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Physician's Responsibility In Iranian And Islamic Law

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Abstract
The medical profession has long been of great importance because of its specialization and dealing with the physical health of humans. However, the sensitivity of the medical profession and the technical operations in this profession has always had liabilities for physicians. One of these responsibili-ties is Civil Liability, which, based on Islamic jurisprudence rules and Iranian law and under certain conditions, physicians must compensate a loss. The most important rules of Islamic jurisprudence (Feghh) regarding civil liability in Islamic and Iranian law include: the rule of Prohibition of Detriment, rule of Fraud and Deception, Liability of unlawful Possession, Waste and Causation. Among the opinions of the Sunni jurisconsults on the recognition of civil liability of physicians, they distinguish between the ignorant and the proficient physicians; and proficient physicians are scrutinized in terms of Faulty and non-Faulty proficient physicians. In the opinion of Sunni jurisconsults, faulty proficient and ignorant physicians will have civil liability. In the Shi'a jurisprudence, the liability of a faulty and guilty doctor is agreed by the juris-consults, and there is no discrepancy about it. Therefore, it is the duty of the physician, according to the medical convention, to treat the patient from the moment of referral up to the completion of the diagnostic and therapeutic procedures, and apply all the scientific and conventional standards for treating the patient and, if they commit a fault or negligence, they will be liable

Key words: Civil Liability, Physician, Islamic jurisprudence, Waste and Causation.

La responsabilidad del médico en la ley iraní e islámica.

Resumen

La profesión médica ha sido durante mucho tiempo de gran importancia debido a su especialización y tratamiento de la salud física de los seres huma-nos. Sin embargo, la sensibilidad de la profesión médica y las operaciones técnicas en esta profesión siempre han tenido responsabilidades para los médicos. Una de estas responsabilidades es la responsabilidad civil, que, de acuerdo con las normas de la jurisprudencia islámica y la ley iraní y bajo ciertas condiciones, los médicos deben compensar una pérdida. Las reglas más importantes de la jurisprudencia islámica (Feghh) con respecto a la responsabilidad civil en las leyes islámicas e iraníes incluyen: la regla de prohibición de daños, la regla de fraude y engaño, la responsabilidad de pose-sión ilegal, el desperdicio y la causalidad. Entre las opiniones de los juriscon-sultos sunitas sobre el reconocimiento de la responsabilidad civil de los médi-cos, se distinguen entre los médicos ignorantes y los competentes; y los médi-cos competentes son examinados en términos de médicos competentes deficientes y no defectuosos. En opinión de los jurisconsultos sunitas, los médicos competentes e ignorantes defectuosos tendrán responsabilidad civil. En la jurisprudencia shi'a, la responsabilidad de un médico culpable y culpa-ble está de acuerdo con la jurisconsulta, y no hay discrepancia al respecto. Por lo tanto, es deber del médico, de acuerdo con la convención médica, tratar al paciente desde el momento de la derivación hasta la finalización de los proce-dimientos diagnósticos y terapéuticos, y aplicar todos los estándares científi-cos y convencionales para el tratamiento del paciente y, Si cometen una falta o negligencia, serán responsables.

Palabras clave: Responsabilidad civil, médico, jurisprudencia islámica, desperdicio y causalidad.

Introduction

The medical profession has long been one of the most important and, at the same time, the most sensitive businesses. In a more precise sense, medicine has an age as old as human history, and by passing the time and progress of technology and public health of humans, not only the need for

medical sciences has not been reduced, but also the humanity's dependence on the medical community has entered a new stage and has grown more and more.[1]

Like all other businesses, this profession is within the framework of the rules of liability and, accordingly, civil liability is recognized as one of the most significant predictable responsibilities.

Since the approval of Iran's Civil Act in 1304, civil liability of physicians in Iranian legal system has evolved, both in terms of rules and in some other instances, such as the liability arising from the crime on fetus. The source of these changes are identifiable in the two groups of the legal doctrine as well as the case law of the courts. In fact, due to the dynamics of Imamiyya jurisprudence and the reliance on the legal and lawful teachings of the countries with modern laws, Iranian law has tried to adapt and to adjust its criminal rules and regulations to the needs and requirements of the day.

