

COMPENSATION FOR MEDICAL ERRORS IN LIGHT OF THE PROVISIONS OF THE DUBAI CASSATION COURT: AN ANALYTICAL STUDY

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Abstract

Compensation for medical errors requires the doctor's responsibility for the harm that caused the patient as a result of these medical errors; Therefore, the researcher had to explain the concept of the doctor's responsibility, and its legal nature, whether it is contractual or negligence, as well as an indication of the claim of compensation, its pillars and procedures for investigating it, leading to an indication of the judiciary's authority to estimate the compensation for the reward. A medical error is every violation or exit from the doctor in his/her behaviour on the rules and medical principles that are required to know, and the error may be technically such as experimental and unprecedented surgical operations in violation of the rules regulating this or conducting experiments or scientific research that are not based on the patient or give a medicine to the patient as a test. It may be professional, such as an error in treatment or lack of follow-up. In addition, the judiciary's estimate of compensation for the type of error and its transgression also depends on the extent of the damage to the patient and the relationship of causation between them. Therefore, the researcher touched on the authority of the trial court to assess compensation for damages caused to the patient as a result of medical error, and judicial applications from the Dubai Court of Cassation as a supreme court in the United Arab Emirates.

Keywords: Compensation, Medical Errors, Dubai Court of Cassation, Trial Court

INTRODUCTION

Regulating the provisions of the civil liability of the doctor in light of medical errors is a subject of a high degree of importance, and the Emirati legislator has regulated this subject in a special law, which is Federal Decree-Law No. 4 of 2016 regarding medical liability. This law was issued after the increase in the number of lawsuits demanding compensation for medical errors, the spread of plastic surgery, and the increase in the number of private hospitals that may be investment projects. Therefore, until 2008, lawsuits against medical errors were filed according to Federal Civil Transactions Law No. 5 of 1985, amended by Federal Law No. 1 of 1987. In 2008, the first UAE federal law regulating medical liability was issued, and after that Federal Decree Law No. 4 of 2016 was issued regarding medical liability (Akoush, 2000).

The importance of the article is that it sheds light on an important and vital topic that has many practical judicial applications, which is compensation for medical errors. With the development of the medical profession and its practices, its risks have increased and the doctor's responsibilities have increased, so it was important to address this topic and explain the special law regulating it. The problem of the article is that the development of all fields and specialties of medicine has resulted in multiple medical errors that occur to the patient. Therefore, the subject of the article represents the importance of studying what is meant by a medical error and explaining ways to compensate for it (2000).

The doctor's negligence in dealing with the patient, his failure to follow caution and caution, and his causing harm and damage to the human body or his death, results in the doctor being held accountable for any error or negligence (Al-Najjar, 2022).

METHODOLOGY

The article adopted the analytical approach by reviewing the texts of the private law regulating medical liability within the United Arab Emirates, which is Federal Decree-Law No. 4 of 2016, and commenting on it. The article also focused on the applied aspect by reviewing the judicial rulings issued by the Dubai Court of Cassation in all aspects of the study (Al Amaren, 2020).

1. DISCUSSION AND ANALYSIS

1.1 The concept of medical error

A mistake is defined as a flaw in a person's behaviour, not done by a rational, insightful man who was surrounded by external circumstances similar to the circumstances that surrounded the responsible person, so the responsibility is based on the idea of the mistake that caused harm to others, thus requiring legal accountability. Some have defined error as a person's deviation from the usual behaviour required by law while being aware of its consequences (Akoush, 1973).

