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 this profession embodies an artistic nature 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 (1). 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 (2) , 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 (3) The reason for responsibility is now that a small mistake also becomes a reason for responsibility.

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

(2) 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.

(3) 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.

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 (4) .

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 ” (5).

Most Arab legislation also stipulates different texts, such as, for example, Article (256) of the Jordanian Civil Code, which states: “Every harm to another obligates its perpetrator, even if he is not discerning, to guarantee the harm ” (6) .

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 UAE legislation. Article (14/1) of Federal Law No. (10) of 2008 regarding medical liability stipulates that: “A medical error is an error that is due to ignorance of technical matters that are presumed to be All Whoever practices the profession is familiar with it, or who is due to negligence or failure to exercise due diligence ” (7).

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

(5) See the text of the article at:

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

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

(7) Article 14/1 of UAE Federal Law No. 10 of 2008.
See the law at the following website:
www.qistas.com

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 " (8) , 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 " (9) .

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 allow for an undisputed technical discussion. If there are scientific issues that are subject to controversy, discussion and disagreement, and the doctor decided to follow a theory that the scientists said, and the opinion regarding it is not 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 (10) .

The Mixed Court of Appeal also ruled on: February 15, 1911 that: “The judge is not permitted to interfere in the evaluation of scientific theories and methods, and his mission is limited to revealing whether the doctor has been negligent or ignorant of the rules that doctors unanimously affirm " (11) .

Another example is what the Egyptian Court of Cassation cited in its criminal capacity in the ruling issued on 4/23/1931

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(8) 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.

(9) 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.

(10) 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.

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

“A doctor was performing an operation on the victim, and the aforementioned person moved and hit him with his fist twice, and with his palm on the head once, and it was proven from the forensic doctor’s report that the victim had advanced aortic anorexia that might explode on his own as a result of an increase in blood pressure, whatever its cause in the first part.” The patient, or because of external violence inflicted on the body, and since the doctor had beaten the victim during the anorism interview, what can be concluded is that the aforementioned anorism had actually been exposed to external violence and exploded and death occurred " (12) .

As a result of the lack of legislation mentioned above, the judiciary resorted to applying general rules that require that the doctor be held accountable, like other people, for every mistake he commits, because he did not want anything to indicate that doctors or others were excluded from the provisions contained in these texts (13).

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. These are established and undisputed rules (14) , 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) (15) . 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 goes to extremes in following them ...

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

(13) 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.

(14) 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.

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

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

He was responsible for his mistake and lack of progress in performing his work " (16) . 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 ” (17).

Third: Medical error in jurisprudence (18):

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 " (19). 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 (20) . 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 ” (21).

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

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

(18) 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.

(19) 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.

(20) 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.

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

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 " (22) .

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 ” (23).

The industry went on to define a medical error as: “which is defined as a 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 is 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 ” (24).

n 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 ” (25) .

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 at fault if he was unaware of it, or failed to carry it out. The doctor or medical care provider - whoever he is - must 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, or Dental prosthetics, or laboratory and radiological tests), here it is necessary 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.

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(22) 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.

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

(24) 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". =

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https://med.fsu.edu/uploads/files/presentation.pdf

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

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 (26).

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 (27) .

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 (28).

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.

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 (29).

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

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

(28) Dr. Hassan Abu Al-Naja: previous reference, p. 127.

(29) 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.

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 (30) , 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 (31).

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. This means that he will make every possible effort to provide due care from conscience, vigilance and diligence, but he cannot guarantee the results." certain, due to medical suspicions " (32) .

The Belgian Liege Court of Appeal followed this approach, ruling that: "The patient who is sent to a therapeutic 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 " (33) .

n 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." He provided his colleagues with knowledge and knowledge of the circumstances surrounding him, 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 " (34) .

If the doctor seeks the assistance of another doctor or a nurse from the medical staff to implement his contractual obligation, the assistant physician 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

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(30) 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, doctoral dissertation, 1999, pp. 281 et seq.

(31) 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.

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

(33) Marie Benedict Couillet, Exeruies driot des obligations, studyrama، 2006، no 103.

See also: Moaz Yacoub, previous reference, pp. 113, 114.

(34) 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.

Exercising care, provided that if the doctor seeks the assistance of another colleague, the latter is obligated to undertake to exercise 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 he is responsible. The doctor whose mistake caused the death of the patient, because he relied in the surgical procedure on the diagnosis issued by another colleague without doing so on his part (35) . 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 (36) . 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 free 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 (37) . 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 case where 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, the obligation here is an obligation to exercise care (38) .

Finally, we note from the above that the debtor (the contracting doctor) is considered to be in breach of the contract, according to the aforementioned meaning, whether he took it upon himself to implement the contract himself, or in this regard he sought the assistance of other people (substitutes and assistants) in this regard. In this case, non-performance is also considered attributable to the debtor (39).

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(35) 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.

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

(37) 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.

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

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