Background Report

# Implementing and Developing the Law of Medical Errors:
*the role of judicial and legislative bodies*

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The right to life and physical safety is one of the most fundamental inherent human rights. For this reason, lawmakers have developed legislation which classifies any actions that cause offence to this right as prohibited actions under national penal codes as well as international declarations and conventions on human rights. Though errors might occur in all professions and occupations, greater emphasis and focus is placed on the errors that cause injury, impairment or sometimes death within the health professions. In the countries where the physical safety of human beings is respected, lawmakers who enact laws and the judiciary which applies these laws have developed the provisions which criminalize negligence of precautionary measures by healthcare and medical professionals. They have adopted new legal theories that emphasize the sanctity of human life.

## The Role of the Judicial System in Developing Medical Malpractice Laws

The enactment of laws regulating redress and compensation of victims of medical malpractice cannot take place all at once, and can only take place gradually. Sufficient time is needed, for example, to demonstrate the need for and then convince people of the importance of such laws. It also will require juridical reviews and advanced judicial applications whereby the judicial system adopts more modern theories that contribute to the interpretation of the provisions of existing law, even if is outdated.

Importantly, the victims of medical errors have not surrendered to the shortcomings of these provisions, and quite to the contrary, they have urged the judiciary to further develop the application of the effective provisions of law and to draft new and efficient rules. The rules and the process itself might be modeled initially after those of the French Council of State and then the French Court of Cassation in regard to

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interpreting the provisions related to medical malpractice.[2] The French judicial applications demonstrate how the French judicial system transformed the application of some traditional theories to new theories relating to civil accountability specifically in regard to medical accidents and the consequences thereof. These transformations included:

1) **Transformation of cause-effect relationship:** Establishing civil liability requires the establishment of a relationship between the cause of the medical error and the resulting injury caused to the patient. If the latter fails to establish evidence that the injury suffered is due to direct medical error, the judiciary would normally reject the patient's case. Upholding this condition deprives victims of medical errors of any right to compensation; this is especially so since it is usually difficult to substantiate medical errors. The judiciary, hence, dismissed this condition, and so the cause-effect relationship is based now on demonstrating one factor of the several factors that might have contributed to the cause of the injury. The French Court of Cassation takes into account the theory of reasons, whereby more than one person is held responsible. This appears to make it even more difficult for the victim of medical errors to prove who is exactly responsible for the injury caused to him or her. However, experience has proven that the number of the persons who might be responsible for an injury decreases to one person as litigation proceedings progress. For example, after the Paris Court of Appeal initially held three persons responsible for a medical error, only one of them turned out to be considered responsible for that error when the case was brought to the Court of Cassation.[3]

2) **Transformation of the burden of proof:** Until March 25 1997, courts continued to adopt a general rule which stated that the plaintiff should be charged with the burden of proof. After that date, the French Court of Cassation changed the rule and placed the burden of proof with regard to medical errors on the physician, and not the injured patient. It required that the physician should inform the patient of the therapeutic intervention the patient would be subjected to, including any associated risks. It issued this decision in the case of a person who was suffering from stomach pains, and

[2] Tharwat Abdulhameed, *Redress of Medical Errors: the extent of liability for harmful repercussions of medical action* (Egypt; New University House, 2006), pp. 117-121. Also, Muhammad Hassan Qasim, *Proof of Medical Error*, (Egypt; New University House, 2006).

[3] Abdulhameed, *Redress of Medical Errors- the extent of liabilityfor harmful repercussions of medical action*, (Jordan; Culture House for Publication and Distribution, 2005), pp. 131-132. See also Ahmad Yasin al-Hiari, *The Civic Liability of Medical Physicians in Light of Jordan's Legal System and Algeria's Legal System*, (Jordan; Culture House for Publication and Distribution, 2005), pp. 135-140.

