

The replacement sect

Substitutes are those whom the debtor replaces in implementing the obligation, and the burden of this implementation is placed on them alone (1) .

The word substitutes means: the plural of an alternative, and the substitute: the successor and replacement, and the substitute member: it is the one that takes the place of another (2) . The substitute in the legal sense (LesubstituitLeremplacant) is known as that independent person whom the debtor assigns to implement all or part of the obligation (3) .

The substitute is distinguished from the assistant in that he carries out the obligation imposed on the debtor alone, and takes his place in implementation. The substitute does not work under the debtor's management and control, but rather he works independently, and this is what the Zurich Court supported by saying: "The only difference between the assistant and the substitute lies in the reality of The total burden of implementation is transferred to the alternative, independent of the debtor, while the matter when inviting agents is limited to assisting them, and the debtor remains to have his own activity in implementing his obligation " (4) , as the Belgian Court of Cassation ruled that : " If the contractor replaces him with another person to implement his obligation If the latter commits a mistake in implementing the obligation, the contracting party himself will be held responsible for the damage that befell the creditor as a result of the substitute's mistake " (5) . Reality sometimes imposes on the doctor or surgeon with whom the patient has contracted to replace another doctor or surgeon in his place in carrying out his obligation to treat or perform surgery, especially if the nature of the medical contract is taken into account, as it is one of the contracts in which the doctor's personality is taken into consideration, based on Considerations of trust, this view leads to the statement that such a substitution is inconsistent, because it conflicts with the nature of the medical contract, which requires that the doctor undertake the treatment himself (6) .

Accordingly, every patient who has contracted with a doctor knows - intuitively - that the doctor he trusts may become ill during his treatment or may go to rest or travel, and the doctor may be forced - for one reason or another - to act on his behalf.

(1) Dr. Abbas Hassan Al-Sarraf: previous reference, p. 228. See also:

Yvaine. Buffelan- lanore, virginie- larribau Terneyere, Op cit. no 791.

(2) The comprehensive dictionary of meanings, and the intermediate dictionary, see:

www.almaany.com

(3) Dr. Hassan Ali Al-Dhanoun: Al-Mabsoot fi Sharh Al-Qanun Al-Civil, previous reference, p. 67.

(4) See: Dr. Abbas Al-Sarraf, previous reference, p. 228.

(5) caas. 27 ferrier 2003 pas, parick wery Droit des oblighations, theorie generale du contrat, ed, larcier, Belgique, 2010, no 181.

(6) Dr. Hassan Abu Al-Naja: previous reference, pp. 92, 93.

However, the patient, on the other hand, sees that these circumstances and others like them do not concern him. This is the case with the doctor who contracted with this patient, or the contracting doctor is responsible for implementing what the patient intended to obtain from him, and then if something happens to this contracting doctor that requires not if he frequents his clinic, he has the right to entrust a colleague to carry out what he himself has committed to doing. In this case, the treating doctor is the original doctor, and he remains responsible towards the patient, and the doctor who replaced him is the substitute doctor (7).

In addition, it is worth noting the necessity of distinguishing between referring the patient by the doctor to another doctor to complete the treatment or part of it, and seeking advice from another doctor. "Questions about responsibility for professional advice, expert opinions, and information play an increasingly important role in a world that has become more complex and difficult, and which is also characterized by the specialization of professions, compared to general professional responsibility. Responsibility for professional advice, expert opinions, and so on is characterized by a certain advantage, which is: that Usually, this process does not include the infliction of direct physical damage. For example, in the case of a doctor being held responsible for a wrong operation or in the case of incorrect performance in restoration work, etc., which results in damage, it includes damage that may arise only as a result of following the contracting party or the third party. This is stipulated in many Western legislations, including German and Austrian law, Paragraph 676 of the BGB of the German Civil Code and Paragraph 1300 of the ABGB of the Austrian Civil Code, which stipulate that providing advice or a recommendation does not establish liability for the resulting damages unless there is a contract or liability. Negligence " (8).

(7) Dr. Alaa El-Din Khamis: previous reference, p. 266.

See also: Dr. Abdul Radi Muhammad Hashem Abdullah, Civil Liability of Doctors in Islamic Jurisprudence and Positive Law, op. cit., p. 266 et seq.

