p. 111.

(91) In this sense: Moaz Muhammad Yaqoub, previous reference, p. 108.

(92) See in this sense: Dr. Wafa Ahmed Hilmi, previous reference, pp. 51, 52.

(93) For more details, see: Dr. Ashraf Jaber, Civil Liability Insurance for Doctors, PhD dissertation, Faculty of Law, Cairo University, 1999, pp. 59 et seq.

For this liability to exist, it is necessary for the third party to have caused the damage resulting from his mistake, in the event of the contract being implemented or due to its implementation (as is the case) in the subordinate's responsibility for the subordinate (94) .

The error must also occur from someone else while performing one of the tasks entrusted to him, or because of the implementation of these tasks. It is not sufficient for the error to occur on the occasion of performing the task, that it facilitated the commission of the error or assisted in it. Rather, there must be a close causal relationship between the error and the task. ; So that it proves that others would not have been able, or would not have thought, to commit the mistake had it not been for this task (95) .

Finally, the error of any of the medical staff (others) is subject in his assessment to the same standard by which the error of the treating physician is measured if he was the one who personally carried out the obligation (96) .

From this standpoint, we will discuss this condition (third-party error), explaining this through three requirements: In the first, we talk about medical error, its concept, standard, and nature, then its types in a second requirement, and finally the images of medical error in a third requirement.

See also: Dr. Talal Ajaj, The Doctor's Civil Liability: A Comparative Jurisprudential Study, Dar Alam Al Kutub Al Hadith, Irbid, Jordan, 2011, pp. 289 et seq.

(94) See: Dr. Al-Sanhouri, Part One, Second Edition, paragraph 433, p. 751.

(95) Dr. Hassan Abu Al-Naja: previous reference, p. 125.

(96) G. Baumet, Thése, OP.cit. N°, 275، P. 347 ets.

(Medical error (its concept, standard and nature

The concept of medical error

The issue of error in civil medical liability in general is one of the important and thorny topics. It is important in view of the importance of the medical profession and its close connection to human life and intellectual and physical safety, and because of the technical nature that this profession embodies in which the surgeon or therapist is unique in controlling the rest of the human body. It is thorny, because it aims to guide legal thought, and consider that civil liability, even if its function is to redress damage, its basis is the obligation to ensure safety as well (97) . Given this importance, we will first present the concept of medical error in legislation, judiciary, and jurisprudence, respectively:

First: Medical error in legislation:

Most legislation neglected to define medical error, leaving the issue to the jurisprudence of commentators and court rulings (98) , This is due to the large number of these mistakes on the one hand, and the continuous development of the profession, which creates new obligations and new mistakes every day. For example: what was previously known as a serious error (99) that entails liability has now become

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(97) Dr. Asaad Obaid Al-Jumaili: Mistakes in Civil Medical Liability: A Comparative Study, Dar Al-Thaqafa for Publishing and Distribution, Jordan, 2011, p. 37.

(98) Dr. Hosseini Ibrahim Ahmed Ibrahim: The idea of the medical team's error between acceptance and rejection: a comparative study, Modern Egypt Magazine, January 2013 issue, p. 273.

(99) The term "serious mistake" has been known since the Roman era, and the Romans defined it as: "a mistake not committed by a person of little intelligence or care." See: Dr. Yassin Muhammad Yahya, Exemption Agreements from Contractual Liability in Egyptian and French Law, Dar Al-Nahda Al-Arabiya, 1992, pp. 135-145.

The majority of contemporary jurisprudence, since the jurist Demoleb, has distinguished between two types of work practiced by doctors: Physical and technical works, and he argued that the doctor is considered responsible for material works alone, not technical ones, and that there are basic principles in medical science and recognized established truths, violating them or making a mistake in their application is considered a serious mistake that is comparable to bad faith, in that it cannot be forgiven. , and inevitably entails liability. See in detail: Mounir Riad Hanna, The General Theory of Medical Liability in Civil Legislation and the Case for Compensation for It, Dar Al-Fikr Al-Jami'i, 2011, pp. 407-419. Bassam Mohtaseb Billah: Civil and Criminal Medical Liability, Dar Al-Iman Publications, 1984, pp. 123-125. Dr. Ahmed Muhammad Subhi Agrir: Administrative Liability for Damage to Public Medical Facilities, PhD dissertation, Faculty of Law, 2005, pp. 114-115. Abdul Qadir bin Tishayya: The personal error of the doctor in the general hospital, New University House, 2011, pp. 24-26.

.A small mistake also creates responsibility

By examining the texts of the laws on practicing the profession in France, Egypt, and Jordan, we did not find a text that stipulates the civil liability of doctors resulting from their errors, or addresses the error in the field of medical work, while the texts were limited to the duties and obligations of doctors. In the face of this deficiency in legislation, we find that some legislation - including the Libyan and Emirati ones - have established laws to address this deficiency and regulate the profession (100).

Despite this, we will address what was covered by general or private legislation that addressed medical error.

A) Medical error in general rules:

Article (1382) - amended to Article 1242 - of the French Civil Code stipulates that: “Every act, whatever it may be, is committed by a human being and causes harm to others. The person who committed that harmful act by mistake is obligated to compensate for this harm” (101).

Most Arab legislation also stipulates different texts, including, for example, Article (256) of the Jordanian Civil Code, which states: “Every harm to another obliges the perpetrator, even if he is not discerning, to guarantee the harm” (102).

Article (163) of the Egyptian Civil Code also stipulates that: “Every mistake that causes harm to others obliges the person who committed it to compensate”.

Likewise, Article (217/2) Egyptian Civil Code stipulates: “However, the debtor may stipulate that he will not be responsible for fraud or serious error that occurs by people he employs”.

B) Medical error in special legislation:

Some Arab legislation has singled out special laws for medical liability, including Emirati legislation. Article (14/1) of Federal Law No. (10) of 2008 regarding medical liability stipulates that:

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(100) See: Dr. Asaad Obaid Al-Jumaili, previous reference, p. 176.

(101) See the text of the article at:

https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000032041559&cidTexte=LEGITEXT000006070721

(102) Article (256) of the Jordanian Civil Code, No. (43), of 1976, which was previously referred to.

“A medical error is an error that is due to ignorance of technical matters that everyone who practices the profession is supposed to be familiar with, or that is due to negligence or failure to exercise the necessary care " (103) .

Article Twenty-Three of the Libyan Medical Liability Law also stipulates the following: “Medical liability results from a professional error arising from the practice of a medical activity that causes harm to others. Any breach of an obligation imposed by applicable legislation or established scientific principles of the profession is considered a professional error, all of this taking into account the circumstances.” surroundings and available capabilities, and the occurrence of damage is considered evidence of committing a mistake or breach of obligation " (104) , Finally, the Jordanian Medical and Health Liability Law No. (25) of 2018 was issued, defining medical error in its second article as: “Any act, omission, or negligence committed by the service provider that does not conform with the prevailing professional rules within the available work environment, and results in harm " (105) .

Second: Medical error in the judiciary:

Medical art is characterized by being a developed art, not rigid rules, and this results in damage occurring as a result of the development of this art, and as a result of adopting new treatment methods and the emergence of new devices and equipment, expected and unexpected damage occurs to patients. The question here is: Are these damages sufficient for liability to arise, or must the element of error that causes liability be present for it to arise? Especially since this problem is one of the most important matters presented to the courts. In its rulings to answer this question, the judiciary stipulates that the doctor is responsible for his error in treatment if this error is apparent and does not support an undisputed technical discussion. If there are scientific issues that are subject to controversy, discussion and disagreement, and the doctor believes that he is following a theory that scientists have said, but the opinion regarding it has not been settled. He followed it, and there is no blame on him. It is also not considered an error attributed to the surgeon if neurological or other disorders occur as a result of the anesthesia procedure, because the doctor is free to use the method of anesthesia that he deems appropriate (106) .

The Mixed Court of Appeal also ruled on: February 15, 1911 that: “The judge may not

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(103) Article 14/1 of UAE Federal Law No. 10 of 2008.