Today, medical activities have new forms and dimensions. Beside the essential surgeries on which the survival of a person depends, other operation such as aesthetic surgeries, and sometimes unnecessary or even illegal surgeries like abortion, occur in this area. Furthermore, today's world medicine has also become instrumental-based, that means using technical equipment and instruments for the application of medical practices is of great use, which has led to the involvement of several practitioners in the field of medical treatment; these measures which sometimes lead into physical injury to patients or even their death, has been under consideration and sensitivity of the Iranian legal and judicial system, which led to civil liability for the necessity of compensation for damages. A physician, on the basis of favor and sometimes his own satisfaction, treats the patient who is in need of treatment; it also seems to be the obligation of the doctor who has traditionally been committed to do so (for example, medical practice or anesthesiologist's practice in the operation room) that should be considered a commitment to the outcome, and any irregularity that has not generally achieved the desired result will cause a liability.

Regarding the importance of the discussion, this study seeks to ex-

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1 - Abbasi, Mahmoud. (1388). Medical Liability, Majd Publications, Tehran, p. 83

amine the most important principles and rules of civil liability of the physician in the light of the legal system of Islam and Iran. Accordingly,
after defining the civil liability of the physician, the most important foundations of Islamic jurisprudence will be scrutinized.

Civil liability of the Physician

Regarding the civil liability it is said that: "If a person has to pay compensation to somebody else, he/she has Civil Liability towards him/her".[2]

Civil Liability is called "Tort" in other countries and is created without a contract; and in English law, it
is called the term of Liability Arisen from a Wrong[3], or in short, The Law of Wrongs.[4]

Approximately, all lawyers agree on these definitions, and they consider a person who is obliged to
compensate someone else has a civil liability.[5] Therefore, the law protects the rights of the harmed
person against the damaging person and these benefits may be protected by issuing a verdict to pay
some amount of money (compensation).

Civil Liability, of course, has both a general meaning and a specific one: "Civil liability is generally applied when a person is held liable towards another person because of breaching or contravention and the damage sustained by him. In other words, civil liability is a guarantee of breach of law and obligation, which is the liability of the doer of action."[6]

The meaning of civil liability in its specific term also means that "a

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2 - Katouzian, Nasser, Non-contractual Obligations, (Forcible Liability), Second Volume, Eighth Edition, Tehran University Press, 2007, p. 46

3 - Aqaei, Bahman, Bahman Law Culture, Third Edition, Ganj Danesh Publication, Tehran, 2006, p. 1047

4 - Katouzian, Nasser, Non-contractual Obligations (Forcible Compensability), p. 47

5 - Jafar Langroudi, Mohammad Jafar, Terminology of Law, Fourth Edition, Ganj-E- Danesh Publication, Tehran, 2004, p. 645

6 - Ghasemzadeh, Seyyed Morteza, Civil Law Principles, Fifth Edition, Mizan Publication, Tehran, 2008, p. 23

person is liable for hurting another person without a contract being made between them ... and this type of compensability or liability which is executed by law and without interference of intention, is called (in the specific sense) Forcible Compensability or Civil Liability".[7] Civil liability means a commitment to compensation. The two common theories that form the basis of civil liability are the Theory of Risk and the Theory of Fault.

Among the jurisconsults, fault is referred to as offense and loss, and the articles 951 to 953 of the civil law implies this meaning. The Jurisprudential root of the theory of Risk can be found in the rule which says: "Everyone for whom there is a benefit, there can be a loss from him as well." According to the theory of Fault, the person who suffers a loss must prove the fault of the damaging person. However, In the theory of Risk (which was taken into consideration with the Industrial Revolution and the spread of damage in Europe), for the sake of simplicity in litigation, there is no need for the person suffering from a loss to prove fault of the damaging person and for him it is only necessary to prove the existence of the causality relationship between the loss and the harm[8] According to the theory of Risk, everyone engaging in activities, creates a risky environment for others, and one who benefits from this environment must compensate the created loss. Advocates of the theory of Risk state that this theory is useful from the economic point of view, because if everyone knows that they are responsible for the consequences of their actions, even actions that are free of fault, they will have to take cautious behavior. On the other hand, it is claimed that liability without committing a fault, would be blaming personal talents and initiatives. As a result, individuals would opt out of business, they would prefer safe jobs, and this is economically harmful.