the physician determined that surgery (laparoscopy) was required in order to remove a tumor from his stomach. The patient suffered from a gastrointestinal perforation as a result of the surgery. He sued the physician and requested compensation based on the fact that he was not provided information on the risks of the surgery. The case was brought before the competent court. Where it decided that the patient should bear the burden of proof. When it was brought before the Court of Cassation, it overturned the decision of the lower court and decided that the burden of proof of the patient's informed consent should be placed on the physician. This decision was the first of its kind, reminding people of a previous decision issued by the same court on 29 May 1951.[4] The court issued this decision based on article (1315) of France's Civil Law. It decided that "the physician has an obligation to give information to the patient on the risks of the therapeutic intervention he might go through, and so he must prove that he fulfilled that. The decision of the lower court, therefore, was issued in contravention of the relevant provision". Article (1315), which the court referred to in its decision, states that "A person who claims the performance of an obligation must prove it. Reciprocally, a person who claims to have performed must substantiate the payment or the fact which has produced the extinguishment of his obligation."[5]

Informing the patient of the risks of therapeutic intervention means offering the patient detailed information on the intended medical intervention about to be performed and its expected effects or repercussions.[6] In light of this, the French Court of Cassation, followed by the State's Council in 2000, indirectly decided that the physician's obligation to give information to his patient on the nature and risk of the therapeutic intervention about to be performed is a result-based obligation not due diligence-based. Additionally, the information disclosed to a physician during the course of the patient-physician relationship should be kept confidential by the physician to the utmost degree.

With regard to the physicians' obligations to make sure that their performance of therapeutic intervention will not put the health of the patient at risk, this applies to all forms of medical practice, including injections, vaccinations, medical analyses and medical devices. They are also bound to

[4] Qasim, pp. 117-121.
[5] Bakir al-Sheikh, *Physician's Legal Responsibility: a study on general rules of comparative policies of laws and judicial attitudes*, (Jordan; al-Hamid House for Publication and Distribution, 2002), p. 88.
[6] Qasim, pp. 90-91.

take into account precautionary measures to avert patients' nosocomial infections[7].

3) **Transformation of aesthetic medical interventions:** The French judiciary's view of aesthetic medicine has transformed in recent times. It used to exempt the physician from any liability for the consequences of aesthetic medical errors the patient might suffer from if there is no professional error. Today, it holds the physician responsible for the consequences of aesthetic medical errors, even if the therapeutic intervention was conducted in compliance with medical, technical and professional norms. This means that the physician has an obligation towards his patient if there is any suffering or injury due to medical malpractice, and this is in addition to making a maximum effort to avoid the patient experiencing any injury during therapeutic intervention.[8]

   Pursuant to that, the Paris Court ruled that the physician of aesthetic medicine is liable for such medical errors despite his compliance with technical medical norms. On 23\11\1913, a physician exposed a girl to x-rays to remove hair from her chin. She suffered visible scars in her face as a result, and so she sued him. The court delegated an expert to examine the case and identify if this was a result of a medical error. The expert reported that no medical error occurred and the injury caused to the patient was difficult to predict beforehand. Despite that, the court held the physician liable and ordered that he should compensate the injured girl. The court's ruling was based on the fact that the physician used disproportionate treatment medicine for a relatively mild condition. The French Court of Cassation attributed the cause of the injury in this case to negligence by the physician because he treated a mild physical flaw as a serious injury.[9] In some other cases of medical errors, a number of Arab courts ordered compensation for injured patients without laws being set to regulate such issues.[10]

4) **Compensation for strain and stress:** The French civil judiciary used to order such kind of compensation only for the family of the person who has died from medical malpractice. Today, it recognizes this kind of

[7] Qasim, pp. 106-116
[8] Munthir al-Fadil, *Medical Liability for Aesthetic Surgery: comparative study*, (Jordan; International Scientific House for Publication and Distribution and Culture House for Publication and Distribution, 2000), p. 71.
[9] al-Fadil, p. 72.
[10]: www.al3asefah.com; visited on August 11, 2011.