See the law at the following website:

www.qistas.com

(104) Law No.: (17) of 1986 regarding Libyan medical liability issued by the General Forum of People’s Congresses, Popular Committees, Federations, Syndicates and Professional Associations (General People’s Congress) issued in the period from 2/26 to 3/2/1985.

(105) Jordanian Medical Liability Law No.: (25) of 2018 regarding Jordanian medical and health liability, issued by the Prime Minister in the Official Gazette, Issue No.: 5517, date: 5/31/2018, p. 3420: p. 3430.

(106) See Civil Cassation: 3/22/1966, Appeal No.: 381 of 1931 BC, Collection of Civil Cassation Rulings, No. 17 of 1966, p. 636, also Alexandria National Primary School: 12/30/1943, Law Firm, No. 24. Clause 35 , p. 78.

See also: Dr. Ahmed Mahmoud Saad, The Private Hospital’s Responsibility for the Errors of the Doctor and His Assistants, previous reference, p. 41.

Interfering in the evaluation of scientific theories and methods, and its mission is limited to revealing whether the doctor has been negligent or ignorant of the rules that doctors unanimously affirm (107) .

Another example is what was given by the Egyptian Court of Cassation in its criminal capacity in the ruling issued on April 23, 1931: “A doctor was performing an operation on the victim, and the aforementioned person moved and struck him with his fist twice, and with his palm on his head once, and it was proven from the forensic doctor’s report that he was When the victim has advanced aortic anorexia, it may explode on its own as a result of an increase in blood pressure, whatever its cause in the diseased part, or due to external violence occurring on the body, and since the doctor had beaten the victim during the anorexia interview, what can be concluded is that the aforementioned anorexia has been exposed. Indeed, due to external violence, it exploded and death occurred " (108) .

As a result of the lack of the previously mentioned legislation, the judiciary resorted to applying general rules that require the doctor to be held accountable, like other people, for every mistake he commits, because it did not want anything to indicate that doctors or others were excluded from the provisions contained in these texts (109). With regard to the French judiciary, as a result of the remarkable development with regard to judicial rulings, we find that it has subjected medical error to liability in all its forms - whether technical or ordinary, serious or minor - meaning that liability also addresses purely medical actions, and it is not permissible to prevent the courts at all from considering them. Therein, under the pretext that dismissing it in this way would lead it to interfere in examining issues that fall within the scope of medical science alone. Indeed, in such cases, the doctor must be asked about his grave error, which is drawn from clear and clear facts, and which in itself contradicts the general rules dictated by good judgment and sound judgment. Taste. Those are the established and undisputed rules (110) , In a ruling dated January 16, 2013, the French Court of Cassation ruled that the anesthesiologist was responsible for the errors he committed, which were represented by his choosing an anesthesia method that was not appropriate for the patient’s condition, as well as his following the anesthesia process in a manner that contradicted the established scientific principles in this field, so he used a dose higher than the recommended dose. Scientifically recommended, which led to the death of the patient, so the court ruled to oblige him to compensate the heirs of the deceased in solidarity with the National Office for Medical Accidents Compensation ONIAM (111) .

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(107) Dr. Hosseini Ibrahim Ahmed: Contemporary Egypt Magazine, previous reference, p. 281.

(108) Criminal Cassation: 4/23/1931 - Law Firm, s. 12, 197.

(109) Dr. Muhammad Ali Omran: The doctor’s commitment to respect scientific data, doctoral dissertation, Alexandria University, 1992, p. 94.

See also: Dr. Alaa El-Din Khamis, previous reference, p. 133.

(110) See in this sense: Dr. Suleiman Markus, Comments on the Provisions of Doctor Responsibility and Hospital Responsibility, Journal of Law and Economics, Cairo University, Seventh Year, First Issue, January 1937, p. 7.

(111) Cass. Civ. 1re. 16 Jan. 2013, N. 12-15452,
Office National d'Indemnisation des Accidents Médicaux
Meaning the National Accident Compensation Office

A relatively recent decision was issued by the Federal Supreme Court of the United Arab Emirates stating that: " The permissibility of a doctor's work is conditional on what is being done being in accordance with established scientific principles. If he neglects to follow them, he will be responsible for his mistake and lack of progress in performing his work " (112).

Finally, the Jordanian Court of Cassation ruled in its decision: "Since the liability of the person who caused the damage is conditional on his unlawfully performing the act that led to that damage, liability for the error requires proof of the responsible person's fault in the occurrence of the damage that befell the third party and a causal link linking the error and the damage " (113).

Third: Medical error in jurisprudence : (114)

It is necessary that we first define what is meant by negligent error. Professor Savateh defined error as: "a breach of a prior duty that could have been known and observed." Al-Sanhouri also defined it by saying: "it is a breach of a legal obligation, meaning that a person takes vigilance and foresight in his behavior so as not to harm others." And his deviation from this behavior while having the ability to discern such that he realizes that he has deviated from the behavior while having the ability to follow it, this deviation is a mistake that calls for his responsibility " (115) .

An error is generally defined as a breach of a contractual obligation, whether by non-performance or by delay in implementation, and regardless of the degree or seriousness of the error, as long as this is due to a deviation in the debtor's behavior in a way that leads to his being held accountable (116).

See also, for details of this ruling, Dr. Asmaa Ismail, previous reference, p. 276 et seq.

(112) Criminal Cassation, issued on 1/30/1999, Collection of Rulings of the UAE Supreme Administrative Court, Section 21, No. 68, pp. 242, 243.

(113) Jordanian Court of Cassation's Rights Cassation Decision, Judgment Decision 196/2008, date: 10/12/2008, unpublished.

(114) Error in language: the opposite of right. It is stated in the language: "Error and error: the opposite of right, and the path was wrong: he turned away from it, and the archer missed the target: he did not hit it." See: Lisan al-Arab by Ibn Manzur, article (error), vol. 1/65, Dar Sader - Beirut, third edition, 1414 AH. Referenced to: Dr. Saleh bin Ghanem Al-Sadlan, Errors that occur by doctors and the limits of liability in Sharia and the law, Conference on Medical Errors in the Balance of Sharia and Law, Jerash University, Jordan, November 1999, p. 19.

Error is a term that some have defined as: "to intend something other than the place in which the crime is intended, such as shooting to hunt and injuring a human being." See: Sharh Fath al-Qadir by Ibn al-Hammam al-Hanafi, vol. 10/203, and d. Saleh bin Ghanem Al-Sadlan, previous reference, p. 19.

(115) Dr. Al-Sanhouri, previous reference, p. 778 et seq.

See also: Dr. Abdul Razzaq Al-Sanhouri, Al-Waseet fi Sharh Al-Law Al-Civil: Sources of Obligation, Volume One, Contract, Third Edition, 1981, p. 892.

(116) Dr. Hassan Jami: The supposed error in civil liability, Dar Al-Nahda Al-Arabiya, 2007 edition, pp. 80 et seq.

See also: Dr. Obaid Majoul Al-Ajmi, Medical Error within the Scope of Civil Liability, previous reference, p. 205.

Medical error is defined as: “The doctor’s failure to fulfill the special obligations imposed on him by his profession. The basic principle is that any person who undertakes a profession that requires special study is obligated to be familiar with the scientific principles that enable him to undertake it, so he is considered a mistake if he is ignorant of them” (117).

Some believe that: “The medical error for which the doctor is held accountable, if all the other elements of medical responsibility are present: is a defect in itself, a violation of the requirements of the profession, and a failure to conform to scientific principles. This is because medical work is characterized by being of an artistic nature, and it is an obligation to ensure the health and safety of the patient’s body.” Which is considered an infringement - without justification - on absolute rights" (118) .

Others defined it as: “ An error that occurs by a person in his capacity as a doctor or on the occasion of his practice of medical work ” (119).

The industry went on to define a medical error as: “which is defined as failure to complete the planned procedure as intended or the use of a wrong plan to achieve the goal.” They also distinguished between a medical error and what is known as an “adverse event.” The adverse event was defined as : “The defect that occurs to the body as a result of incorrect medical practice, and not the disease or the patient’s underlying condition ” (120).

