

Medical Errors and Physicians Liability between Islamic Regulations and Law

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Abstract

This research aims at defining medical errors and the working physician's liability about them. Is this liability related to the physician's derelict or is it contractual? To what extent is the physician responsible in accordance with the legal status of the medical liability? The researchers arrived at the fact that the physician's liability according to the Islamic regulations is contractual and derelict as well. Accordingly, the physician who has not obtained a certificate of practicing the profession, which is issued by the relevant authorities, or neglect, and encroach will be responsible for any harm he causes, and he, or the health insurance, will be responsible for compensating any damage caused by the physician. The French and Egyptian laws in addition to most of the world's laws also adopt this view. The researchers have realized the failure of the laws in the third world as to physicians' errors and the need for regulating this issue by special laws.

Key word: Islamic Regulations and Law, Medical Errors, Physicians Liability

Introduction

The Nature of the Medical Liability, This nature includes two parts:

Contractual and Derelict liability of the difference between them is that the contractual liability implies liability for any harm caused because of neglecting the terms of the contract. The derelict implies the liability for any harm caused because of the physician's wrong action. These two trends appeared in the French and Egyptian laws. Both laws tend to consider the physician's liability as a contractual one (1). The followers of this view supported their opinion by claiming that it will make no difference to consider the physician's error a crime or not because the physician's error means one thing: neglecting the terms of the contract. Accordingly, the nature of the liability, being a crime or not, will be defined. However, neglecting the basics of the profession may lead to a derelict liability that is conditioned in by the absence of a contract between the two parties (2).

Medical liability means the abidance by what he says or does. It means commitment to compensate any harm caused by him to others as a result to his behavior (3). Scholars of Islamic Share's confirmed that the physician's status totally comes under the definition of an employee (worker) because the relationship between the physician and the sick is a contractual relation that is based on a legal known payable benefit (4). However, Islamic scholars agree that the employee is responsible to compensate any harm caused by him, and this comes under dereliction liability. Islamic regulations adopt both trends: contractual and dereliction liability depending on the condition of the medical error.

Benefiting from physicians is a type of services that physicians provide sick people with. There is no contradiction among Islamic scholars on the possibility of hiring an engineer or a physician, which is approved by status law (5). Hiring people for work comes in two types: private employee or public employee. A private employee works in the private sector and a public employee works in the public sector (6). Islam considers medicating as a basic need for people as they cannot live without medical care. Hence, governments provide this service to people as narrated by Imam Al Bukhari about taking care (7).

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This implies that the work of a physician is originally in the public sector. However, Islamic regulations do not prohibit the work of physicians in the private sector in accordance with the regulating laws and legislations in this regard and laws, on the other hand, have not guaranteed, these needs and transfer this liability to the private insurance institutions.

The nature of the physician's contractual commitment

Usually, Islamic scholars differentiate between two types of contractual commitments: commitment to accomplishing a result which is the recovery of a patient and a commitment to provide the required care. They agree on the prohibition of making a cure-conditional contract between the patient and the physician as this contract builds on what is unknown. The international medical laws that conceive physicians' liability as a contractual one have adopted this view (8).

The Criminal Liability of Medical Errors

Islamic scholars agree that a physician is only responsible if he caused harm (9), no matter in which sector he works. They have divided the infringement in two parts: ordinary medical errors which may cause by most people as he is one of them, and medical errors that related to technical issues. An example of the ordinary errors is practicing the profession without having a legal permission; another example is abortion after the fourth month of pregnancy, which is considered by Islamic scholar as an act of killing a live person, except in necessary cases. A third example is disclosing patients' secrets, as Allah ordered Muslims to keep the secrets of others. Term (24) of Jordanian Physicians' Association Act excludes the following situations "scientific needs, infection cases, witnessing of a physician in the court and for the purpose of telling a patient's relative of what they need for curing the patient; and if the patient is under the legal age, his guardian should be told" (10).

An example of the technical errors is giving fault reports by a physician. International laws have prohibited this action, as it is a type of forgery. Term 266/1 the Jordanian Penal Code states a penalty of an imprisonment for a period of a month to a year for any physician accused of forgery. Another example is prescribing a narcotic material to be used by the patients themselves. Term (6) of Jordanian Physicians' Association Act states that a physician who does this action must be banned, and it does not refer to any penalty. Islamic regulations state a penalty on this action that can be estimated by a judge.

A third example is a specialized physician's refrainment from mediating a patient whose case is serious, unless there is a force majeure, which may prevent him from doing his job. Term (17 & 18) of Jordanian Physicians' Association Act adopts this view. The Italian Law (Term 40F2) and the Swiss Law (Term 127) Legalize penalizing any physician who refrains from helping a patient if has no excuses. The French Law of the year (1945) which amends Term (6) of the Criminal Law, the Belgian Law, the German Law, the Greek Law, The Iraqi Law of the year (1990) Term (370 F) and the Kuwaiti Law of the year (1981) also adopts the view of penalizing a physician in the abovementioned case [11].

Islamic scholars agree on the necessity of treating any patient in the abovementioned cases. Any physician who refrains from doing this is considered as committing a great sin which he should be penalised for by a judge. They have also agreed on penalizing an ignorant physician as he causes harm by his ignorance, and the specialized physician if he neglects and derelict in his work (12,13).

Proving the Ordinary or Technical Medical Error

It is agreed on among Muslim scholars and jurists that within the framework of the status law and Islamic regulations that the burden of proving that a medical error is caused by a certain doctor relies on the patient in accordance with the rule (Evidence is on the plaintiff and swearing is on those who deny). The judge must transfer the case to a specialized physician to investigate such issues as an experienced person, especially in the technical issues of the profession and violating the rules of science (14,15).

Estimating the error that results from negligence or dereliction must be agreed on by experienced people and not by accepting the opinion of some and neglecting the others'. This is because the work of physicians relies heavily on expectations, so the error must be clear to the extent it is not disputable among experienced or specialised people. For those doubtful scientific issues that are not scientifically proven yet, the judge must consider the physician unguilty and irresponsible.

In this case scholars are said to be wisdom in specifying the right status of medical errors by relying on experienced people in defining any medical error regardless of being simple or serious. What is important for Muslim scholars is a clear proof that a physician has violated the fundamental rules of his medical work that are indisputable (16,17). An experienced person must be a wise adult who is well experienced and practitioner in his field of work. The medical specialized authorities must also consult him as an experienced authorized person. Imam Al Shafi'Has confirmed this view when he states that "experienced people are those who are well informed in their field of work and do what is usually done by their counterparts, which aims at the welfare of people who need their service in that field of work; however, if he does not do what is usually done by his counterparts, then he is in charge of his false actions" (18). Ibn Al Ikhwah, one of the scientists of the twelfth century, that a physician must write a report about the status of their patients, to specify the required medicine for them, to follow up their patients' cases and to keep these information in the patient's medical record so that he will be responsible for any possible medical error [19].

Conclusion

Jurists have agreed indisputably that a physician whether working in the public or private sectors is responsible for any medical error if he/she encroach or does not act properly in this work. The government must guarantee if the physician works in the public sector, while he is personally responsible if he works in the private sector. The researchers recommend that the medical constitution in all countries must include detailed regulation as to medical errors and its results and consequences. The present medical constitutions are immature in this regard, especially in the countries of the Third World where a lot of such errors occur in disregard of the lives of human beings.

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