

## The legal basis for authorization in medical work

### "A comparative study"

It is established in jurisprudence and jurisprudence that the medical contract is considered a consensual contract that does not have to be concluded in a specific form, but rather mere mutual consent is sufficient for its conclusion (1).

Likewise, the contract is often based on personal consideration, in what the patient relies on in terms of the doctor's personal qualifications, his professional reputation, and his medical and scientific competence, so the doctor is trusted by the patient (the contracting party), and thus the doctor (contracted with him) is the executor of the medical treatment contract (2).

The peculiarity of this contract from other contracts lies in that its subject is the human body, and because this body is inviolable and infallible, it is not permissible to touch it except for the necessity or need of treatment, because the right to life and the right to physical integrity are among the rights in which the right to God Almighty and the right are combined. The slave, in addition to this, the relationship that arises between the doctor and the patient is an unequal relationship; The doctor is a professional with a high degree of knowledge and specialization, while the patient is a person who is ignorant of what is related to the disease or the art of treatment. What increases the inequality is that one of the parties to the contract - the patient - suffers from a physical, psychological or mental illness, so he resorts to the doctor in search of treatment (3).

The medical contract is a continuous contract based on the element of time, which is considered an essential element in its implementation, because healing is not often achieved from the first visit to the doctor, but rather requires a long period of time to achieve the desired goal. The doctor must follow all stages of treatment carefully, and not

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(1) See in this sense: D. Elie Dagher: Contracts in Civil Law, Lebanese University Publications, 2009, p. 12.

(2) Rene Savatier, Jean – Marie Auby, Jean savatier, Op. Cit., p262.

See also: Bakhshan Bashir Saeed, Criminal Liability for Medical Errors When Performing Surgical Operations in Iraqi and Comparative Law, Master's Thesis, Mansoura University, Faculty of Law, 2013-2014, p. 148.

(3) Dr. Hisham Al-Khatib and others: The Muslim and Professional Ethics, University of Jordan Library, 1989, p. 35.

Referred to: Dar Al-Hekma for Studies and Research, The Nature of the Medical Contract, January 2014.

<https://www.daralhivima13.blogspot.com./abutus>.

Stops any stage of it unless necessary (4) , It is not permissible for him to abandon his patient by suddenly stopping treatment as long as the latter is in need of his efforts, except in the event of an emergency circumstance, and under certain conditions, otherwise he will be considered to be in breach of the treatment contract (5) .

We note from the above that the aforementioned characteristics of the medical contract are consistent with the norms and ethics of the medical profession. The patient is given the full right to choose his treating doctor, and he also has the right to change the doctor and go to another, and this right is guaranteed to the doctor by refusing to contract with the patient, and this is due in its entirety to the principle of freedom of contract. However, if the doctor accepts to treat the patient, he becomes obligated to commit to the treatment, and he may not be released from this obligation except in the event that the patient's continuation of treatment is guaranteed by another party (6).

The purpose of the above is that the basic idea on which the medical contract between the doctor and the patient is based is based on the agreement of two wills to create one or more obligations (7).

Within the framework of this idea, there is nothing in this contract that prevents the doctor from delegating some of his powers. There is nothing that imposes on the doctor himself to perform everything necessary to treat the patient, as long as his assistant is qualified, and the use of a foreign assistant for the contract does not contradict the character of the implementation of the medical obligation. As long as the treating physician maintains the authority to issue instructions and exercise supervision and control.

We will discuss the division of the legal basis for delegating medical work into two matters: the legal basis for delegating medical work through legislation, and the legal basis for delegating medical work through judicial rulings.

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(4 ) Abdul Karim Ashous: The Medical Contract, Dar Houma, Algeria, 2007, p. 23.

(5 ) Dr. Sherif Al-Tabbakh: Medical Error Crimes and Compensation for them in the Light of Jurisprudence and Judiciary, Dar Al-Fikr Al-Jami'a, Alexandria, 2003, p. 42.

(6 ) Dr. Elie Dagher: Contracts in Civil Law, previous reference, p. 12.

(7 ) Dr. Muhammad Al-Saeed Rushdi: The Medical Treatment Contract, an analytical and original study of the nature of the relationship between the doctor and the patient, Dar Al-Fikr Al-Jami'i, Alexandria, 2015, p. 71.

## The legal basis of medical authorization in comparative legislation

We will examine this topic through legislation in the study countries (first) in which there is no direct text on the permissibility of delegation in medical work, and then we will learn about Western legislation that has permitted delegation and explicitly stipulated it (second).