In a more comprehensive and general definition, we go to support him, he sees that a medical error is: “the doctor’s breach of his obligations in confronting his patient, which consists of violating medical data and principles " (121) .

We add that the error made by the doctor or medical care provider on the occasion of his practice of medical work is not made by a vigilant doctor found in the same circumstances as the doctor, and who enjoys the same scientific and practical qualifications. The basic principle is that whoever undertakes a medical profession that requires knowledge and expertise is obligated to be aware of the scientific principles that enable him to He is considered to be at fault if he was unaware of it, or failed to do it, so the doctor or medical care provider must-

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(117) See: Dr. Asaad Obaid Al-Jumaili, previous reference, p. 172.

(118) Dr. Ahmed Mahmoud Saad: previous reference, p. 63, Dr. Sharif Ahmed Al-Tabbakh, previous reference, p. 11, Dr. Ali Issam Ghosn: Medical Error, previous reference, p. 17 et seq.

(119) Dr. Ashraf Jaber: Civil Liability Insurance for Doctors, previous reference, p. 17.

(120) Patient Safety Definitions:
- "Medical error, defined as The Failure of a Planned action to be Completed as intended or the use of a wrong plan to achieve an aim.
- Adverse event: defined as an injury caused by medical management rather than by the underlying disease or condition of the patient". =

= In: Dennis Tsillimingras، M D., M P.H. & Assistant professor of family medicine Rural Health، the Florida state University college of medicine:
https://med.fsu.edu/uploads/files/presentation.pdf

(121) Dr. Hosseini Ibrahim Ahmed: previous reference, p. 277.

Whatever it is - to exercise the required care, because he is obligated to exercise care, not to achieve a result, unless the nature of the obligation requires otherwise (such as plastic surgery, dental prosthetics, or laboratory and radiological tests), in which case he is obligated to achieve a result. Therefore, the doctor or caregiver must follow methods that ensure avoiding risks, in a way that does not expose the patient's interests to danger.

The nature and criteria of medical error

The responsibility of the treating physician arises when he deviates from the requirement of exerting effort, sincere endeavors, and vigilance that are consistent - in other than exceptional circumstances - with established medical principles, rules, and principles. These are the principles that the profession agrees upon in every specialty, and they do not tolerate those who are ignorant of them or neglect them. In matters where there may be debate or where opinions differ, the doctor should not be held accountable or questioned if he chooses a theory said by a scientist and follows it, even if he has not yet settled on a medical opinion (122).

In addition, it is necessary to differentiate between whether the treating physician's commitment to the patient is a commitment to achieving a result or an obligation to provide care. In the obligation to exercise diligence, the fault of the third party who replaced the debtor or assisted him in implementing the obligation is established if the creditor proves that he did not exercise the required diligence by committing a mistake or deviating from the principles and instructions that must be observed in implementation. The basic principle is that the diligence required of the debtor should be similar to what he exerts. The usual person, as she is like a middle person between the ranks, entrusted to the familiar person in the care of the majority of people (123) .

This therefore applies to the third party whom the debtor has used in carrying out his obligation. However, it must be taken into account that the standard of the ordinary person does not suit the debtor with a professional obligation, such as the treating physician. The degree of care required of him is not measured by the standard of the ordinary person, but rather by the standard of the professional of his sect and rank (124).

This is what should be taken into account when determining the degree of care required of the third party whom the debtor used as a substitute for him or as an assistant to him in carrying out his obligation towards the creditor. Therefore, in order to negate the error on the part of the third party, it must be proven that the latter exerted the care of a professional of the same sect and rank, which is a standard. Technical.

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(122) Dr. Asaad Obaid Al-Jumaili: Error in Civil Medical Liability, previous reference, p. 203.

(123) See: Collection of Preparatory Works for the Egyptian Civil Code, Part Two, p. 532.

(124) Dr. Hassan Abu Al-Naja: previous reference, p. 12 .

As long as the doctor's obligation is merely a commitment to provide care, the patient cannot establish his responsibility unless he provides evidence that the doctor took a wrong course. Thus, the doctor is liable for every negligence in his medical conduct that did not occur from a vigilant doctor, of his professional level, who was found in the same external circumstances. That surrounded the responsible doctor (125) .

This is what a group of jurists said when they said: The doctor's commitment is not an obligation to achieve a result, but rather an obligation to exert care, but this care required of him requires that he make sincere and vigilant efforts for his patient that are consistent with the established principles of medical science (126) , While it is considered an error for one doctor, while it does not constitute an error for another doctor, this type of commitment requires a realistic analysis of each case individually (127) .

In this regard, the French Court of Cassation issued on October 14, 2010 stated that "in the law of medical responsibility, the doctor is obligated to provide the necessary means for the person under care, and this means that he makes every effort possible to provide due care from conscience, vigilance and diligence, but he cannot guarantee the results." certain, due to medical suspicions " (128).

The Belgian Liege Court of Appeal followed this approach, ruling that: "The patient who is sent to a treatment institution without choosing the doctor who will treat him, so that he surrenders himself to the hands of the doctors working in this institution, and the patient has contracted with this treatment institution only, the contract binds the doctor." "By committing to exercise care, not to achieve a result " (129) .

In this regard, the Egyptian Court of Cassation also ruled that: "The doctor's responsibility is not primarily based on achieving a goal, which is to heal the patient. Rather, he is committed to exercising certain care that is required by the principles of the profession to which he belongs. His duty in exercising this care is based on what a vigilant doctor provides from the middle " His colleagues are knowledgeable and knowledgeable about the surrounding circumstances

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(125) Dr. Jaber Mahjoub Ali: The role of will in medical work: a comparative study, previous reference, p. 447.

See also: Dr. Abbas Hassan Al-Sarraf, previous reference, p. 203.

(126) Dr. Abdul Quddus Abdul Razzaq Muhammad Al-Siddiq: Liability insurance and its contemporary compulsory applications: a comparative study between the Civil Transactions Law of the United Arab Emirates and Egyptian law, Faculty of Law, Cairo University, PhD thesis, 1999, pp. 281 et seq.

(127) Dr. Osama Ahmed Badr, The obligation to exercise care and the obligation to achieve a result between personal responsibility and objective responsibility: an analytical study in French and Egyptian law, Law Journal for Legal and Economic Research, Faculty of Law, Alexandria University, second issue, 2009, p. 379.

(128) Cass. Civ.1re 14 Oct. 2010, N° 09-68.471

(129) Marie Benedict Couillet, Exeruies driot des obligations, studyrama، 2006، no 103.
See also: Moaz Yacoub, previous reference, pp. 113, 114.

And while practicing his work, taking into account the traditions of the profession and the established and stable scientific principles in the science of medicine (130) .

If the doctor seeks the assistance of another doctor or nurse from the medical staff to implement his contractual obligation, the assistant doctor must implement the obligation in the nature of the obligation agreed upon between the original doctor and the patient, and it is often an obligation to provide care. However, in the event that the doctor seeks the assistance of another colleague, the latter is obligated. By committing to provide care, by making the necessary diagnosis for the patient himself and not relying on what the original doctor did, as the French Court of Cassation ruled in its ruling issued on April 30, 2014 that the doctor whose error caused the patient's death was responsible for relying in the surgical procedure on the diagnosis issued. From another colleague of his without doing it on his part (131).

As for the obligation to achieve a result: once the result is not achieved or the deadline for achieving it is missed or delayed, it is assumed that this is due to the error of the third party that the debtor used in implementing the obligation, which consequently leads to the doctor's contractual responsibility towards the patient, and the doctor cannot absolve himself of the obligation. He himself is responsible unless he proves that the failure to achieve the result or the delay is due to an external cause beyond his control or to the patient's fault (132) .

An example of this is: the doctor's commitment to achieving a result in the field of his technical work, where the nature of the work that the doctor will perform is devoid of the element of possibility or in which this element is greatly diminished, the result here is the absence of harm, and an example of this is the injection process; It creates a commitment to safety, which is a commitment to achieving a result that is the absence of harm from the injected substance (133) .