The rules of Islamic jurisprudence regarding the liability of the phy-

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7 -Ibid

8 - Seyyed Hassan, Safaii, Civil Law (Commitments and Contracts), Higher Accounting Institute of Tehran, 1351, pp. 538-540

sician

1. Rule of Prohibition of Detriment

The rule of Prohibition of Detriment is one of the most important rules of Islamic jurisprudence and in terms of its concept, many theories have been expressed, the most important of which has been emphasized by of all jurisconsults and based on that: "In Islam, there is no judgment which results in harm, whether it is an affidavit or an obligating injunction".

This prevailing opinion exists in the Shia jurisprudence, known by Sheikh Ansari, and he stated in his statement: "The purpose of the hadith of the rule "Prohibition of Detriment" is negating the religious order by which people might be harmed, that is, in Islam no harmful order has been forged ... For example, according to the religious order, the loss of a deceived person must be compensated, therefore it is denied in Islam"

Many jurisconsults believe that the rule of Prohibition of Detriment is only a negation, and the proof of the sentence, including compensation for damage, must be obtained from other proofs such as Waste and Causation. But some other jurisconsults believe that in addition to respecting the loss, the proof of the sentence, including the order to compensate for the loss, can be obtained from the rule of Prohibition of Detriment itself.

As a result, it can be said that: If someone hurts another person the way that it is not considered as loss and damage, a compensation could be awarded merely based on the rule of Prohibition of Detriment. The rule of Prohibition of Detriment is taken from the famous hadith of the Prophet (pbuh), written by him about Sama'r ibn Jondeb regarding the disputes Samir had with the Ansari man: "Lahrir and la Zahar Ali al-Momen", or the hadith from Imam Sadiq (AS) who said: "Man Azra Be Tariq Al Moslemin Fa Hova Lahoo Zalemoon" or "Mal'oon Men Zar Mo'mena Au Makkar Beh".

2. The rule of Deception

According to the rule of Deception, if someone deceives another person (the deceiver) and he/she is deceived by this (the beguiled), the deceiver is liable for the damage. Indeed, under the rule of Deception, liability is based on the action which is deceptive!

Perhaps in Civil Law, Deception has not been included in other civil liability sources, but it can be seen as a liability in some materials, including articles 263, 325, 391 of the Civil Law. For example, Article 263 of the Civil Law states that whenever the owner is not allowed to do the transaction and the client is also ignorant of non-authorization, he has the right to claim for the price of compensation for all the losses from the unauthorized seller and, in case of being aware, he only has the right to claim for the purchase price. Article 325 of the said law also states that "If a client is unaware of the usurpation and the owner prosecutes him, he can also prosecute the seller for the price as well as the damages, even if the object of sale is wasted by the customer himself and if the owner claims for a similar item or the price, refers to the seller, the does not have the right to refer to the customer.

There is a disagreement regarding the necessity of fault or lack of fault of the deceiver, in Islamic jurisprudence and based on the famous view "where one knows the truth, but he does not intend to deceive another, if he acts the way that in the public is considered as deceiving the others and causing damages to them, he is liable to them... But there is disagreement on the case that person does not know the truth... According to the view of a group, deception is obvious in this case, too, because ... the person has deceived the other one by this action ... and, to some others, deception means hypocrisy and dissemblance, and in the case of the person who is ignorant of an event, the principle of deception cannot be cited."[9]

Also there is disagreement among the jurists about this. Some mention the fault of the deceiver as the condition of the deception, and at any rate, the intent and prudence of the deceiver in causing harm is considered as the condition of deception;[10] while others have stated

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9 - Quotation: Katuzian, Nasser, Out-of-Contract Requirements (Forcible Compensability) p. 169

10 - ibid, p. 169, Darab Pour, Sohrab, Civil liability of the contract, p. 258

that in liability of deception, fault is not a condition, and the mere existence of the causality relationship between the act of the deceiver and the deceived person's act is sufficient.[11]

On the basis of this principle, they have relied on the rule of Prohibition of Detriment and practical method and behavior of the wise men precisely according to the well-known hadith, "Al-Maghroor Yarijal-i-i-Ghar".