First: Legislation that did not explicitly address delegation:

There is no explicit text in either the French law or the Arab laws derived from it, such as the Egyptian, Jordanian, and others, as we note the existence of some legislation and laws specific to the health profession, from which it is implicitly deduced to authorize authorization in an indirect way without explicitly stipulating that by specifying the work that is within its jurisdiction. It includes doctors, which can be performed by non-doctors. The category of doctors and non-doctors and the conditions for practicing medical work have been specified in many texts, and we will discuss some of these legislations through the texts by referring to their source.

Egyptian legislation:

Article 1, in clauses A, B, and D of Law No. 51 of 1981, as amended by Law No. 53 of 2004 regulating medical facilities in the Arab Republic of Egypt, stipulates the following:

Article (1/a) Private clinic: "It is every facility owned or rented and managed by a doctor or dentist. He may be assisted by one or more doctors licensed to practice the profession with the same license".

Paragraph (b) of the same article also stipulates: "The specialized clinic. The joint clinic employs more than one doctor from different specialties who are united by a common management, one of whom is the technical director responsible for the clinic".

As for paragraph (d), which talks about the specialized medical center, it states: "A private hospital is any facility prepared to receive and examine patients."

and their treatment, provided that this is under the supervision and management of a doctor licensed to practice the profession” (8) , Supervision and management by a licensed physician. This can only be achieved by directing orders to these assistants, and this is done by delegating them to specific tasks, and this is done in several ways, as we will present later when talking about the forms of delegation”.

Article (11) of Resolution issued by Law No. (14) of 2014 regulating the affairs of members of the medical profession working in entities affiliated with the Ministry of Health and Population who are not subject to special laws or regulations stipulates the following: “An emergency incentive will be paid to consultant doctors, specialists, and their assistants.” (9) .

Jordanian legislation:

Article (12) of the Jordanian Public Health Law No. (21) of 1971 stipulates: “It is a duty for every physician or licensed physician to supervise or participate in the treatment of any person suffering from a disease.”( 10), Some articles of Law No. (47) of 2008 - such as Article (19, paragraph C) - also stipulate the following: “The director or authorized doctor has the right to take samples.” Likewise, Article (20, paragraph A): “Every doctor who supervises or Participate in the treatment of any injured person.” Article (27) also states: “The plaintiff or the authorized government physician may take all necessary medical measures for the patient.”(11) .

It is clear from these texts that medical work (therapeutic and preventive) can be practiced by delegating it to other assistants or substitutes on the condition of monitoring and supervision, as due to the expansion of the scope of medical work in cases of epidemics and diseases on the one hand, and the absence of doctors and their travel to see their patients on the other hand, Many doctors have begun to seek the help of their assistants or substitutes to carry out some tasks, and on this basis the principle of

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(8 ) Law No. (51) of 1981, issued by a decision of the People’s Assembly, regarding the organization of medical facilities.

(9 ) Decision of the President of the Arab Republic of Egypt by Law No. 137 of 2014, amending some provisions of Decision by Law No. 14 of 2014 regulating the affairs of members of the medical professions working in entities affiliated with the Ministry of Health and Population who are not subject to special laws or regulations, published in the Official Gazette No. 45 bis C, date November 12, 2014.

(10 ) Jordanian Public Health Law No. (21) of 1971, Article 12, paragraphs 3 and 4. See the link:

[Http://www.moj.gov.jo](http://www.moj.gov.jo)

( 11) Jordanian Public Health Law, previous reference, No. (47) of 2008.

Doctors may delegate authorization to their assistants and substitutes to complete the required medical work.

Second: Legislation permitting the delegation of medical work (America and Canada):(

1 -American legislation:AuthorityofPhysiciantoDelegateCertainMedicalActs

An explicit text was mentioned in Article (157) of the Controlled Health Professions Law of the American State of Texas in 2005, talking about the doctor's authority to delegate certain medical tasks, and the first paragraph of this article came as follows:

a) "A physician may delegate any medical work to a properly qualified and trained person working under the doctor's supervision who a reasonable physician finds to be within sound medical judgment, and may be delegated if the work is, in the opinion of the delegating physician, capable of being done correctly and safely by the person to whom the medical work has been delegated." It is carried out in its usual manner, and does not violate any other law, and if the person to whom the work is delegated does not certify to the public that he has been authorized to practice medicine, in the event that the delegate is not a doctor.

b) The authorized physician remains responsible for the medical actions of the person performing the delegated medical procedures (12) .