The radiologist is also obligated to achieve a result, which is to provide clear x-rays that show the subtleties and details of the body requested by the treating physician, indicating the signs and signals of the disease from which the patient is suffering, and attaching to it a written report explaining what he sees regarding the patient's condition. This is in the case where the disease is apparent. In the situation in which it is

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(130) Appeal No. 2941 of 69 BC: Session of June 1, 2000, Collection of Rulings of the Egyptian Court of Cassation, Part Two, Fifty-First Year, from May to December, 2000, p. 765.

(131) Cass. Civ. 1re, 15 Avril 2014, N° 13-14.288.
See also, for details of this ruling, Dr. Asmaa Ismail, previous reference, p. 267 et seq.

(132) See in this sense: Dr. Hassan Abu Al-Naja, Contractual Liability for the Action of Others, previous reference, p. 127.

(133) Dr. Muhammad Hassan Qasim: Proving error in the medical field: a comparative jurisprudential and judicial study in light of contemporary developments and provisions of medical liability, Journal of Law, Faculty of Law, Alexandria University, second issue, 2001, pp. 105 et seq.

The disease is not apparent on the x-ray, or science has not established the nature of the disease, the means of diagnosing it, and its limits, then the obligation here is an obligation to exercise care (134) .

Finally, we note from the above that the debtor (the contracting doctor) is considered to be in breach of the contract, according to the above meaning, whether he took it upon himself to implement the contract himself, or in this regard he sought the help of other people (substitutes and assistants), in this case also non-performance is considered attributable to the debtor (135) .

Types of medical error

Medical error is divided into two types: material error and professional error, and on the basis of these two sections the doctor's responsibility is determined (136) .

Jurisprudence has divided the doctor's work while practicing his work into two types of work:

A) Physical works that are not related to the art of the profession.

b) Medical works related to the art of the profession.

It follows that the doctor, while performing the work assigned to him, may commit two types of errors: material error, which is outside the profession (137) , The professional error, which is at the core of his profession, is determined by reference to the scientific and technical principles and rules of the medical profession.

Egyptian jurisprudence differentiated between professional error and material error, and decided that the doctor is responsible for his serious professional error, not the minor one, and subjected his error, which is not related to the principles of the profession, to the general rules regarding responsibility for the error (138).

And a side of the French jurisprudence goes to the necessity of distinguishing between deeds or deeds that are issued by any ordinary person and there is no matter in it for the attribute of the doctor, which is "material deeds", and the medical works that are issued by the one who is responsible for On the work Material only, not artistic works. However, the principle of the doctor's responsibility for his technical work has not been generalized, as the medical profession has basic principles

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(134) Dr. Alaa El-Din Khamis, previous reference, p. 355.

(135) Muhammad Hanoun Jaafar: The contractor's contractual liability for the actions of others: a comparative study, previous reference, p. 75.

(136) Dr. Hassan Zaki Al-Ibrashi: Criminal Liability of Doctors, University Press House, Egypt, 1989, Dr. Saleh bin Ghanem Al-Sadlan: previous reference, p. 39, Dr. Sharif Ahmed Al-Tabbakh: Medical Error Crimes and Compensation for Them, previous reference, p. 14 et seq. .

(137) Dr. Ahmed Mahmoud Saad: previous reference, p. 373.

(138) Dr. Hosseini Ibrahim Ahmed: previous reference, p. 282.

There are established scientific facts that are agreed upon and recognized, and violating them or making a mistake in their application is considered a serious mistake that is comparable to bad faith in that it cannot be forgiven and that it inevitably creates responsibility. However, on the other hand, they said that the doctor is responsible for every error in his physical work, just as he is responsible for his technical work if he makes a serious error in it.

These jurists relied on a ruling issued by the French Court of Cassation on July 21, 1862, which stated: “These two articles (1382, 1383 French Civil) established a general rule, which is the rule of the necessity of attributing fault and compensating for damage that arises from human action, or even from mere negligence or failure to do so.” His insight, and that this rule applies to all people, regardless of their position and industry, without exception, except in cases specifically stipulated by the law, and there is no such exception for doctors, and that there is no doubt that the court requires the judge not to delve into Examining medical theories and methods, and that there may be general rules dictated by good foresight and sound taste, which must be observed in every profession, and that doctors in this regard are subject to public law like other people”.

The jurists concluded from this ruling that it distinguished between technical works, so judges were forbidden from delving into them, and ordinary works, so doctors were treated like all other people (139).

Some people explain their position rejecting this distinction by saying: “The distinction between material error and technical error in practicing the profession, in addition to being inaccurate in some cases, is unjustified. Rather, the doctor or other client is in need of protection from technical errors. What must be taken into consideration is The artistic man is responsible for his professional error, just as he is responsible for his ordinary error, so he is asked about this or that, even for a minor error. What has introduced confusion regarding professional error is that the standard by which this error is measured is also an artistic standard - which is the standard of a person from among the artistic circles - it is not permissible He may make a mistake in what the established principles of art are, and the established principles of art are what are no longer a subject of discussion among the men of this art. Rather, the majority of them accept them and do not accept controversy in them. Therefore, departing from these established principles seems an unforgivable mistake. An artistic error is almost fundamental. To come into contact with a grave error and be mixed with it, but it must be noted that deviating from these established principles - whether this departure is serious or minor - is considered a professional error that requires responsibility " (140) .

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(139) Referenced to Dr. Hosseini Ibrahim Ahmed: previous reference, p. 283.

(140) Dr. Al-Sanhouri: The Mediator in Explanation of Civil Law, Part One, The Theory of Commitment in General, Sources of Commitment, Arab Heritage Revival House, Beirut, 1952, paragraph 548, p. 823.

See also: Dr. Suleiman Markus, The Doctor’s Responsibility and the Hospital Administration’s Responsibility, Journal of Law and Economics, 1937, p. 155 et seq.

We, in turn, support this jurisprudential opinion. This is because the principle that considers that only a serious mistake is responsible, not a small mistake, but this opinion has become a thing of the past, and it cannot be relied upon in light of modern developments that have included all aspects of life, including medical inventions, and in light of the difficulties in distinguishing between the two types. The error, due to the absence of legislative texts that distinguish between a minor error and a serious error.

To distinguish between these two types of errors - the material error and the doctor's professional error - we present them in two sections, the first: the material error, and the second: the doctor's professional error.

Material error

It is an error that results from a breach of the general duties of caution and caution that everyone, including the doctor, is obligated to do within the scope of his work. Some believe that: "Breach of the obligation imposed on all people to take the necessary care when carrying out a certain activity or performing a certain act, in order to avoid the unlawful result that this behavior may lead to, and this error is not subject to the technical aspects of medical science, and is not due to the principles." recognized therapeutic treatment (141) .

Physical works are those that are issued by an ordinary person and are not related to his professional capacity, and medical physical works are those that are not related to the technical principles of the medical profession, and are issued by a doctor and are not related to his capacity as a doctor (142).

Examples of a material error for which a doctor is accountable include the following: a doctor performing surgery while drunk, or performing surgery while injured, or neglecting to sterilize surgical tools, and also including: leaving some tools in the patient's body. This is also considered a type of error. The materialism of the doctor: The refusal of a government hospital doctor to treat a patient without justification or to order the removal of a patient from the hospital despite his poor condition or before he has completed his treatment. This also includes the doctor's failure to observe the rules of hygiene during his work .

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(141) Dr. Saleh bin Ghanem Al-Sadlan: previous reference, p. 39, Dr. Ahmed Mahmoud Saad, previous reference, p. 372, Dr. Mustafa Muhammad Abdel Mohsen, Medical and Pharmaceutical Error, without a publishing house, 2000 edition, p. 45. See also:

Ethan D Grober and John M.A. Bohnen Defining medical error, canadian Journal of surgery, in: https://www.ncbi.nlm.nih.gov/pme/articles/pmc3211566.