3. Liability of Possession

According to this rule, anyone who holds or dominates over another person's property without a legal or lawful permission, will be liable for returning that property, and if the property is defected, lost or damaged, or it is considered wasted and he is not able to return it to the former state, he will be liable to compensate the price of it or provide a similar item like it.

This is a rational principle based on respect for human property extracted from the well- known prophetic hadith, "Al-al Aid Ma Akhazto Hatta Todih"[12]

The rule of Liability of Possession is extensive and has been cited by the Liability of the

Usurper and Liability of the Possessor in a Void Contract, and Taken for Bargaining. In the Liability of Possession, intention and fault, deliberately and unintentionally, knowledge and ignorance of the subject matter or Imperative rules or Positive rules, do not affect the liability of the person subject to the property of others, and in a manner it is similar to the theory of Danger, Even in the Liability of Possession, unlike loss, there is no need for intercourse between an action and the damage it causes and thus the force majeure is not either a factor by which the liability of the responsible individual is invalidated.

4. Waste

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11 - Bahrami Ahmadi, Hamid, Civil Liability, p. 65

12 - Mohaghegh Damad, Seyyed Mostafa, The rules of Islamic jurisprudence, Civil Section p. 61

The rule of Waste is one of the basic rules in the Tortious Liability or in Civil Liability, and the jurisconsults have applied this rule both for the waste of property and for the loss of life.

"Under the initial wording of the Rule of Wasting, aim and intent by no means interfere in the creation of a type of liability. Therefore, a person whose action has caused the waste of someone else's property, has an obligation and liability for compensating the loss, whether he has deliberately done this or has done it with no intention to do so."[13] In other words, waste, even unintentional, does not preclude the liability, and the fault does not play a role. Of course, in this rule, it is essential that there is a causal relationship between the person's action and the waste of property; therefore, what is conditional in the liability caused by waste, is the attribution of the loss to the doer of action not the fault of him/her. In the articles 328, 329 and 330 of The Civil Law this point has been referred to as well.[14]

This point has also been referred to in the Islamic Penal Lode in articles 495 and 498 .[15] The scholars of Islamic jurisprudence have cited verse 40 of Surah Shoura ("The punishment of a wrong did, is a punishment similar to that, and anyone who forgives and forgets will be rewarded by God", Allah does not love the oppressors.), verse 126 Surah Nahl: "And if you want to punish, only punish the amount you have been subjected to".

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13 - Ibid, p. 114

14 - Article 328: Everyone who wastes someone else's possessions he is liable of it, and must, like a leg, pay for it, whether
intentionally wasted or deliberately, whether it is the same or the profit, and if it is not possible, the person must compensate the rice of it.
Article 329: If someone destroys another person's house or building, he must construct it in the same way as the first one, and if it is not possible, he must bear the price.
Article 330: If a person kills an animal without the permission of the owner, he shall give a difference of the living price and the killed one; and if he does not have the price, he shall give all the price of the animal.

15 - Article 495: Whenever a physician causes physical loss or injury in his treatment, he is liable for the Diyah.
Article 498: Whenever an object carried by a person or a vehicle causes a crime in a way, the carrier is liable for the Diyah.

16 - Tusi, Mohammad ibn Hassan, Al-Mbassout, Volume 3, Maktabiah Al Mortazaviha, Tehran, 1351, AH, p. 59 17 - Najafi, Mohammad Hassan, Javad Al-Klam Fi Sharh al-Islam, vol. 37, Darjeyah al-Terath al-Hear, 1981, p. 60

And verse 194 Surah Baqara: " Anyone who has assaulted you, like you") and a such as "Haram Mal-al-Moslem Kahrmah Dameh"[16] and "Man Ottlof Malghir Faho Laho Zamen"[17] to prove the rule of Wasting; of course, before the rule of Wasting is documented by the Verses of Quran, narrations or the words of great people, it is a rational matter.