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(12) § 157.001 GENERAL AUTHORITY OF PHYSICIAN TO DELEGATE CERTAIN MEDICAL ACTS.

a) A physician may delegate to qualified and properly trained person acting under the physician's supervision any medical act that a reasonable and prudent physician would find within the scope of sound medical judgment to delegate if, in the opinion of the delegating physician:

(1) The act:

(A) Can be properly and safely performed by the person to whom the medical act is delegated;

(B) Is performed in its customary manner; and

(C) Is not in violation of any other statute; and

(2) The person to whom the delegation is made does not represent to the public that the person is authorized to practice medicine.

(B) The delegating physician remains responsible for the medical acts of the person performing the delegated medical acts.

Reference: 2005 Texas occupations code chapter 157. Authority of physician to delegate certain medical acts. In:

<http://law.justia.com/codes/texas/2005/oc/003.00.000157.00.html>

Paragraph (5) of the same article also stipulates that: "A person authorized by a doctor to perform medical work is not permitted to practice medicine without a license to perform medical work."(13).

It is clear from this article that the American legislator has authorized the delegation of medical work, as it allows the doctor to delegate any qualified, properly trained and licensed person to do so from the competent authorities working under his supervision to carry out specific tasks, including, for example: providing drugs and giving treatment through the doctor's orders. Or a permanent authorization order from him, provided that this does not conflict with any other laws, and the authorizing physician remains responsible for the medical tasks he has delegated towards his patients.

2- Canadian legislation:

Define the term "controlled work" (14) in the Controlled Health Professions Law (R H P).

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Acts 1999, 76th leg. ch.388. §1, eff. sep. 1. 1999.

<sup>(13)</sup> §157.005, PERFORMANCE OF DELEGATED ACT NOT PRACTICING WITHOUT Medical License: "A person to whom a physician delegates the performance of a medical act is not considered to be practicing medicine without a license by performing the medical act".

Reference in:

Acts 1999, 76th leg; ch.388. §1, eff. sep. 1. 1999

<sup>(14)</sup> controlled Acts under the RHPA:

Works subject to regulation under the Regulated Health Professions Act (RHPA). We mention these works briefly, and they are as follows:

- 1 .Inform the individual or his personal representative of the diagnosis that defines the disease as the disorder as the cause of the individual's symptoms.
- 2 .Perform the procedure on subdermis or submucosal tissue.
- 3 .Treatment or repair of a broken bone or dislocated joint.
- 4 .Moving the spinal joints outside the individual's usual physiological range.
- 5 .Administering the medicinal substance by injection or inhalation.
- 6 .Placing an instrument, hand, or finger beyond the external ear canal, beyond the larynx, beyond the opening of the urethra, beyond the opening of the vulva.
- 7 .Applying or regulating the application of a form of energy determined by the executive regulations in the Health Professions Law.
- 8 .Prescribing, dispensing, selling or refining medicines as specified in the Pharmacy and Medicine Law.
- 9 .Prescribing or dispensing medications for vision or eye problems, and prescribing or dispensing vision devices, lenses, or other medical glasses.
- 10 .Describe a hearing aid for a hearing-impaired person.
- 11 .Preparing or dispensing with a dental prosthesis or braces.
- 12 .Managing the business or conducting the delivery of children.
- 13 .Conduct an allergy test.
- 14 .Treatment through psychotherapeutic techniques, administered through the therapeutic relationship, seriously disturbed thought and perception or disturbed mood and emotional regulation.

In detail, see this:

Year 1991 (15): "As tasks that can only be performed by licensed regular health professionals, and among the fourteen tasks subject to supervision, doctors are authorized to perform thirteen of them, and they can, in appropriate circumstances, delegate the performance of those tasks to other individuals, who may or may not be Members of regulated health professions. Authorization under this law is a mechanism that allows a doctor authorized to perform regulated work to grant that authorization to another person - whether regular or irregular - who is not independently authorized to perform that work. Delegation can take place either through orders Direct or medical directives, in most cases these are used to facilitate the effective delivery of patient care".

From the above, we note that there was an explicit text in the Canadian Regulated Medical Professions Act No. (18) of 1991. Its articles recognized the existence of (14) fourteen tasks performed by doctors, including permission to delegate some of the work of doctors in appropriate circumstances.

We also note that this delegation is not limited to other doctors, as it may be carried out by doctors other than licensed regular doctors. Persons from the professional medical staff or others may be authorized in accordance with the text of this article.

Finally, this law clarifies the form that delegation may take, indicating that delegation is carried out by direct orders or medical directives, all with the aim of providing appropriate medical care to the patient in an easy and effective manner.

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(15) Regulated Health Professions Act: "Controlled acts are specified in the regulated health professions act, 1991 (RHPA) as acts which may only be performed by authorized regulated health professionals. Of the (14) controlled acts, physicians are authorized to perform (13) and may, in appropriate circumstances, delegate the performance of those acts to other individuals who may or may not be members of a regulated health profession.