(8) Heinrich Honsell

Liability of Professional Advisors under Swiss and German

"Questions concerning liability for professional advice, expert opinions and information play an increasingly important role in a world which has become more complex and difficult and which is also marked by the specialization of professions. Compared with general professional liability, liability for professional advice, expert opinions and information, etc., is distinguished from the outset by a specific feature: It typically does not involve an immediate of physicians liability for a faulty operation or in the case of the faulty performance of e.g. repair work etc. which results in damage. Instead, it involves harm which arises solely as a result of the fact that the contracting party or a third party follows faulty advice. ... In German and =Austrian Law, § 676 BGB {German Civil Code} and § 1300 ABGB {Austrian Civil Code} provide that liability for resulting damages unless there is a contract or a tort".

In: <http://www.honsell.at/pdf/FSBaerKarrer.pdf>

Accordingly, we will discuss this topic through three topics: the first of which we will address the definition of the alternative doctor in jurisprudence and legislation. We also see that the process of replacing or replacing a surgeon or therapist with another doctor in case of necessity should not be done at all, as there must be conditions for it, and we will discuss these conditions in the second requirement, and finally, in a third requirement, we address the nature of the legal relationship for this replacement or replacement.

Definition of the alternative doctor in jurisprudence and legislation

First: The alternative doctor in jurisprudence:

One side of jurisprudence (9) believes that the general rule is to allow the assistance of others in all cases. The purpose of the binding bond is to obtain an objective value, that is, a certain economic value, so that the debtor fulfills his obligation if the creditor obtains the goal that he sought to obtain from the contract. Accordingly, the general rule is the possibility of implementation by others. The third party here is the alternative that comes as a result of a promise to implement, so the original debtor remains committed, but he only authorizes the implementation process to a third party who has no relationship with the creditor. Based on this, the owner of this opinion believes that the substitute doctor: "is that doctor who succeeds the treating doctor in his capacity to carry out all or part of the treatment on his own without the successor doctor being present at his side, unlike the assistant doctor, and he believes that the substitute doctor differs from the assistant doctor in several ways." Notably, the assistant works continuously and regularly alongside the treating doctor and under his supervision, while the work of the substitute is temporary in which he carries out all or part of the obligation on his own, and is in an independent position facing the original doctor.

Second: The alternative doctor in legislation:

Article (36) of the French Public Health Law (10) permitted the treating physician to abandon his therapeutic profession for his patient, which is based on the trust he gave him, when it permitted the physician to bring a substitute to replace him. If he did so, the original physician would be responsible for what the substitute physician committed. of mistakes, and this responsibility is considered a contractual responsibility for the actions of others in accordance with Article (1147 M.F). In Egypt, Article (40) of the Minister of Health's Resolution No. 234 issued in 1974 regarding the issuance of the Charter of the Human Medicine Profession stipulates that: "If a doctor replaces a colleague in his clinic, he must not attempt to exploit this situation for his personal advantage".

Article (41) also stipulates that : " If a doctor is invited to the clinic of a patient who is being treated by another doctor and it is impossible to invite him, he must leave the completion of the treatment to his colleague as soon as he returns, and inform him of the measures he has taken " (11).

(9) Dr. Abdul Rashid Mamoun: previous reference, pp. 49-52, Dr. Hossam Al-Din Kamel Al-Ahwani, previous reference, p. 387.

(10) www.legifrance.gouv.fr

See also: Desouqi Ali Desouqi Behairi, Defense of Civil Liability by the Action of Others, op. cit., p. 341.

(11) Regulations on Professional Ethics: Medical and Pharmacy Professions, Resolution of the Egyptian Minister of Health No. (234) of 1974, Article No. (40). The Regulations on Professional Ethics were amended by Resolution of the Minister of Health and Population No. 238 of 2003.

n Jordan, by reviewing the laws related to the medical profession - such as the Law of the Medical Syndicate, the Medical Constitution, and the Law of the Medical Council - we find that these legislations did not directly address the substitute doctor (12) , but some articles indirectly permitted the work of the substitute doctor, and among these Articles: Article (36) of the Jordanian Medical Constitution stipulates that: "A doctor is not permitted to manage a colleague's clinic temporarily for a period exceeding one continuous month except with the approval of the Syndicate Council, provided that it does not exceed one year." Article (37) also stipulates: It is: "It is not permissible for a doctor to deputize on his behalf temporarily to monitor and treat his patients except a doctor registered in the union and licensed to work in the same specialty." Finally, Article (38) came to stipulate that: "It is not permissible for a doctor's clinic to be managed outside the country in the event of his absence " For a period exceeding six months, except with the approval of the Syndicate Council " (13) .

Finally, he embodied the American legal doctrine (Respondent Superior), by saying that: The doctor acting in place of someone else - the substitute doctor - in the job will be an independent contractor. He or she will be an independent individual contracted solely to provide the physician's services as a substitute physician for a specific period of time (14) .

(12) Dr. Abdullah Al-Zubaidi: previous reference, p. 281.