Article 329 states If someone destroys another person's house or building, he must construct it in the same way as the first one, and if it is not possible, he must bear the price.

Article 330: If a person kills an animal without the permission of the owner, he shall give a difference of the living price and the killed one; and if he does not have the price, he shall give all the price of the animal. The intellectuals of the world know the person who wastes, uses or destroys the property of someone else, liable; and this is a rational necessity.[18]

5- Causation

Causation is a type of wasting in which the action of the mediator causes a waste indirectly. In other words, in Causation, a person indirectly causes the loss, defect, or malfunction or non-use of the property, whether intentionally or unintentionally, whether by doing an action or leaving it.

Cause in the Causation is the base for waste so that if there is no cause, there will be no waste. In Causation, like Waste, intention of the result and intention of the act is not necessary, but attributing the action to the doer of it is necessary; that is, a non-virtual act that causes the damage is a Liable Causation in case it is attributed to a cause. In the definition of Causation it is said that: "It is an event or action that causes the occurrence of a loss; however, it is not the definite cause, but the act is in such a way that, if it had not occurred, the loss would not have happened."[19]

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17 - Najafi, Mohammad Hassan, Javad Al-Klam Fi Sharh al-Islam, vol. 37, Darjeyah al-Terath al-Hear, 1981, p. 60

18 - Darab Pour, Sohrab, Off-Contract Liabilities, p. 72.

19 - Quoted by Ra Peik, Hassan, Civil Liability Law and Compensations, Seventeenth Edition, Khorsandi Publication, Tehran 2011, p. 166

Civil Law does not provide a precise definition of Causation, but in Article 331it states: "Anyone who causes a loss must return a similar property or compensate the price of it, and if he has caused the defect of that property he must be liable to compensate the price defect." But in Article 506 of the Islamic Penal Law, in the definition of Causation, it is stated: "The Causation in a crime is when someone causes loss or injury of another person, but he has not directly committed that crime, however, that crime without his action would not have happened; for example, when a person digs a well and someone falls into it and is harmed." A number of views have been expressed regarding the necessity or lack of necessity of a cause in Causation. In Islamic jurisprudence, the famous observation is that the fault is not a condition, but some of the law professors who a gued about the difference between Waste and Causation, have mentioned the necessity of the element of assault and aggression (Fault), and they have considered it as a liability if it is publically known as an assault and aggression and something against the law; or if it is in vain to the intellectuals, or because of provocation of disgust and hatred, in the sight of the custom, it is against morality and a is kind of oppression."[20] They have considered it as liability and have described the fault as an external act that unreasonably creates a risk which results in harming the others, and finally it is concluded that "If a cause has not committed a misconduct and indiscipline, he will not be liable".[21] But some other lawyers have commented on the lack of necessity for fault in Causation and said that what is supposed to be a fault is in a sense the same causation, and in other words, "It is proving the fault in Causation, proving the relation of the customary causation (Common Violence) between actions of the defendant and the harm, not proof of his condemnable and dissuasive behavior, since, for example, it is not possible to prove such a fault about an underage or

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20 - Quran: the same, p. 168, Katouzian, Nasser, the obligation outside the contract (QHARI), p. 161
21 - Rah Peik, Hassan, Civil Liability Law and Compensations, p. 168