Emirati legal jurisprudence has agreed that error consists of two basic elements, the first of which is breach or transgression, which represents the material element, and the second of which is awareness or discrimination, which is the moral element. The traditional idea of error in civil liability generally includes a medical error, but due to the specific nature of doctors' work, and the development the world is currently witnessing in the medical field; The UAE legislator adopted special rules to regulate medical liability by establishing special legislation without being limited to the general rules in the Civil Transactions Law, in accordance with Federal Decree-Law No. 4 of 2016 regarding medical liability, which defined the concept of medical error in Article 6 as: "An error that is due to ignorance of technical matters that everyone who practices the profession is supposed to be familiar with, or that is due to negligence or failure to exercise the necessary care." (Article 6 of the Federal Decree-Law No. 4 of 2016)

It is established in the judgment of the Dubai Court of Cassation that the doctor's responsibility towards his patient requires that he exercise a reasonable and appropriate degree of competence and skill and exert a high degree of attention, care, and vigilance and that the standard for this is what is accepted by skilled and vigilant professionals who are supposed to be at their level. Also, the estimating of whether or not the doctor performed the duty entrusted to him to the required degree in accordance with this standard, extracting the error that necessitated his responsibility

and the resulting harm, and proving the causal link between the error and the harm. All of these are matters of fact in which the trial court is independent within the scope of its authority to collect and understand the reality in the case and evaluate its evidence, including the expert's report, without being commented on by the Court of Cassation as long as it bases its ruling on justifiable reasons that have support in the papers (Al-Najjar, 2022).

It is also established in the judgment of the Dubai Court of Cassation that the responsibility of the doctor and his technical assistants is subject to the general rule and that when the judge investigates and confirms the error attributed to any of the medical team, whether professional or not, and regardless of its degree of seriousness, whether serious or minor, the doctor or any of his team of technical assistants from the nursing staff must be held accountable for his mistake. This is because the permissibility of the work of a doctor and his assistants is conditional on what they perform in accordance with established scientific principles. If they neglect to follow these principles or violate them, they will be held liable according to their intentional action or as a result of their negligence, negligence, or lack of caution in performing their work (Civil Appeal No. 2021/383, 2021).

The human body is the most precious thing a person possesses, and preserving health is what any person hopes for, this is the case and the doctor's mistake differs from the mistake of other professionals because that leads to damage to the human body or loss of the benefit of one of its organs. The doctor is the one who examines the patient, diagnoses the disease, and determines the appropriate medication for the patient's treatment condition. If the patient's condition deteriorates and it becomes clear that the doctor made an error in diagnosing the disease, which results in him prescribing an incorrect treatment; The doctor has committed a medical error that requires accountability, which is one of the forms of medical errors (Al-Jumaili, 2009).

Medical liability occurs when the doctor fails to provide the due care, he/she is supposed to provide towards his patient, throughout the period of the doctor's relationship with his patient. Any error by the doctor that leads to harm to the patient must compensate the latter for those damages. The doctor is obligated to exercise the necessary and required vigilance and care when performing his work, and this vigilance must be in accordance with the established principles of medical science, in other than exceptional circumstances (Al-Shawabmeh, 2011).

There are two standards for considering the standard of ordinary doctor error, the first of which is a personal standard and the other is an objective standard. The personal standard is based on comparing the doctor's actions in light of his normal behaviour in terms of the possibility of avoiding harmful acts if he/she was found in the same circumstances that surrounded the perpetrator. If the doctor was able to avoid the harm and did not, his/her action is considered a mistake. This standard is criticized for being inaccurate and difficult to apply because it relies on monitoring the behaviour of the aggressor to determine if his behaviour constitutes a mistake or not. There is no justice achieved by applying it, and it is not a fair standard to hold accountable someone who is accustomed to being vigilant for his smallest lapses and not punishing someone who is accustomed to negligence for negligence. The objective standard by which the error in the obligation to exercise diligence is measured depends on relying on the analogy of the behaviour

of the average person, who is the middle man among people, that is, the insightful man who is neither too careful nor vigilant nor too careless and ignorant, and this standard applies to responsibility whether it is contractual or negligent. The doctor's behaviour is compared to the behaviour of an attentive and perceptive doctor if he/she is found in the same circumstances surrounding the first, without considering the internal factors specific to the doctor's person. If he/she deviates from this behaviour, an error is found and responsibility is imposed for the damages that befell the injured patient (Abdul Ghani, 2017).