(13) The Jordanian Medical Constitution 1989, issued in the Official Gazette, No. 3607, dated 2/16/1989, Chapter Five, Jordanian Medical Association Law, No. 13 of 1972 and its amendments of 2015, p. 27.

(14) Responsibility for the acts of others: Para (14)

(This is an independent individual who is hired solely to provide physician services as a substitute physician for a limited period of time).

Russell G. Thornton, JD See, e.g., Hinkle v Adams, 74 SW3d 189, 196 (Tex App - Texarkana 2002, no pet).

In: <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2900989>

Retrieved.23(3); 2010 Jul

The second requirement

Conditions for an alternative doctor to replace the treating doctor

The doctor commits a mistake if he stops treating his patient suddenly and under unjustified circumstances, and this matter is considered a breach of his contractual duty and entails liability (15).

Therefore, replacing a doctor with another doctor is a guarantee for patients to continue receiving treatment, and a guarantee that they will not be exposed to harm as a result of the absence of the treating doctor for any compelling reason. This process must be carried out in accordance with the rules and ethics of the medical profession and the principles followed in it. In this procedure, it is stipulated that the substitute doctor must first have competence and experience commensurate with the level of the original doctor so that the patient's confidence in his doctor is not shaken, as it is assumed that the original one is indebted to his clients to exercise conscious care as long as he has not retired from the profession, and it is assumed that he does not choose the substitute doctor poorly. If he happens to choose his replacement doctor incorrectly, he is considered contractually responsible for the actions of others, and in accordance with the ruling of the Court of Appeal (Dijon) issued on 2/7/1978, which explicitly ruled that: "The debtor of a contractual obligation shall be responsible towards his contracting party for the mistakes of the people to whom he entrusts implementing his commitment" (16).

The French Court of Cassation also decided on the joint responsibility of a radiologist and his substitute if he brought in an incompetent doctor to carry out the task entrusted to him, and he misused the radiation, causing burns on the patient's body, and the treating physician did not warn his substitute in advance of the patient's sensitivity to the type of radiation used in treatment (17).

Second: Leaving the freedom for the patient to submit to the alternative doctor. If the patient has the freedom to choose the alternative doctor, the original doctor is removed from the contractual responsibility, and if he does not have a choice in that, given his medical circumstances, such as if he is in a situation where his will is deprived of him (such as the situation he is in when The surgical operation was performed, and the original treating doctor suffered from a medical illness during which he was forced to seek the help of an alternative doctor. This case, despite its human cruelty, puts the original doctor in question regarding the alternative doctor (18).

(15) Atef Al-Naqeeb: General Theories of Responsibility for Personal Actions, Oweidat Publications, Diwan of University Press, Beirut, 1984, p. 252, Dr. Abdul Latif Hosni, Civil Liability for Professional Errors, previous reference, p. 183.

(16) CA. Dijon. 7 – 2 – 1978:D.1978.IR.P.466.

(17) Michèle HARICHAUX-RAMU, La responsabilité du médecin: Fautes se rattachant à l'exercice collectif privé ou social de la médecine, Recueil Juris-Classeur, Responsabilité civile, Vol 04, fasc 440-6, Technique Juris-Classeur, Paris, 1993, p 04.

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

Third: The replacement doctor abstains from treatment as soon as the original doctor returns to practicing his work. Accordingly, the original doctor remains responsible when the compelling circumstance that befell him disappears and he returns to practicing his work as before. The replacement doctor chosen by the original doctor must stop following up on the patient's condition immediately and assign the tasks that It was assigned to the commissioner who initially delegated the work to him, who is the original doctor.

Fourth: The treating physician must inform his substitute of all the details of the medical condition entrusted to him and the treatment previously carried out. This is a mutual obligation that falls on the substitute toward the principal as well. If these conditions are not met, the personal responsibility of the treating physician arises, not responsibility for the actions of others. This is because poor selection and lack of information are the cause of the damage resulting from the mistakes of the alternative doctor.

See also: Hanoun Jaafar, previous reference, p. 154 et seq., Dr. Abd al-Radi Muhammad Hashem, previous reference, p. 270.

The nature of the relationship between the patient and the alternative doctor

The original doctor and the alternative doctor

First: The relationship between the patient and the alternative doctor:

The patient's relationship with the treating physician is the cornerstone of practices, that is, medical ethics, and this is stated in the Declaration of Geneva when it says : " The physician, when practicing his work, must act in accordance with the commitment that says: (I will put the health of my patient above all considerations)," and as the Code of Medical Ethics stipulates: The doctor is required to treat his patients with all sincerity, and to adhere to all his scientific information that concerns them. It is noted that the traditional concept of the doctor-patient relationship, and its concept that the patient receives the doctor's decisions, has been abolished, due to its conflict with the law and professional ethics, especially since we are now in the era of informatics regarding medical data (19) .