B) Delegation: Delegation is a mechanism that allows a physician who is authorized to perform a controlled act to confer that authority to another person (whether regulated or unregulated) who is not independently authorized to perform the act .... Delegation can take place through either a direct order or a medical directive.in most cases, these are used to facilitate the efficient delivery of health care to patients.

COLLEG OF PHYSICIANS AND Surgeons of Ontario Policy STATEMENT #5-12

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LEGISLATIVE REFERENCE: Regulated Health Professions Act.1991, S.O.1991, C.18, as amended.

## The legal basis for medical authorization in comparative justice

### First: The legal basis for medical authorization in French judiciary:

The French judiciary explicitly affirmed the permissibility of delegation in the medical field in a famous case, the facts of which are summed up in the fact that the night before a prostate surgery was performed on a 36-year-old person, the anesthesiologist participating in the operation entrusted an unqualified nurse working in the hospital to take a sample of... The patient's blood to verify his type, for the purpose of transfusing blood to him during the operation. The nurse drew two blood samples at the same time, one from the victim and the other from another patient. She made a gross negligence mistake in writing the name on each of the two vials, then sent them to the analysis laboratory, and it was determined The victim's blood type was considered to be type (A+), and indeed a quantity of blood of this type was transfused to him during the operation. Then, puzzling symptoms appeared on the patient after the operation, so the anesthetist performed a new blood analysis, and it became clear to him that it was type (O+), and that The complete incompatibility between the two blood types led to the patient's death despite the care that was taken to save him. The Toulouse Court of First Instance ruled on January 11, 1960, convicting both the anesthesiologist and his assistant on charges of manslaughter. Based on entrusting the blood drawing process to an unqualified nurse.

When the matter reached the Toulouse Court of Appeal, it ruled to acquit the anesthesiologist, which was supported by the Criminal Chamber of the French Court of Cassation in its decision issued on 5/16/1961 based on the idea of delegating jurisdiction in the medical field (16).

In a previous decision of the French Council of State dated 6/24/1925, medical work was defined as that work carried out by a doctor or surgeon, and work that a medical assistant cannot do except under the direct supervision of the doctor and under his responsibility, so that he can intervene immediately if any malfunction occurs. (17).

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(16) He referred to the rulings related to this incident in its various degrees. By Nawar Abdel Rahman Ben Chaaban: The criminal liability of doctors for murder and wrongful injury, a dissertation to obtain a state doctorate degree, Ben Aknoun Faculty of Law, Youssef Ben Khadda University, Algeria, 2007, p. 97.

(17 ) Dr. Ahmed Issa: The responsibility of government hospitals: a comparative study, Al-Halabi Legal Publications, Lebanon, 2008, p. 36.



It is clear from the previously mentioned judicial rulings that medical work is within the jurisdiction of doctors and surgeons, but it can be performed as an exception by a medical assistant, through authorization under the condition of supervision and control by the treating physician, with whom the patient has agreed and placed his trust. Thus, doctors no longer carry out their work. On their own, they often resort to medical assistants who take it upon themselves to carry out medical work, and it is a fortiori that such delegation to auxiliary and supportive medical personnel who are already specialized in medical work is permissible.

Although there is no precise definition of therapeutic works in a way that allows them to be distinguished from medical works - for the purposes of authorization - there are some works that do not raise a problem in their classification if they are medical, such as diagnosis, surgery, and prescribing treatment - which are not problematic in their medical nature - or therapeutic works or Medical such as injections, x-rays, occupational and physical therapy; The criterion for classifying work as medical, which raises the responsibility of the supervising physician, or as therapeutic work, which raises the responsibility of the hospital, remains an objective, material, not organic, personal standard (18) , The nature of the work completed is looked at, not the person who accomplished it, and this was confirmed by the French Council of State in accordance with the Rouzet decision issued on 6/26/1959 (19).

He decided that delegating specialties in the medical field does not cause the work performed by a medical assistant to lose the status of medical work and turn into therapeutic work, but rather it remains medical work regardless of the person who performs it (20) .

Second: The legal basis for medical authorization in the American judiciary:

The Supreme Court for the Middle District of Pennsylvania decided in the case of Megan Shinall and her husband, Robert, v. Dr. Stephen Thoms, that it stated in this decision: "Because the physician's duty to provide the patient with information sufficient to obtain informed consent is not delegable,

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(18 ) The organic standard is one of the standards used by administrative law, and is concerned with looking at the character or appearance of the person who took the action or carried out the activity.