The researcher prefers to take the objective standard because it does not take the doctor's personal considerations into account like the personal standard. The objective standard is based on the damage based on the behaviour of the doctor who committed the harmful act, taking into account the external circumstances surrounding him/her. It is an objective standard that is fairer than the personal standard.

1.2 Types of medical error

Achieving a balance between the interests of the patient and the doctor requires specifying the types of medical error, by specifying which the patient has the right to consult the doctor when he/she discovers the existence of this medical error. This is not considered prejudice against doctors or intimidation of them. Rather, the doctor should develop his medical practices and strive diligently to develop himself and his/her commitment to scientific rules and the foundations of medical science, and to enhance trust between the patient and the doctor. Medical errors are divided into two categories, the first is professional, and the other is ordinary, as follows:

1.2.1 Professional medical error:

A professional medical error means every technical error committed by a doctor as a result of violating the technical rules and principles required by the medical profession, meaning deviating from the professional and technical behaviour of the medical fundamentalist rules required by medical science theoretically and practically within medical science circles at the time of carrying out medical work (Qandil, 2004). Some define it as an error committed by a doctor while practicing the medical profession, and it is directly related to the arts of the medical profession and its principles so that it is closely linked to the status of a doctor practicing the profession and it is impossible to attribute it to others. A professional medical error may be related to the doctor's humanitarian duties, or it may be related to his technical work as a doctor (Markus, 1992).

First: Errors related to the doctor's humanitarian duties

A. Commitment to insight

Article 4 of the UAE Federal Medical Liability Law No. 4 of 2016 stipulates that "without prejudice to the obligations stipulated in the applicable legislation, the doctor must, in particular, commit to the following: 5. Inform the patient of the available treatment options. 6. Describing the treatment, specifying its quantities and method of use in writing and clearly, indicating his/her name, signature, and the date of the prescription, and alerting the patient or his/her family, as the case may be, to the need to adhere to the method he/she specified for treatment. 7. Informing the patient of the nature of his/her illness and the degree of its seriousness, unless his/her interest requires otherwise or his/her psychological state does not permit informing him/her. Any of the

patient's family, relatives, or companions must be informed in the following two cases: A. If he/she is incapacitated or incomplete. B. If his/her health condition does not allow him/her to be informed personally, and he does not specify a person to inform him/her. 8. Informing the patient or his/her family of complications that may result from the diagnosis, medical treatment, or surgical intervention before starting its application, monitoring them, and initiating treatment whenever possible." (Article 4 of the Federal Decree-Law No. 4 of 2016)

In all cases, the doctor has an obligation to inform the patient, considering this obligation as one of the pillars of the medical contract. However, the obligation to provide insight is a matter related to the proper implementation of this obligation (Morcos, 2015).

The goal of insight is for the doctor to provide advice to the patient, guide him to what will benefit him, and enlighten his will about the type and nature of the disease, as well as the method of treatment, the expenses it requires, the side effects that may result from it, and other technical matters that he/she is unaware. He/she must explain to the patient, frankly and in detail, the type of medical work that will be performed on him/her and that suits his/her health condition, especially for critical diseases such as those that require surgical operations to completely or partially remove a part of the body, or implant a natural organ or a new factory into it. It is not enough for the doctor to simply inform the patient of the type of treatment proposed, he/she must obtain his/her consent to carry out this treatment. Of course, the patient will not be able to make a decision unless he/she is fully aware of the reality of his/her illness and the type of surgical intervention he/she needs if the medical condition requires it. It is not permissible for him/her to begin treatment except after obtaining prior informed consent from his patient unless he/her is in a state of extreme urgency that does not allow him/her to make a decision, as is the case in traffic accidents in which the victim enters the coma stage, or the case of the actual loss of an organ in the body that requires its replacement by transplanting another organ, such as a kidney transplant (Zawawi, 2019).