(142) Dr. Alaa El-Din Khamis, previous reference, p. 140.

Disagreement or controversy does not arise in jurisprudence about holding a doctor accountable for the material error he commits in all its degrees and forms, as is the case with the average person (143) .

Some courts in Egypt differentiate between ordinary doctor error and professional error (144) .

Professional error

Professional error means the professional's failure to fulfill the special duties imposed on them by their profession. Responsibility for this error is considered a contractual liability if a contract binds the professional to the injured person (145) .

Some believe that: "The deviation of a person who belongs to a specific profession from the principles that govern this profession and restrict its people when practicing it is a violation of a special duty imposed on a limited group of people who belong to a specific profession, such as doctors " (146) .

An aspect of jurisprudence in Lebanon defines professional errors committed by professionals while practicing their professions, in which they deviate from customary professional behavior in accordance with established principles (147) , What is meant - in general - is the deviation of a person belonging to a certain profession from the principles that govern this profession and restrict its people when practicing it (148) .

It is a breach of a special duty imposed on the category of doctors in our case, and it is related to violating the principles of the medical profession and the rules that govern it. If a doctor violates these rules and principles established in medical science, he is considered to have committed a professional-technical error.

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(143) Dr. Suleiman Markos: The responsibility of the doctor and the responsibility of hospital management, previous reference, p. 157 et seq.

(144) Ruling dated January 26, 1935, Law Journal, vol. 15, issue 6, p. 471.

(145) Dr. Sharif Ahmed Al-Tabbakh: Medical error crimes and compensation for them, previous reference, p. 14.

(146) Dr. Munir Riad Hanna: previous reference, p. 44, Dr. Hamdi Abdel Rahman, previous reference, p. 18, Dr. Abdel Moneim Muhammad Daoud, the legal responsibility of the doctor, without a publishing house, 1988 edition, p. 18.

(147) Dr. Abdul Latif Al-Husseini: Civil Liability for Professional Errors, previous reference, p. 73.

(148) Dr. Saleh Al-Sadlan: previous reference, p. 40. See also:

jean Penneau, responsabilité du Médicin Dalloz 1996 P. 230.

v.aussi, Mme/Domitille Durval- Arnould La responsabilité civile des Professionnels de santé et des établissements de Sant privés êã lumi laêre de la loi du 4 mars 2002, Sur: Courdecassation. Fr.

See in detail: Dr. Asmaa Ismail, previous reference, p. 94.

Examples of these errors include the doctor making a mistake in diagnosing the patient or in the treatment he administers to him, prescribing an inappropriate medication, not performing medical tests, negligence in monitoring, supervising and following up on the patient, and there are many examples that cannot be enumerated.

The professional physician's error is minor in most cases, and may be serious in some cases. A serious error is defined as: "An error resulting from blatant ignorance of the basic principles of medical science, fraud, violation of agreed-upon sound rules, or definite neglect of the duties of the profession".

The connection of the work practiced by the doctor to the principles of medical science and art is the criterion for distinguishing between material errors and technical errors of the doctor. The doctor's error is divided according to the direct connection of his work with the technical principles of the medical profession. If the work is like that, it is artistic. If it does not relate to these principles, it is materialistic.

The importance of distinguishing between a doctor's ordinary error and his professional error is due to the fact that the judge may decide on the issue of ordinary errors on his own initiative and based on his discretion. As for deciding on the doctor's professional errors, the judge may not be subject to them, because they are technical issues that are difficult to decide unless the judge seeks help. With technical experience (149) .

The American judiciary also differentiated between both material works and technical works. The New York court went on to distinguish between two types of errors in view of the nature of medical work: "(The first type): errors resulting from undertaking administrative work, and the hospital is responsible for these errors because they are administrative works. (The second type): Errors resulting from undertaking medical work. These errors are technical medical work, for which only those who perform them should be held accountable (150) . The Egyptian judiciary believes that: "The doctor's responsibility is subject to general rules whenever the error is confirmed, regardless of its type, whether it is a technical error or non-technical error, serious or minor. Therefore, it is correct to judge the doctor who commits a minor error, even if this error has a clear medical tinge " (151) .

There is a jurisprudential opinion that contradicts this distinction in this regard: "This call to adopt the distinction between a normal error and a technical error is a call dictated by the desire of some jurists to favor one class over another, and it is a call that has not been

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(149) Dr. Hamdi Abdel Rahman Ahmed: The infallibility of the body, previous reference, p. 19.

See also: Dr. Alaa El-Din Khamis, previous reference, p. 143.

(150) See: Dr. Mustafa Adawi, Civil Breach, Tort Liability in American Law, 1994 edition, p. 34.

(151) Egypt Court of Appeal, January 2, 1936, Law, s. 16, q. 334, p. 713.

It is considered acceptable in light of the dominance of democratic ideas and principles that refuse to accept or approve such special treatment, which involves class or professional privileges that have no place at all, and this is what the French judiciary quickly and completely realized " (152) .

Despite the validity of this opinion, we disagree with it in terms of the necessity of this specific division of medical error and the doctor's professional error specifically, despite the ease of distinguishing between the two types of error in some cases, including: the incident of the doctor asking the patient to return early without performing the procedure. The necessary medical care to treat her, despite the availability of all the necessary machines and equipment in the hospital to receive such cases, which resulted in missing the opportunity to perform surgery on her in a timely manner, which caused her some damage (153) .

This also applies to the case where the doctor leaves the hospital immediately after completing the surgery, neglecting to follow up on the patient's condition, which revealed the occurrence of blood bleeding that led her to death (154) ; This is because the judge cannot rule on the responsibility of a doctor, and therefore award compensation to the injured party unless he is able to seek the assistance of expertise of the same rank, qualifications and experience as the doctor to determine the extent of this doctor's responsibility towards the damage resulting from his error on the patient, and thus award appropriate compensation.

This distinction was not established for a long time, as both French and Egyptian jurisprudence abandoned it. The French Court of Cassation ruled that "all errors made by the doctor establish his responsibility without requiring that they reach a certain level of seriousness " (155) , The Egyptian judiciary, in turn, decided that "the doctor who makes an error is responsible for the outcome of his error without distinguishing between a minor and serious error, nor between technicians and others. As for what the majority of French jurists and their followers have agreed upon, there are few rulings regarding the distinction between a doctor's error related to his profession and his violation of the rules." The technical error of medical science, which is expressed in the error of the profession, and the material error related to the doctor violating the rules of precaution required of him when performing his work, and the statement that the doctor should not be held accountable in the event of professional error, except for his grave mistake and not the minor one. This statement was the subject of objections because of the difficulties in distinguishing between the two types.

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(152) Dr. Hassan Ali Al-Dhanoun: Al-Mabsoot fi Civil Liability, previous reference, p. 580.

(153) Criminal cassation in Appeal No. 31881 of 69 BC, session of December 20, 2006, Technical Office Group, of 57, p. 1001.

(154) Criminal cassation in Appeal No. 26137 of 67 BC, session of December 18, 2006, Technical Office Group, of 57, p. 984 .

(155) Cass. Civ. 1re, 30 Oct. 1963, R. Dalloz 1964, P.81 J.

The error, and because the text of the law that regulates the responsibility of the wrongdoer for his mistake was general and not restricted, it did not differentiate between a minor and serious error, nor between technicians and others " (156) .

Finally, we conclude that jurisprudence and jurisprudence have established that: “The doctor is responsible for his error, whatever its type, whether it is a technical or material error, serious or minor. A doctor does not enjoy any exception, and the judge must verify the existence of this error, and that this error is It is sufficiently proven for him, and he must seek the advice of experts. If he describes the “doctor’s error” that exceeded the permissible number in x-ray sessions as a minor error, then he is responsible for it according to the general rules, and he is responsible for every negligence in his medical conduct that did not occur from a doctor who was attentive to it. His professional level existed in the same external circumstances that surrounded the doctor in charge. He is also asked about his ordinary mistake, regardless of its seriousness. Not transporting the patient to the specialized medical department in a timely manner constitutes a gross error that necessitates the doctor’s responsibility. He is also asked about his mistake of injecting the patient with an anesthetic without Look at his bottle and confirm whether it is the drug he requested, and the judiciary decided that the error must be clear and proven conclusively and not probabilistically " (157) .