drunk person."
Although it can be said that in the legal basis of the Casualty, apparently the fault has not been mentioned and, in other words, the appearance of Articles 231 and 506 is referred to as the legal basis of the Causation, but in our opinion, the legislator in articles 507 and 508 (508: "When someone does one of the acts referred to in Article 507 of this law in his property or in the place in which is occupied by him and under his authorization, he will not be liable."
Summing up these stated views, it can be said that the fault lies in the meaning of the Causation and as long as a person does not commit any illegal acts or is not responsible for any duties, his action or not acting will cannot be considered as liability for Casualty.
Regarding the basis of this rule, apart from the agreement of the jurisconsults26 and the
hadith, "Man Ottlaf Mal al ghir Fahova lahoo Zamen", other narrations such as "Anything that causes harm to the people, its owner of that property is liable for the raised loss and damages", have been mentioned as the basis of the rule.22
Civil liability of the physician in the public and Shia jurisprudence
Sunni jurisconsults have differentiated between a specialist doctor and a non-specialist physicians, and have foreseen separate decrees for each group of them. Like the Sunni jurisconsults, Shi'i jurisconsults have differentiated the ignorant and proficient physicians from the Sunni jurisconsults regarding the liability. However, the main disagreement among the Shi'i jurisconsults is on the liability of the proficient physician.
The Opinion of Sunni jurisconsults
Sunni jurisconsults are have differentiated the ignorant physician from proficient ones. Based on the categorization presented in Sunni jurisprudence, we will follow the material in two forms of the igno-

22 - Vahid Khorasani, Hossein, Tozih Al-Masaleh, 1423, Qom, p. 237 law legislator by citing the evidence such as "La-zarar" (Prohibition of Detriment) and "la-haraj". This probability is briefly discussed below.
23 - Ansari, Sheikh Morteza, Macaseb, One-volume, published by Etela'at, Tabriz, 1997, p. 93

rant and proficient physicians.

Ignorant physician

Medical is one of the professions associated with scientific and technical expertise and if a person presents himself as a physician and treats patients, without sufficient knowledge of medicine, he is considered to be liable.

Sunni jurisconsults argue that not only the judge has the right to, but he is obligated to prohibit the ignorant physician from practicing medicine. The Sunni intellectuals have narrated several Hadiths regarding the liability of the ignorant physician, including:

"The person who practices medicine and has no specialty in medical sciences, is liable." Therefore, according to the opinion of Sunni jurisconsults, the ignorant physician has absolute liability, and medical treatment itself brings him liability, whether his practice leads to causing damage or not, since even practicing it is considered as a fault; and of course in case the patient is aware of the doctor's ignorance and allows him to apply treatment, obviously there will be no liability on the faulty physician for taking the action.

Proficient Physician

Regarding the skilled physician and a specialist, Sunni scholars have differentiated between the case of which the skilled physician is guilty of or attempts to practice without permission, and the case that he does not commit a misdemeanor and his actions is with permission but his action leads to a loss.

Faulty Proficient Physician

According to the Sunni jurisconsults, if a doctor makes a mistake in treatment and this mistake leads to death or injury in spite of his proficiency and the patient's satisfaction, in case the loss reaches one third or more, the doctor is liable; however the liability is waived in less than one third loss.

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24 - Mohaghegh Damad, Seyyed Mustafa, Al-Estefta'at fi-Nizam al-Qaza'i fi Islamic Republic in Iran, Al-Tawhid Magazine No. 31, 1366, p. 31

It is also possible that if the doctor treats the patient without the consent of the patient or his next of kin, also in this case the proficient physician will be liable. Of course, in this regard Ain Al Qeim states that the doctor has no liability, weather the permission has been obtained or not, because he is a benefactor, and "Ma Al al-Mohsenin Ben Sabil" and whether it is an assault or not, refers to the doctor's action, and
the permission or lack thereof has no effect on it, but the criterion for liability is whether the action is done on the right and the conventional way or not.23

Non-faulty Proficient Physician

In case a doctor treats a patient while he or she is an expert and has been treating the patient with his or next of kin's permission, but the patient dies or any of his body organs are lost or damaged due to the physician's treatment, according to the Sunni scholars, this is not a liability for the physician, on condition that no mistake has been made by the doctor during the treatment, and the loss or death was the result of something not in the hands of the physician.24

Of course, despite the consensus of the Sunni jurisconsults, regarding the liability of the non-faulty physician, they disagree on the lack of liability of the physician:

Hanafi (the Hanafi religion is the oldest and at the same time the most well-known stream of Sunni jurisconsults whose founder is Abu Hanafiyah) believe that for two reasons including social necessity and the permission of the sick or his/her next of kin, liability of the physician is invalidated.