compensation for the family of the injured person who might suffer chronic impairment a result of medical malpractice. For example, on 9\2\1989, the French Court of Cassation issued a decision in favor of compensating the family of a person who suffered chronic impairment due to medical malpractice. They were compensated for the stress which was inflicted on the family as a result.[11]

5) **Compensation for medical accidents without admission of liability:** The judiciary no longer requires serious medical errors to hold the State liable for redressing medical risks, and this is on the grounds that the administration's responsibility for medical accidents that occur in public medical facilities is part of its responsibility for providing services. Consequently, the administration's liability arises when the injury caused is due to maladministration and mismanagement of the medical facility, or failure to provide the necessary service for the patients. In this case, insurance companies will not guarantee compensation for their relevant insured health professionals. On the contrary, compensation is to be incurred by the social insurance fund of the French Ministry of Health[12]. This principle was adopted with the hope that legislation would include clear provisions of law that allow compensation for those injured through medical malpractice in general, especially after a draft law was submitted to the French parliament in 1998 and approval of legislation thereof in 2002.

6) **Insurance of the protection of the patient against medical malpractice:** Ensuring the safety of the patient implies that the physician is responsible for providing the appropriate health service for the patient in addition to due diligence. The obligation to ensure a patient's safety was introduced into law first in sea transport and then in land transport before it became a general principle of all aspects of human life. Once the physician fails to realize the desired effect, there is no need for proving the medical error he might have committed, even if he can defend himself by proving that the medical error occurred due to *force majeure* or due to an error committed by another person or by the injured himself.[13] Jurists have spared no effort to make a physician's commitment to patient safety obligatory, and this is without

[11] Fawaz Saleh, "Physicians' Civil Liability: Comparative Study in Syrian and French Law", published on www.syrianbar.org.

[12] The French legal system used the social insurance fund for traffic accidents in accordance with Law 31, December, 1951. It also used it for redressing physical injuries arising from riots according to Law 5\77 of 1977, amended in 1981 and 1983. In addition, it was used for combating terrorism and protecting state security in 1986. See also Qasim, pp. 123-133.

[13] Ibid.

compromising the obligation to due diligence. The courts, for example, decided that the physician should ensure good quality of the device he uses in oral rehabilitation or dental implant. The court's decision was that "if the physician's obligation in a dental surgery is limited to due diligence, he should achieve the expected result". This means that he should use reliable materials and supplies in dental implants. The court implemented this rule with respect to diseases arising from blood transfusion by binding the blood transfusion center to guarantee the safety of the patients concerned. This allows for compensation of the patients suffering from AIDS or hepatitis due to contracting an infection while undergoing blood transfusion within the medical facility.[14] The French courts issued three rulings holding hospitals accountable for nosocomial infections since hospitals are responsible for ensuring the safety of the patients against any hospital-acquired disease. They also have an obligation to ensure the safety of the patient in compliance with the following provisions: 1) the contractual relationship between the hospital and the patient during the stay as an in-patient provides that the hospital is responsible for ensuring protection for the patient against hospital-acquired disease and cannot disclaim such responsibility unless an external cause for an infection is proven; 2) the physician should give information to the patient about the risks of the therapeutic intervention; and 3) the physical should be liable for a nosocomial infection unless an external cause for the infection is proven.[15]

## The Role of the Legislature in Developing a Legal Infrastructure for Medical Malpractice Issues

The intervention of law-makers to draft provisions of law regulating the relationship between the patient and the physician, especially in regard to medical malpractice, has become necessary. This additionally applies to healthcare professionals other than physicians when they also have cases of malpractice. Such provisions are necessary for the regulating of relationships instead of keeping cases of medical malpractice subjected to strictly juridical interpretations which might contradict each other.