In order for the doctor to not be responsible, he/she must have informed the patient about his/her illness, its nature, how to treat it, and the risks of surgical operations. Otherwise, the doctor will be responsible even if he/she has not committed a mistake in carrying out his/her work. Accordingly, the doctor's obligation to inform the patient is an obligation to achieve a result (Mamoun, 2000).

B. The doctor's obligation to obtain the patient's consent:

The obligation to obtain the patient's satisfaction in the medical treatment contract is considered one of the most important obligations placed on the doctor, as it is the doctor's duty to obtain the patient's satisfaction before any therapeutic or surgical intervention, and the failure of this satisfaction makes the doctor wrong and responsible for the risks resulting from the treatment, even if he/she did not commit the slightest error in undertaking it. This consent shall be issued by the patient or his/her legal representative if he/she is in a state that does not allow him to express his/her consent, provided that this consent is free, informed, and legally valid. The doctor's responsibility remains as a result of his/her negligence and the resulting treatment risks, and this absolutely does not affect the patient's consent in the medical treatment contract, as this approval

is an approval for the treatment and not an approval for the risks of treatment as a result of the doctor's negligence, and the doctor has the responsibility of proving the patient's prior consent (Mansour, 1999).

It is stipulated in the rulings of the Dubai Court of Cassation that "a doctor is prohibited from performing a surgical operation unless written consent is obtained from the patient himself, including his/her acknowledgment that he is clearly informed of the medical complications that may occur during and after the surgical operation. It is understood if he has full capacity, meaning that he/she has completed eighteen years of birth, or if he is a relative up to the fourth degree, if he lacks legal capacity, or if it is impossible to obtain his/her consent and approval due to loss of consciousness or loss of awareness of a mental illness or psychological illness, or his health condition does not allow obtaining his consent and approval. This is so that the patient or his relatives, as the case may be, have the choice between performing the operation or refraining from it. If the doctor performs the operation and the patient suffers from the medical complications that resulted from the surgery, and the patient denies the doctor to perform the surgery without taking from him/her an informed acknowledgment of the possible medical effects and complications that may result from the surgery" (Civil Appeal No. 2021/234, 2021)

In order to avoid liability for himself, the doctor must prove that he/she has obtained this written declaration, which would negate the description of negligence, or prove the existence of an emergency situation that necessitates the necessity of immediate surgical intervention to save the patient's life (Al-Sanhouri, 1998).

The Emirati legislator has excluded some cases in which the patient's consent can be dispensed with, such as emergency cases that require urgent and rapid intervention, or when the patient's illness is contagious or a threat to public health. In this regard, Article No. 5 of the UAE Federal Medical Liability Law No. 4 of 2016 stipulates that "A doctor is prohibited from treating a patient without his consent, except in cases that require emergency intervention and in which it is impossible to obtain consent for any reason, or in which his/her illness is contagious and a threat to health. or public safety, the consent of the incompetent patient regarding the examination, diagnosis, and administration of the first dose of treatment is taken into account, provided that any of the patient's relatives or companions are informed of the plan for this treatment." (Article 5 of the Federal Decree-Law No. 4 of 2016)

Second: Errors related to the doctor's professional or technical work

The doctor's obligation is not to disclose professional secrets. There is no specific definition of professional secret, but in general, it means non-disclosure and not making any declaration or statement about the work of the job or profession. He/she should not disclose matters that he/she is aware of by virtue of his/her job if they are confidential by nature, or according to instructions, and the obligation to maintain professional secrecy is binding on employees, even after they finally leave their jobs (Othman, 2009).

As for practicing the medical profession, it is the origin of the emergence of the medical secret. It is impossible to practice this profession in light of the lack of trust between the patient and the doctor. There is no trust without a medical secret. If it is established that the diagnosis is made

through the doctor's knowledge of the symptoms of the disease through acquired scientific data, then the patient's disclosure of the developments of the symptoms and medical antecedents in his genetic origins to the doctor is of great importance in diagnosing the disease, and this disclosure that is made by the patient to the doctor cannot be done if the patient is afraid of the doctor revealing the secret (Al Musalla, 2012).