According to the Shafi'ian (the Shafi'i religion was founded by Mohammad Ibn Idris Shafei, who created a moderate religion between Al-Maliki and Hanafi religion.), firstly, since the physician starts treatment with the patient's permission, and secondly, he intention is to improve and cure the patient and he did not intend to harm; therefore, the physician's action is right and liability for him is invalidated.

Hanbali (Hanbali religion was founded by Ahmad ibn Hassan Baghdadi, the sons of this religion believe in a limited interpretation of the Qur'an and the traditions of the Prophet (PBUH) and the method of

his Companions) believe that because the physician has done a permissible action, there is no liability for him.

According to Malikian (Maliki religion was created by Malik Ebn Ons in Medina), this

Islamic jurisprudential jurisprudence has accepted the fairness with emphasis on the material of the institute as a source of jurisprudence), on the one hand, Islamic law permits legalization of practicing medical profession and, on the other hand, the permission the patient gives the physician causes that he does whatever is for the patient's good; consequently, for these two reasons, there will be no liability for the physicians.

As a result, according to the Sunni jurisconsults, the principle is based on the lack of liability of the physician, unless he makes a mistake in his job or is treats the patient without his/her permission or his/her next of kin's.

The opinion of the Shia jurisconsults

According to the rules of Islamic jurisprudence and the rule of Liability, when ignorant people start to practice medical treatments and, instead of healing and curing the patient, hurt them and cause corruption, they are rationally, genuinely and legally liable for their actions, and if they cause the death of a sick person they will be liable for the death due to mistake.

The Shia jurisconsults also do not have any discrepancies regarding the liability of an ignorant physician due to his medical practice a sick person is hurt, and even in some cases there has been a claim of consensus towards it. In this regard, the verses of the Holy Qur'an are including: "Do not ever follow what you do not have knowledge about", and "Indeed, does not rightly call anyone an unnecessary right, and a narration from the Imam Ali, which obliges the Islamic ruler to have the false scholars and ignorant physicians imprisoned and cite rational signification. Regarding the ignorant physician, Fadhil Meghdad states in Tanghih: "If a physician is not proficient, he will be liable for the loss arising from his treatment; and uses the phrase" Al-Qaeda al-Ma'rafa "in the expressing a non-proficient physician and he claims a consensus about it. Also, Moghadas Ardebili in the book of Majama' Al-Faeedeh Va Al-Burhan25 states that:

"If a physician, whether proficient or not, fails in treating a patient and it leads to a loss, he is liable for it treated and apparently there is no opposition to it.
The owner of Riyadh in this regard has said: "There is no disagreement on the liability of the unprofessional physician".26
The owner of Jewel after stating the above mentioned says: "When an unprofessional
physician's non-proficiency is obvious at the time of admission, is undoubtedly liable, however, some have stated that if the liability is invalidated by allowing for treatment, then the liability is invalidated here as well." And in the following, the Owner of the Jewel in response to this statement says: "Even with the permission, he is definitely liable for two reasons; first is the rule of Wasting ("Whoever wastes a life or body organ,
is liable"); and second, is the rule of La Yatel (No Violation) according which: "Obviously there must be liability for a Muslim's blood"; and therefore, this permission has no effect.27
Ayatollah Seyyed Mohammad Hosseini Shirazi, the owner of Al-Fiqh book, has made an
interesting split in this regard. He distinguishes between a physician who is exculpated regarding the treatment and a physician who is not; and regarding the ignorant physician,
he has mentioned two conditions.41 According to him, if the physician does not have the
knowledge and skills, but with the permission of the patient or with religious permission (a religious permission is granted when the physician is unique and, for example, the patient's life is in danger, then the physician is religiously authorized to give medical treatment and is considered as permitted religiously). There are two conditions in this case as well: In the first condition, if the necessity of permission is even exculpation, the liability will be invalidated so that the physician treats the patient with his/her permission and if anything happens or the patient dies, as if the physician has been exculpated by the patient and is not liable.
The second condition is that the patient's permission does not have the exculpation with it. This rule requires that the doctor is liable,

since the proof for liability is absolute and involves this case, too. Of course, these two situations are in case when the patient is wise, but if a next of kin gives this permission on behalf of an insane person or a child. Here, if the permission is considered right religiously, and the child's life is in danger, it is for the child's parent to measure the child's benefit in order to permit or refuse the treatment.