(19 ) French jurisprudence referred to this decision, referred to in:

«Il n'ya pas lieu de s'attacher pour qualifier l'actemédical, à la qualité de celui qui a accompli l'acte, maisà la nature de celui-ci ». In:Nadia YOUNSI-HADDAD, op.cit, p19.

(20) Catherine DAGENAI, Laresponsabilitécontractuelle du fait d'autrui en droitmédical et hospitalier, *Revue themis*, Vol. 32, n.01 themis, 1998, p 50, sur: <http://www.themis.umontreal.ca>

We decide to overturn the ruling of the Supreme Court, which confirms the ruling issued in favor of the defendant, and reconsider a new trial.” (21).

The facts of this case can be summarized as follows: On November 26, 2007, appellant Schnall and Dr. Thomas met for an initial consultation for twenty minutes to discuss the removal of a recurrent, non-malignant tumor from the pituitary gland area of Mrs. Schnall’s brain. Years earlier, a surgeon had performed an operation on Mrs. Schnall to extract that tumor by accessing it. Through the nose, but he was unable to remove the entire tumor, so the remaining part of it remained and increased in size until it extended to the vital structures of the brain, which endangered Chanal’s eyesight and her carotid artery. If left untreated, the tumor would eventually threaten her life.

According to Dr. Thomas' subsequent testimony at trial, the meeting between him and the patient on November 26 entailed a discussion of Ms. Schnall's goals and expectations in life, and the risks of different approaches to surgery, including potential damage to the carotid artery near the optic nerve. Depending on what he remembers. Thomas, Mrs. Schnall said she wanted to stay alive for the sake of her child - then nine years old. Dr. Thomas understood that Ms. Schnall “wanted me to give her confidence, and tell her if I felt like I could remove all the tumor with reasonable risk.” He also stated that he and Mr. Schnall reviewed the alternatives, risks, and benefits of total resection versus partial resection. Although Dr. Thomas recalled many details, he testified that he advised Ms. Schnall that total surgical resection offered the highest chance of long-term survival.

Ms. Schnall then decided to undergo surgery, however the surgical approach had not yet been determined, and on December 19, 2007 Ms. Schnall had a telephone conversation with the physician's assistant, whether radiation would be necessary, as well as the date of surgery. He pointed out

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(21) Because a Physician’s duty to Provide Information to a patient sufficient to obtain her informed consent Is non Delegable,we reverse the Superior Court, s order affirming the Judgment entred Hn Favor of the Defendant, and we remand for anew trial"

Decision: (J- 106-2106) THE Supreme Court of Pennsylvania, no.31Mar 2016, DECIded, June 20,2017

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Case Law,Find law.com,pa-supreme court.

The medical record for this phone call indicates that Physician Assistant Thomas also answered Ms. Schnall's questions about surgery and its risks. On January 17, 2008, Ms. Schnall met with the Physician Assistant in the Neurosurgery Clinic at Gensger Medical Center. The Physician Assistant obtained a medical history, performed a physical examination, and provided With information regarding the surgery, and Mrs. Schnall signed the consent form.

During the trial, Ms. Schnall was unable to recall that she had been informed of the relative risks of surgery, and testified that if she had known the alternative approach to surgery - total resection versus partial resection as safer and less invasive alternatives...

On January 31, 2008, Mrs. Schnall underwent an open total resection of the tumor at Geinsger Medical Center. During the procedure, Dr. Thomas punctured Mrs. Schnall's carotid artery, which led to bleeding, stroke, traumatic brain injury, and partial blindness.

On December 17, 2009, Ms. Schnall and her husband filed suit in Montour County Common Pleas Court, alleging that Dr. Thomas did not obtain Ms. Schnall's prior consent for the procedure performed on January 31, 2008. According to Schnall's lawsuit, Dr. Thomas did not explain to Mrs. Schnall the risks of the surgery, He did not tell her about the less risky surgical alternative. On May 28, 2013, the Court of First Instance issued its ruling granting a partial judgment in favor of Gensger Medical Center.

The plaintiffs, Mrs. Schnall and her husband, were not satisfied with this ruling, so they filed an appeal against Dr. Stephen and the medical center. On March 31, 2016, the Supreme Court of the District of Pennsylvania issued its decision to overturn the ruling and reconsider a new trial.

We conclude from this decision that it is permissible to explicitly delegate medical work in the American judiciary, except that it excludes from this medical work if the doctor informs his patient, given the seriousness of these works, and therefore it is not permissible to delegate the patient's information by the doctor to his assistants.

**Author: Dr. Nasser Abu Rumman**

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