As for the alternative doctor, opinions differed about the nature of the relationship between the patient and the alternative doctor, and there is no room here to expand on it. We see, in brief, that some opinions say that the mere acceptance of the patient to submit to the alternative doctor concludes a new contract that replaces the original contract between the patient and the doctor. The original opinion, and their support for this, is that the substitute doctor is independent and works freely and contracts with the patient freely. This opinion was criticized on the basis that it ignores the personal nature of the medical contract.

Another opinion goes to the opposite, in that the original doctor remains responsible because he is the one who concluded the contract with the patient. There is a third opinion that holds that the patient's submission to the alternative doctor leads to the conclusion of a new contract between the patient and the alternative doctor, not to mention the first contract between him and the original doctor.

All of these opinions have been subjected to criticism, including the last opinion; Under the pretext that it is not possible to suspend and stop the implementation of the medical contract concluded with the treating doctor, as long as the latter continues to follow up his patient remotely, as before his temporary withdrawal, he has the duty to leave the instructions and counter-instructions added to the substitute, which must be implemented by the alternative.

(19) John Williams: John Williams

World Medical Association, Textbook of Medical Ethics, op. cit., p. 16.

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<https://www.wma.net/wp-content/uploads/2016/11/ethics-manual-arabic.pdf>

The substitute, because he is more knowledgeable about the patient's condition, the substitute is only an implementer of the treating physician's orders, except in the case of urgency, in which case he must take what he deems appropriate, and vice versa, the substitute must also inform the treating physician of the development of the patient's condition, the stages of treatment, and every new development that occurs to it (20).

A part of jurisprudence in this regard also believes that: "The substitute is responsible personally for the patients who contract directly with him, and for this reason we see that by accepting to continue treatment with the substitute, he creates a contractual relationship between them. This is because the patient had the right to refuse treatment with the substitute, so his continuation and belief that This substitute doctor is like the original one, and the original's choice of the substitute is based on competence, and we see that the original doctor is exempted from responsibility for the mistakes of his successor if he is known for his competence " (21).

However, we see that we should not rely on this opinion, or those of the jurists who have moved towards it. This is for several reasons, including: The patient is the weakest party in this equation, and the patient is often under treatment, or under the influence of anesthesia and the medications he is taking, some of which may contain narcotic substances, as is known, not to mention the trust that the patient gave to his doctor. The principal - the treating doctor - which initially led him to contract with this doctor and no one else. So, what should be taken into account when talking about satisfaction in this case is the patient's satisfaction when he is in a psychological and physical state that allows him to do so, and this point should not be relied upon except after confirming the patient's written consent in this regard.

Second: The relationship between the original doctor and the alternative doctor:

The preponderant opinion of jurisprudence has been established that the contract concluded by the treating doctor with another doctor to replace him does not terminate or stop the original contract concluded between the patient and his treating doctor, but rather it is a continuation of it for a temporary period until the original doctor returns to treat his patient.

In this regard, some believe that: "The original doctor remains committed, but only authorizes the implementation to a third party who does not have any contractual relationship with the patient, and therefore the patient does not have any direct right to him, and even

(20) DAGENAIS (Catherine), op, Cit, p 31 In: <http://www.themis.umontreal.ca>

(21) Dr. Ahmed Mahmoud Saad: previous reference, p. 119.

When the substitute undertakes to perform full implementation, he remains from the patient's point of view a mere assistant to the original doctor and a person completely alien to the contractual relationship that binds him to his doctor (22).

In this regard, the French legislator stated that, given the personal consideration in the relationship between the patient and the treating physician and the trust granted by the patient to his physician, it is not permissible for the latter to abandon his therapeutic mission for his patient except within the framework of Article (36) of the Medical Obligations Law (23).

Other than that, the doctor must complete the treatment he began with his patient. This is because personal considerations have an impact in the medical field, and therefore it is not permissible for the doctor to bring in a substitute to replace him. If he did so, he would be responsible for the mistakes committed by his successor (24).

Author: Dr. Nasser Abu Rumman

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(22) Dr. Abdul Rashid Mamoun: previous reference, p. 54.

(23) Article. 36. du. code de deontologie medicale: sur:
<https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006072634&idArticle=LEGIARTI000006680539>

(24) J. Mazen: essai sur la responsabilité civil des medecins. Thèse, 1934. P. 199.