In this case, if there is no other professional physician available, then the non-proficient doctor is not liable, because here someone who had the right to give permission (the child's parents), permitted the treatment; in addition to the fact that there is a link between the permission and lack of liability. Finally, the owner of al-Feghh book concludes that where a physician is authorized religiously to give medical treatment, even if he does not have the permission of the patient, since the religious authorization is more important than the permission of the patient, this authorization invalidates the liability.

But where the physician has neither enough knowledge in science (unprofessional physician) nor the permission, he is liable as if it is not a permission at all, or there is an authorization, but there is no invalidation of liability, or there is merely a permission, that is, no permission for the necessities and if the true permission which invalidates the liability does not exist here, doubtlessly liability will be true since proof of liability is absolute and is not allocated in this case.

Conclusion

There is no precedent in Islamic jurisprudence on the basis of Civil Liability in modern times, but jurisconsults have talked many times regarding the conditions of Civil Liability, most notably the Rule of Wasting.

In Iran's law, according to Article one of the Criminal Law, as the basis of civil liability, the principle is based on the theory of fault, unless non-fault liabilities, according to the premise, are considered as exceptions to the principle. Therefore, if there was no premise for a case, the act would be done according to the same premise, and otherwise it would be acted in accordance with the principle that is the theory of Fault.

Regarding the civil liability of the physician, the jurisconsults have paid special attention to taking the acquittance and lack of it, so that

almost all jurisconsults in their books have firstly scrutinized the physician's conditions, whether they are professional or non- proficient, authorized or non-authorized, and faulty or non-faulty, before they checked for the taken acquittance and at the end, they examined the condition of the physician's liability on the assumption of receiving the acquittance. However, in Islamic jurisprudence, compensation has been considered more important than the reason of its assurance, and as much as possible, it has attempted to leave unlawful losses without liability; especially because the physician deals with human life.

The former Islamic Penal Law served in the same well-known method of the Imamiyya, jurisconsults according to which, if the doctor has not taken an acquittance, his liability is definite. However, if he is acquitted, it must be scrutinized that if the physician has committed the fault or not; in other words, here the physician has a two-stage liability. The new law on the civil liability of the physician has undergone fundamental changes so that the doctor's civil liability in the supposition of stewardship will be adapted to the facts of the current society and considers the doctor as liable if he is guilty of fault or failure.

In other words, the theory of fault is considered as the based for the physician's liability, but in the Causation, the law will be strict with the physician so that they behave cautiously in selection his assisting staff; and this law has put the theory of Fault Assumption as the basis for the physician's liability (civil liability).

However, there is an ethical problem that a physician, after being insured, behaves so that the probability of mistakes, amount or its severity may increase. A physician who, transferring the risk of liability to the insurer, will be able to withstand the damage caused by the negligence and faults Being

exempted by the carelessness and neglect of the rights, lives and property of others. It is necessary for him, at least in cases where he has made such a mistake that he has caused death or a severe physical condition to the patient, he himself be responsible for proving his own innocence.

Other cases that may cause the burden of proof to be reasoned in-

clude the registration of medical cases and the history and treatment process, the duty that was already in the hands of the physician for clarity in the lawsuit. This fault leads to a higher level of caution. Doctors need to act more cautiously in order not to be liable.

Determining the scope of medical mistakes, as well as the effective standard by the legislator, can, allegorically and not privately, create better conditions for the attention of doctors and reduce their inadequacy. Courts and medical science experts will also examine the harmful act more easily in determining a law-governed sentence. In fact, limiting harmful acts and medical errors allows the activists in this profession to be supported by the law.

A physician, is personally more cautious because he is responsible for his subordinate medical treatment staff under his control, as he cares for the selecting nurses to carry out orders and prescriptions, and will be more motivated to choose them. If so, doctors have a better position than nurses and healthcare providers to decide on, then this is an effective responsibility.

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