The development of society and the progress of medicine have also contributed to the development of the concept of medical secrets through the emergence of new concepts such as the shared secret among members of the medical team, and the patient's consent to divulge the secret to persons he specifies in advance. Disclosure is achieved even without the intention of harming and the necessity of preserving the secret even after the patient's death. Given that the disclosure of medical secrets is subject to criminal and disciplinary punishment in accordance with the ethics of the medical profession, its nature raises many problems in application in cases where the law orders or authorizes disclosure (Al-Sanhouri, 1998).

The doctor's duty to adhere to medical confidentiality is linked to the concept of the right to privacy, as it is an intrinsic right that creates a duty of abstinence against the doctor. According to this duty, the doctor refrains from revealing the secrets of his/her patients, as a result of the relationship that arises between him/her and them. By virtue of this relationship, the doctor is required not to divulge the secret, and this relationship also requires him/her to ensure the compliance of his/her assistants (Fakih, 2022).

Maintaining the patient's secret is considered one of the doctor's most important moral and humanitarian obligations towards his patient, and it is an obligation that finds its justification in reality. If the patient fears that his doctor will reveal his secret, he will refrain from treatment for fear of his matter being exposed and for fear of the harm that might befall him if his matter is revealed (2022).

The UAE legislator has prohibited the doctor from disclosing his patient's secrets. Article 5/6 of the UAE Federal Medical Liability Law No. 4 of 201 stipulates that "the doctor is prohibited from disclosing the patient's secrets that he/she learns during the practice of the profession or because of it, whether the patient has entrusted him/her with this secret or entrusted it to him/her or if the doctor had seen it himself, and this prohibition does not apply in any of the following cases: a. If the confidentiality is disclosed at the patient's request or consent. b. If the disclosure of the secret is for the benefit of the husband or wife and is personally notified to either of them. c. If the purpose of disclosing the secret is to prevent the occurrence of a crime or to report it, in this case, disclosure shall be to the competent official authority only. d. If the doctor is appointed by a judicial authority or an official investigating authority in the country as an expert either of them summons him/her as a witness in the investigation of a criminal case. e. If the doctor is assigned to conduct the examination by an insurance company or the employer, this does not exceed the purpose of the assignment. f. If it is based on a request from the health authority and the purpose of establishing the secret is to protect public health in accordance with the conditions and controls specified by the executive regulations of this decree-law. g. If the purpose of disclosing the secret is for the

doctor to defend himself before an investigating body or any judicial body and as required by the defence's needs." (Article 5/6 of the Federal Decree-Law No. 4 of 2016)

Although the basic principle is that the doctor is obligated to provide care, there are cases in which the doctor or medical worker is obligated to achieve a result, as is the case in medical tests. As a result of scientific development, the element of possibility has become non-existent unless there is negligence or negligence on the part of the person conducting the analysis. The same applies to the use of medical tools and devices. The doctor using these devices is considered responsible for any malfunction or deviation in these devices that may lead to harm to the patient (Al Musalla, 2012).

Regarding blood transfusions, the doctor undertakes towards patient to provide appropriate and healthy blood and that the blood transfused is not contaminated or transmitting any infection. If it is contaminated or transmits an infection, the doctor is responsible to the patient for the diseases and infections that afflict the latter as a result of the transfusion of contaminated blood, unless the doctor proves that what happened to the patient was the result of a foreign cause that the doctor had no control over. Immunizations and vaccinations, in which the doctor is responsible for achieving the result of not transmitting an infection or disease to the recipient of the immunization or vaccination, as it is not accepted that the vaccination or immunization is a transmitter of a disease or infection, the doctor who performs the vaccination or immunization procedure has an obligation to achieve a result, which is the safety of the immunized person (Othman, 2009).

1.2.2 Ordinary medical error:

Ordinary medical error means an error that is outside the scope of the medical profession practiced by the doctor, which is a breach of the duty of caution that must be followed by all people and which the doctor must adhere to before committing to the duties of his profession. For example, a drunk doctor performs surgery on a patient, and the normal error relates to the ethics required of all people, and these ethics are considered among the ethics of the medical profession (Abdul Ghani, 2017).