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(156) Alexandria Civil Court ruling, session of December 30, 1943. See also, Dr. Asmaa Ismail, op. cit., p. 97 et seq.

(157) Dr. Sharif Ahmed Al-Tabbakh: Medical Error Crimes, previous reference, p. 20.

Pictures of medical error

We note that the forms of medical error are many and numerous, and are increasing in number due to the multiplicity of relationships between doctors and patients. Therefore, the forms of medical error are many and cannot be limited to (158) , In order to determine the best way to investigate these medical errors, the relationship between the doctor and the patient must be traced from the stage of detection, inspection, and expressing an opinion until the stage of treatment, follow-up, and supervision to which the patient is subjected. Through this, we note that these images are not limitable, and we mention them - but not limited to them. Failure to inform the patient, errors in inspection and examination, prescribing treatment, negligence and negligence, surgical errors, dental prosthetics errors, including: radiology, anesthesia and laboratory errors. There are many others, and we will present the most common and important ones, which are diagnostic errors (the first branch) and treatment errors the second branch .

Misdiagnosis

Jurisprudence and jurisprudence have established that a mere error in examining the patient and diagnosing the ailment or disease from which the patient suffers does not raise the doctor's responsibility, unless the doctor's error in diagnosis involves ignorance of the scientific and technical medical principles that are established, stable and recognized in medical sciences. Failure or failure to diagnose The cause of an illness being correctly diagnosed is not in itself evidence of negligence. In order for the doctor to be liable, the patient must prove that the inaccurate and incorrect diagnosis was due to a failure or failure to exercise unacceptable skill and care (159) .

In this regard, the Cairo Court of First Instance stated in its ruling issued on January 27, 2011 that: "An error is every breach of a general legal duty associated with an awareness of the breach of this duty, and it is also a deviation from normal, familiar behavior. If it deviates from this behavior that others expect and they base their actions on...

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(158) Dr. Asaad Obaid Al-Jumaili: Error in Civil Medical Liability, previous reference, p. 238.

(159) Look:

Leahy Taylor، the Doctor and the Law, second edition، London, MB.BS.DMJ, MRCGP, the medical protection society Limited, London, 1982, P.118.
Referenced to: Dr. Asaad Obaid Al-Jumaili, previous reference, p. 240.

See also: Muhammad Hussein Mansour, The Responsibility of Physicians and Surgeons, op. cit., p. 271.

Based on his consideration, he made a mistake, and after that, it was intentional or negligent. They are equal in the availability of civil responsibility (60) .

The doctor's efforts in treating the patient begin with diagnosing the disease, and this stage is preceded by the patient's examination stage, so the doctor begins to know the patient's medical history either through him or through the patient's family and relatives, and this stage is called CVPatient, and then performs the necessary medical examinations and analysis, including biological and clinical examinations, and performs All types of radiology, in order to form the doctor's belief in arriving at a correct diagnosis of the nature of the disease. These examinations include:

First: Pathological chemical examinations or analyses:

There are multiple tests, including clinical chemical tests, as follows:

1 -Acid phosphatase: Acid phosphatase is taken from blood serum for the purposes of examining prostate cancer, Gaucher's disease, hemolytic diseases, broken blood platelets, Paget's disease, and bone tumors, especially in women.

2- Albumin: Albumin is taken from blood serum for the purposes of conducting tests for malnutrition and malabsorption, which causes an increase in this substance. Its increase causes liver disease, kidney disease, thermal burns, cancers during chemotherapy, and hereditary hypoproteinemia.

3- Calcium: Calcium is taken from blood serum.

An increase in calcium levels occurs in some cancerous tumors, when the parathyroid glands are hyperactive in sarcoidosis, and when pathologically high vitamin D occurs.

Calcium deficiency: occurs in cases of poor activity of the parathyroid glands, vitamin D deficiency, chronic kidney failure, and alcoholics.

Examples of hormone tests include:

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(160) The ruling of the North Cairo Court of First Instance in Case No. 804 of 2007, Circuit (7), Compensation, session of January 27, 2011, a scanned copy of the ruling. The facts of this case are that the patient (...) underwent surgery to remove her right breast as a result of what was revealed by the examination. The pathology revealed the presence of individual, third-degree cancer cells. However, after the surgery, a sample was taken from the part that was removed and analyzed, and it was concluded that there were no cancer cells at all, and that what the patient is suffering from is nothing more than a chronic chest infection as a result of a fat analysis, which... It led her to hold the pathologist accountable for his error in diagnosing her condition.

4- Alpha Fetoprotein: AlphaFetoprotein (AFP) is taken from blood serum and is used as a detector for some cancers. This hormone is elevated in testicular cancers, liver cancers, and gastrointestinal cancers when there is or is not an outbreak of the liver.

5- Hematology tests

completeBloodcount (CBC) is taken from a whole blood sample. Reason for taking the sample: To examine the number and shape of red and white blood cells and platelets.

6- The rate of sedimentation of red blood cells: The rate increases in cases of infection, inflammation and cancers.

7- Coagulation tests: Bleeding time, a percentage different from the normal percentage indicates a defect in platelet function, and is used in diagnosing Vonwill disease, when there is a decrease in the number of platelets, and with long treatment with aspirin, the bleeding time increases.

There is no doubt that blood tests and the blood transfusion process require a specialized doctor or technician , Supervises this process (161) A doctor or technician may be a worker in a hospital, or he may be a worker in a blood transfusion center. The doctor's responsibility is if he makes a mistake or causes harm to others, because he failed to fulfill his obligation to achieve a result, which is to ensure the safety of the blood transfused to the patient (162) .

8- Tissue and cell examinations: Histopathology & Cytopathology

Example: Breast secretions: To determine the presence of abnormal or cancerous cells, the sample is taken by a cytology technician.

9- Immunology tests: Immunology & Serology

Example of insulin antibodies: They are taken from the blood serum, and they are either present or not, and their presence means the presence of type 1 diabetes, and determining their percentage helps in treatment (163) .

We conclude from the above that laboratory results are subject to errors, and that the measured results always differ from the real results. If a certain result is re-measured using the same working method, we will notice that there is a difference no matter what.

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(161) Dr. Hamad Suleiman Al-Zyoud: Civil Liability for Contaminated Blood Transfusion, Dar Al-Nahda Al-Arabiya, Cairo, 2009, p. 268.

(162) Sarah Danon: The Civil Liability of the Doctor, Master's Thesis, Faculty of Law and Political Science, University of Qasid Merbah, Algeria, 2013, p. 55.

(163) Laboratory Tests Guide: Princess Iman Bint Abdullah II Center for Research and Laboratory Sciences, second edition, 2011, pp. 21 et seq.

It was small among these results, and therefore repeating measurements for the same measured values is a must in order to obtain accurate results.

The sources of errors in chemical analyzes can be identified through two basic types: “determinate errors” and “indeterminate errors.” These are often called random errors. Non-specific errors are defined as those errors that cannot be identified and defined, and do not have a measured value. Specific errors contain: Personal errors such as negligence or inability to distinguish colors, as well as mechanical errors and errors resulting from the chosen analysis method " (164) .

Second: Clinical examinations: Physical examination

These are the examinations that the doctor conducts for the patient by looking at the patient and noting his general condition, good or poor, and the pathological signs, such as: skin color, weight estimation, and behavior, using his senses and the power of observation. He may also use simple equipment such as a stethoscope and a blood pressure measuring device, and then Conducting a physical examination by feeling the patient’s body, such as: feeling the pulse, moving the limbs, etc (165) .