Some jurists and legal specialists claim that such law could be futile because the general provisions of law allow for holding accountable any professional breaching

[14] See Qasim.
[15] Abdulhameed, p. 137.

the norms of their profession in a manner that causes injury to others. These provisions of law apply to all professionals, including physicians. Legislative efforts in many countries aim to achieve justice for the physician and the patient. The following legislation examples were either written or amended to serve this goal:

1. Jordan drafted a law regulating medical accountability to do justice to the physician and the patient. Jurists supported the regulation of this relationship through clear provisions of law which judges and lawyers could comprehend in their own clearly laid out terms instead of resorting to uncertain subjective interpretations. They now have legislation whereby the rights and obligations of all parties are clear. This draft law covers significant issues such as the formation of a High Technical Committee, which presents its technical opinion regarding medical malpractice-related complaints filed with the court or the Attorney General. **It also provides that the health service provider who is accused of causing injury or death to a patient during therapeutic intervention should not be remanded during investigation of the case.** It also demanded the Ministry establish a national registry of judicially documented medical errors. However, it has not ordered healthcare service providers to insure against civil liability arising from medical malpractice.

2. On 4 March 2002, the French Parliament attempted to balance between the rights of health care providers and the rights of the patients by substantiating the principle of liability arising from medical practice by health care providers. Concurrently, the lawmakers established a system (National Solidarity) to indemnify the victims of medical malpractice. The Parliament approved of Law No. 2002\303, which is relevant to patients' rights and health system quality. It provides for establishing a **National Office for Compensation of Medical Malpractice**. It was transformed into Law No. 1577\2002, issued in December, 2002. This binds the physician to hold **a contract of insurance against civil liability** and regulates the relationship between hospitals, insurance companies and the national office in regard to compensation for victims of medical malpractice.[16]

[16] Saleh, "Physicians' Civil Liability...". Also see: Ashraf Jabir, *Physicians' Insurance against Civil Liability* (Cairo; Al-Nahda Al-Arabiya House, 1999) p. 472.

3. In 2008, the **United Arab Emirates** drafted a law on "medical liability" outlining physicians' duties, including their duty to inform the patient of the disease he might be suffering from, surgery conditions and if his case is unpromising. It also outlines the provisions related to medical research conducted on patients as well as reproductive health related issues. Provisions relevant to medical errors are also included, such as the definition of a medical error, cases of medical liability, procedures of investigation into medical errors, establishing a "high committee" of medical liability with mechanisms relating to work, jurisdiction and obligatory insurance against liability for medical errors. This law is quite progressive compared to other medical liability related legislation. However, unlike the law in Jordan, it has not provided for the establishment of a national registry of medical errors.[17] In addition, several countries have open discussions concerning how to handle medical errors and Libya drafted Law No. (17) Of 1986 to regulate medical liability.

4. **Obligatory Insurance Against Civil Liability Arising from Medical Errors:** Some States bind health care providers and institutions to insure against liability for medical errors, such as the French Law of Public Health of 2002, Libyan law, Algeria's insurance law and United Arab Emirates Law of 2008.[18] Generally speaking, several countries have taken on an approach to establish a legal basis for insurance against liability of medical errors. The cost of the financial burden of such insurance would be shared between the physician involved and the health institution he works for, though this would differ from one country to another.

With these developments in mind, the State of Palestine should accordingly work towards developing a holistic and comprehensive legal system to address medical accidents and the injuries caused to citizens as a result of such accidents, no matter

[17] The regulation related to this law was issued in 2009. It included 17 articles.

[18] Article (31) of Libyan law No. 17 of 1986 on medical liability on that: "arise body called (Authority (medical insurance)) have legal personality, committed people organizers professions medical and related professions insurance have about the dangers of the exercise of those professions ". And ensures UAE medical liability law for the year 2008 several articles on medical liability insurance (for more, see articles 25-27 of the Act.

if these injuries are mild, severe, cause death or even result in unnecessary anxiety and stress.[19]

[19] For more on Palestinian reviews on medical errors, refer to: Maen Shihda Ideis, Medical Errors,- Towards Balanced Legal Protection for the Parties to Medical Errors Cases, (Palestine: ICHR), 2012. Also Maen Shihda Ideis Physician's Liability for His\Her Professional Errors, (Palestine: Palestinian Association for Human Rights and Environment –Law), 2001