Some believe that a normal medical error is what a doctor makes when performing his job without having anything to do with the technical principles of medicine, such as a doctor who performs surgery while drunk, and the criterion for this error is no deviation from the usual behaviour of the average man, which is the average man. He/she is the middle man who represents the majority of people and must be determined in light of the apparent circumstances in which the doctor found himself being questioned (Othman, 2009).

Since the patient's relationship with his doctor is a relationship that includes honesty, honesty, keeping secrets, and preserving private parts, the doctor's responsibility arises if he violates one or more of these principles, which may lead to harm to the patient, which requires the doctor to be held accountable. The doctor who discharges the patient from the hospital despite his/her instability in his/her health condition or before completing the required treatment period, he/she may have committed a medical error that requires accountability (Al-Jumaili, 2009).

Article 9/A, of the UAE Federal Medical Liability Law No. 4 of 2016 stipulates that: "The patient may not be removed from the health facility unless his/her health condition allows it in accordance

with recognized medical principles or based on the patient's request if he/she has full capacity despite his/her awareness of the consequences of leaving without medical advice, and a written acknowledgment is taken from him/her that he/she bears responsibility." (Article 9/A of the Federal Decree-Law No. 4 of 2016)

1.3 Provisions of civil liability for medical error and estimation of compensation therein

The doctor's relationship with his patient is a legal relationship governed by the law, and before it was governed by the law, it was a relationship governed by the rules of ethics and humanity. Therefore, the doctor was obligated to provide the necessary care for his/her patient, and in view of the developments in medical science and the development of medical devices and the possibility of an error on the part of the doctor, it was obligatory for the doctor to compensate the patient about medical error (Abdul Ghani, 2017).

1.3.1 Doctor's liability for medical error

Responsibility is holding accountable and bearing the consequences of a mistake. Civil responsibility constitutes one of the pillars of the legal and social system. Every rational person is responsible for his actions, that is, he is committed to certain obligations towards others, the most important of which is not to harm them. If he violates these obligations, he is obligated to repair the damage and compensate the injured person (Othman, 2009).

Article 3 of the UAE Federal Medical Liability Law No. 4 of 2016 stipulates that "Whoever practices the profession in the country must perform his/her work duties with the accuracy and honesty required by the profession and in accordance with recognized scientific and technical principles. In order to achieve the necessary care for the patient, while not exploiting his/her need to impose an unlawful benefit for her/himself or others and without discrimination between patients, he/she must also adhere to the legislation in force in the state, which means that the doctor is held liable due to his negligence in his/her duties towards patients." (Article 3 of the Federal Decree-Law No. 4 of 2016)

Article 6 of the UAE Federal Medical Liability Law No. 4 of 2016 stipulates that "a medical error is what is committed by a practitioner of the profession as a result of any of the following reasons: 1- His/her ignorance of the technical matters that everyone who practices the profession is supposed to know of the same degree and specialization. 2- Failure to follow recognized professional and medical principles. 3 - Failure to exercise due care. 4 - Negligence and failure to exercise caution. Thus, the doctor is held liable whenever he/she breaches one of his obligations towards his patient." (Article 6 of the Federal Decree-Law No. 4 of 2016)

The doctor's civil liability takes one of two forms: the first is contractual liability, and the second is tort liability. The researcher will explain both forms, as follows:

1.3.2 Doctor's contractual liability

The basis of this responsibility is the contract concluded between the doctor and the patient. The doctor's failure to fulfil his contractual obligations in the medical contract exposes him to civil liability. Under the contractual relationship, the doctor is obligated to exert the necessary care, effort, and vigilance to achieve what was contractually agreed upon. The liability here is conditional upon the doctor's error and his harm to the patient (Al-Jumaili, 2009).