Supplementary examinations are conducted for the patient according to the type of disease or surgery that will be performed on him. For example, if the surgery is to remove a tumor, a pathological analysis of a sample of the tumor must be performed before and after surgery, and various types of plain or color x-rays must be performed, or an endoscopy must be performed. To examine the internal body systems, such as the digestive system, for example, and the urinary tract, each doctor performs the complementary examinations he needs. While conducting examinations, the doctor must take into account the rules and principles of the profession, and avoid haste and negligence.

The doctor’s negligence in conducting these examinations may raise his liability, because an error in biological and clinical examinations is considered a medical error, as conducting preliminary medical examinations for the patient is necessary before performing surgery or implementing treatment, and the negligence of the surgeon or physician in conducting such necessary biological and clinical examinations for the patient constitutes An error on the part of the doctor is made by his responsibility (166) .

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(164) Muhammad Magdy Abdullah Wasel: Foundations of Analytical Chemistry, Part Two, Dar Al-Fajr for Publishing and Distribution, Egypt, without a year, p. 35 et seq.

(165) English، Arabic Dictionary، LDLP- Libraire Du Liban publishers
Last viewed on 12/27/2016, available on:

https://ar.wikipedia.org/wiki/فحص

(166) See: Dr. Alaa al-Din Khamis, previous reference, p. 158.

The Court of Appeal When the operation was performed, the patient had an intestinal obstruction that led to her death. When this ruling was appealed in cassation, the court rejected the appeal and upheld the ruling (167).

Third: Radiology tests

Radiology is one of the important scientific discoveries that plays a prominent role in diagnosing and discovering diseases. Despite its effectiveness, its use may lead to some damage due to the incorrect method of using it, or due to the patient's condition and physical conditions. If the patient develops an ulcer as a result of the doctor's negligence in taking the necessary precautions to avoid this danger or exceeding the time required to take the image, he will be responsible (168) .

The prevailing tendency is to assume the doctor's error as soon as damage occurs as a result of the use of x-rays. This is in view of the great technical progress that science has brought about in this field by improving x-ray devices (169) , ensuring their efficiency and providing them with the necessary capabilities to prevent harm to the human body (170).

After conducting the previous examinations and analyses, the doctor's efforts begin to diagnose the disease to find out the appropriate treatment for his condition. This stage is considered one of the most important and dangerous of the various stages of treatment, as the doctor tries to identify the nature of the disease, its degree of seriousness, its history and development, and to know the patient's general health condition, and any medical history, if any. And genetic factors, if they exist as well. Then he decides, based on what he has gathered of all of this, the type of disease that the patient suffers from and the stage he has reached. In this matter, the doctor should not be hasty or negligent, and should try to apply his knowledge and the rules of his art according to what science has reached. And medical art (171) .

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(167) Dr. Alaa El-Din Khamis: previous reference, p. 159.

(168) See: Dr. Muhammad Hussein Mansour, Medical Responsibility: Doctor, Surgeon, Dentist, Pharmacist, Nursing, Clinics and Hospitals, Medical Equipment, New University House, Alexandria, 2011, p. 58.

(169) An example of this is: For more, please see the following link:

https://ar.winipedia.org/wiki/

(170) Savatier, Op. Cit., p.47.
See also: Dr. Muhammad Hussein Mansour, previous reference, p. 59.

(171) Dr. Muhammad Faiq Al-Jawhari: p. 394 et seq. Referenced to: Dr. Sharif Al-Tabbakh, previous reference, p. 37.

The doctor should also not be embarrassed to consult other specialists if he cannot be certain of the nature of this disease, or if he is confused about something. He is also committed to resorting to all scientific methods, such as analyses, examinations, and modern devices whenever that is necessary to verify the condition and the correctness of his assessment. If he neglects, then he does so. He will be responsible for all damages resulting from his error in diagnosis.

The doctor's responsibility for an error in diagnosis arises if the error constitutes clear ignorance of the basic principles agreed upon in the principles of the medical profession, or if the error involves clear negligence on the part of the doctor that is inconsistent with what has been practiced in such cases. The doctor is also liable for the error in diagnosis. If he uses outdated means and methods that are no longer recognized, or if he does not consult his colleagues who are more specialized, experienced and knowledgeable, the same applies if he insists on his opinion despite his discovering through the opinions of his colleagues the nature of his error in diagnosis.

The court convicted the doctor who traveled after performing the operation and left the patient in the care of colleagues who found out that the diagnosis was wrong. Upon his return, he did not share the opinion of the colleagues. It should be noted that diagnosis is a purely technical issue that the judge cannot decide on without consulting experts.

Some also believe that a mistake in diagnosis does not necessarily constitute a medical error, unless it is made out of gross ignorance, or negligence in the examination, such as if it is done in a superficial, quick, and incomplete manner (172).

However, a misdiagnosis results in a medical error. Its natural consequence is the prescription of inappropriate treatment, the possibility of exacerbation of the disease, and the possibility of exposing the patient to the loss of his life (173) .

In application of this, the French Court of Cassation ruled on 12/14/1965 that the Court of Appeal, after carefully reviewing the experts' opinions and stating that the doctor's errors may be proven once and for all, concluded from the documents submitted to it that there was enough evidence to say that the child's disability was As a result of the error attributed to the doctor, the facts of this case can be summarized as follows: "A doctor treated a child for a fracture he sustained as a result of a fall, and the doctor made a mistake in the diagnosis, and thus in the treatment. This matter became clear after the sick child was presented to several other doctors, and when a lawsuit was heard." The liability that was brought against the doctor, the court of first instance referred the matter to an expert, and the court concluded, after reviewing the expert's report, that the doctor had committed an error in diagnosis that led to an error in the treatment to be followed " (174).

See also: D. Muhammad Hussein Mansour: previous reference, p. 48, Dr. Alaa al-Din Khamis, previous reference, p. 162.

(172) Dr. Sharif Al-Tabbakh: previous reference, pp. 38, 39, Dr. Muhammad Hussein Mansour, Medical Liability, previous reference, pp. 48 et seq.

(173) Dr. Al-Sayyid Muhammad Al-Sayyid Imran: The physician's commitment to respect scientific data, Faculty of Law, Alexandria University, 1992, p. 40.

(174) Dr. Hamdi Abdel Rahman: previous reference, p. 40.

But the French judiciary did not settle on this situation, so it held that a mere error in diagnosis does not raise the doctor's responsibility. Medical error in the field of diagnosis is not every breach of the doctor's obligation to make a correct diagnosis, whether minor or serious. The error in diagnosis that raises the doctor's responsibility is only the apparent error. The obvious (175).

In application of this, the courts in France ruled that: "A mistake in diagnosing a disease is not considered an error that necessitates the doctor's responsibility, except that the matter is different if the mistake was inexcusable " (176), and the Lyon court also ruled that: "A mistake in diagnosis is not in itself considered a punishable criminal error " (177).

Finally, the Rouen Court concluded: "What is meant by forgivable scientific error in a case, in which the dispute was related to a doctor who confused pregnancy with fibroid tumor, on April 21, 1923, and the facts of this case are summarized in that a woman complained to a doctor about pain in her abdomen, so he examined her and decided She suffers from a fibroid that must be removed immediately.

While the operation was being performed, he appeared to be removing the fibroid tumor, which he claimed was a mistake in the diagnosis, and that the woman was pregnant and did not have a tumor, so he immediately proceeded to cut open her abdomen and extract her fetus alive. But on the evening of the same day, the woman suffered from bloody bleeding, accompanied by complications that claimed her life. The court decided that the error in diagnosis was what led to a surgical operation that killed the woman, and this does not in itself necessitate the responsibility of the doctor or surgeon, because it is certain that it is due to the difficulty of diagnosis and the inability to reach the truth " (178).

The truth is that what the French judiciary has decided in this regard cannot be said at the present time, given the development of medical art and the emergence of modern and advanced devices that have a great impact in detecting diseases and diagnosing them correctly. Therefore, the doctor must be held responsible if he makes a mistake in the diagnosis. An example of this in our case is the recent decision of the Rouen Court, as the doctor could have easily diagnosed the patient's condition.

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(175) Dr. Alaa El-Din Khamis: previous reference, p. 165.

(176) Paris, 19 mars 1971: J.C.P. 1975. 18046.
(177) Lyon، 1 Dec 1981: D. 1982. I. p. 276.
See also: Dr. Suhail Sweis, previous reference, p. 115.

(178) Dr. Alaa El-Din Khamis: previous reference, p. 165.

He is pleased to use the Ultra Sound imaging device (179) , He discovers that the patient is pregnant and does not have fibroid tumor as he thought.

One of the applications of the English judiciary is that: If an error in diagnosis occurs in good faith during treatment, the doctor's responsibility does not arise, and the doctor's error in diagnosis is presumed to be negligence, and to negate this presumption, the dispute must be referred to an expert to determine whether there was negligence on the part of the doctor or not. For the doctor to be freed from responsibility, certain conditions approved by the Anglo-Saxon judiciary must be met. These conditions are:

1 -The doctor must possess a degree of skill and knowledge that is usually possessed by other doctors practicing the same specialty.

2 -The doctor must exert his effort and care in the diagnosis process.

3- The doctor must carry out and carry out care and treatment in accordance with the honest belief that what he did was correct in the circumstances known to him at the time (180) .

Bad information is also one of the most important reasons that lead to error in diagnosis. For example, X-rays are not taken in the appropriate manner, and doctors have learned not to accept bad information, and yet some of them do so sometimes. For example, in the coronary angiography process that used Anyone who looks at it should be sure whether the patient actually suffers from coronary artery disease or not, and doctors should not accept this type of "bad information," because it can lead to a huge difference, and thus make an error in the diagnosis process.

We conclude from the above that diagnosis is a thorny and complex task. Points of view differ between doctors, despite the availability of modern devices and equipment that help in accurate diagnosis, as the doctor finds himself...

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(179) (Ultra Sound): It is an ultrasound imaging device. This device is used to obtain an image of the child before its birth, and to determine how the pregnancy is progressing. This device is also used to diagnose some types of birth defects, such as spinal cord anomalies, and this device works By directing very high-pitched sound waves towards the tissues in the abdomen, for example, then these waves are bounced and visually translated into a drawing of illuminated areas, and these waves create an image on the screen.

See the following link: entitled: (Ultrasound imaging in pregnancy):

https://www.medlineplus.gov/ultrasound.html

(180) by Grad Wohl: Forensic Medicine, p. 422.

See: Dr. Asaad Obaid Al-Jumaili, previous reference, p. 256.

There is a thorny situation if the symptoms of the disease are not clear in a way that is difficult to diagnose, especially since the symptoms of the disease are sometimes unclear, and the symptoms of the disease do not appear in reality as a literal expression of what is found in scientific books, and diseases are very similar to two or more diseases in At the same time, for example: (the symptoms experienced by a patient who suffers from irritable bowel syndrome, and the symptoms experienced by a patient with heart disease and angina pectoris).

However, the doctor will be held accountable if evidence is established that the error he committed could have been avoided if he had resorted to another method of examination that does not carry any harm or danger to the patient. Likewise, the doctor is exposed to responsibility if he ignores the basic principles that the science of the causes of diseases requires of him (181) .

Error in treatment

The treatment stage constitutes the middle stage of the recovery stages, and since this stage is so important, it must receive a lot of care and attention, as it is the effective place and practical application of what the diagnosis has established. Since human nature differs from one body to another in terms of its ability to heal and its speed, the difference between young and old, weak and strong, and in the extent of resistance and endurance, it was necessary for the doctor to take into account the patient's structure, health condition, and degree of endurance and resistance.

This is what the French courts said in their decision issued by the Court of Saint-Cant in, when they said: "The doctor is considered at fault if he orders a treatment that does not take into account the patient's structure, age, strength of resistance, and degree of tolerance to the toxic substances that are presented to him " (182).

This stage begins after diagnosing the disease. The doctor prescribes the medicine and determines the appropriate method for taking it. He is not committed to a specific result, such as the patient's recovery. Rather, all he has to do is exercise due diligence in choosing the appropriate medicine for the patient. To do so, he may consult specialists if he finds himself facing a condition that is beyond his scientific level (183) .

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(181) Dr. Hassan Ali Al-Dhanoun: Considerations on Medical Liability, paragraph 66, p. 40.

Referred to by: Dr. Asaad Obaid Al-Jumaili, previous reference, p. 135.

(182) M. Bassam Mohtaseb Billah: Civil and Criminal Medical Liability between Theory and Practice, Dar Al-Iman, first edition, 1984, pp. 150-152. See also: Dr. Jihad Muhammad Al-Jarrah, Civil Liability of the Medical Team in accordance with the Provisions of Jordanian Medical Legislation, Amman University for Postgraduate Studies, 2006, p. 100.

(183) Dr. Sharif Ahmed Al-Tabbakh: Previous reference, p. 47.

A part of jurisprudence defines treatment as: “the means chosen by the doctor, which leads to recovery from the disease, reducing its dangers, or alleviating the pain resulting from it, whether by alleviating it or eliminating it ” (184) .

It is clear from this definition that the purpose and goal of treatment is to achieve recovery or reduce and alleviate the patient’s pain. Some people criticize this definition because it should have included the quality of the person performing the treatment, the presence of the patient’s satisfaction, and that the treatment should be in accordance with recognized medical principles (185).

t is the doctor's duty to balance the risks of the disease with the risks of treatment. If the disease is mild and there is no danger from it, it is better to use harmless medications. However, if the patient's condition is severe and in its advanced stages, the doctor has the right to use any method to save him, regardless of the risk of treatment. The need to consult other specialists, as we mentioned previously.

The doctor must be careful and vigilant when prescribing and writing the medicine, so that this medicine does not affect other diseases or interfere with them, and thus cause harm that may be more serious than the disease to be treated. It is not permissible to give cortisone derivatives or the substance fesetyl biotazone to a joint patient if he suffers from arthritis. With a stomach ulcer or high blood pressure, the doctor must alert the patient to any side effects or any risks of the drug to be taken, and to monitor the patient during the period of taking the drug (186).

We conclude from the above that when choosing treatment, the following matters should be taken into account: “The goal of treatment is to preserve and restore health as much as possible, and the doctor should not aim in his work simply to remove the symptoms of the disease without considering the consequences, and if the disease cannot be treated, the doctor will refrain from treatment, and finally, treatment must be done in the manner The easiest and the easiest, so one should not move from using the usual simple treatment to the complex treatment unless the effect of the first is lost (187) .

After verifying that a medical error occurred, as previously explained, whether it was an error in diagnosis or an error in treatment, an important matter must be clarified in order for the doctor to be held contractually liable for the actions of his assistants. This matter depends on the type of obligation that each contracting party has with the patient, and we exclude the treating physician’s responsibility in His private clinic

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(184) Dr. Osama Abdullah Qayed: Criminal liability of doctors, previous reference, F (36), p. 86.

(185) Dr. Asaad Obaid Al-Jumaili: previous reference, p. 293.

(186) Al-Hakim Raji Abbas Al-Tikriti: Professional Behavior of Doctors, Dar Al-Tarbiyah for Printing and Publishing, Baghdad, third edition, 1987, p. 225, Dr. Suhail Suwais, previous reference, p. 116.

(187) Dr. Ahmed Al-Saeed: Scientific progress and diligence in the medical field, Journal of Law and Economics, Year 55, 1985, p. 8.

this case. This responsibility arises in the private hospital, where this obligation is determined according to who is the party that chose the hospital to receive treatment there and contracted with it. If the doctor is the one who chose the (private) hospital for treatment, then the latter is the guarantor of all work related to the treatment from its beginning to its end, including The actions carried out by his assistants or substitutes, and therefore the doctor's responsibility for the actions of others is fulfilled here. However, if the patient is the one who chose the private hospital for treatment, the treating physician's responsibility is only for his personal error that he committed during the therapeutic intervention, and the responsibility for the actions of the assistants in this case falls on the hospital, and this is what is imposed by the general rules of contractual liability. About the actions of others.

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