1.3.3 Doctor's tort liability

The doctor's tort liability arises as a result of a breach of a prior legal obligation, which is the obligation not to harm others. It is known as an unlawful error, as the doctor is legally obligated to provide the necessary care for the patient, and responsibility is imposed whenever the doctor breaches this legal obligation if this breach causes harm to the patient (Qandil, 2004). The researcher believes that whether the patient signs a medical contract with the doctor or not, the latter is in all cases legally bound to the former to exercise the necessary care and take the necessary effort and vigilance.

1.4 Medical liability committees

Article 18 of the UAE Federal Medical Liability Law No. 4 of 2016 states that “compensation claims filed due to medical liability shall not be accepted except after resorting to and presenting to the medical liability committees in accordance with the provisions of this decree-law.” (Article 18 of the Federal Decree-Law No. 4 of 2016)

The UAE legislator has introduced the necessity of presenting and resorting to medical liability committees to accept compensation claims filed due to medical liability, where the patient is examined by the specialized medical committee and all medical procedures and circumstances in which the medical error occurred are reviewed. This is something that the court examining the case cannot do, so the medical committee reviews the procedures for the medical work, the circumstances surrounding it, and all its procedures. This is to clarify the extent of the doctor’s responsibility that requires compensation. The decision of the Medical Committee can be appealed before the competent authority, and the court retains the supreme authority to evaluate the work of the Medical Liability Committee and the authority to estimate compensation for damages (Al Musalla, 2012).

It is decided in the judgment of the Dubai Court of Cassation that the text in Article 18 of Federal Decree-Law No. 4 of 2016 regarding medical liability, effective as of 8/15/2016, stipulates that “an expert committee of doctors shall be established by decision of the Minister or the head of the health authority, as the case may be.” (Article 18 of the Federal Decree-Law No. 4 of 2016)

Specialists in all medical specialties are called the “Medical Liability Committee.” The executive regulations specify how it is formed and the rules and procedures for its work. This committee is exclusively responsible for examining complaints referred to it by the health authority, the public prosecution, or the court, and determining the extent to which a medical error occurred or not and the extent of its seriousness. The provisions stipulated in Federal Law No. 7 of 2012 shall apply to this committee insofar as they do not conflict with the provisions of this Decree-Law, and compensation claims filed due to medical liability shall not be accepted except after resorting to and presenting to the Medical Liability Committees in accordance with the provisions of this Decree-Law. (Abdul Ghani, 2017)

The text in Article 20 of the Decree Law stipulates that “the complainant and the practitioner against whom the complaint is made, as the case may be, may appeal the report of the Medical Liability Committee by submitting a grievance to the competent health authority within thirty days from the date of notifying them in a legal letter of what the report concluded. As specified in the

executive regulations, the competent health authority must refer the report and all papers and documents related to it, along with the grievance, to the Supreme Committee for Medical Liability stipulated in Article 21 of this Decree-Law. The committee's report is considered final if it is not appealed within the time specified in the first paragraph of this article. In this case, the medical reports issued by it will not be appealed to any party." (Article 20 of the Federal Decree-Law No. 4 of 2016)

The text in Article 21 of the same Decree-Law stipulates that "a permanent medical technical committee shall be formed by a decision of the Council of Ministers called the Supreme Committee for Medical Liability based on the proposal of the Minister of Health and Community Protection after coordination with other health authorities. The decision specifies how it is formed, the rules and procedures of its work, the duration of its membership, and the rewards granted to its members. This committee has exclusive jurisdiction to consider grievances from the reports of the medical liability committees stipulated in this decree-law. It shall prepare a report justifying its opinion on each grievance in accordance with the procedures and rules specified by the decision of the Council of Ministers referred to above. The Supreme Committee has the right to confirm the report and reject, amend, or cancel the grievance. Its report is considered final and the medical reports issued by this committee are not subject to appeal in any way before any party." (Article 21 of the Federal Decree-Law No. 4 of 2016)

Therefore, the report issued by this committee was considered final and not subject to appeal in any way before any party, and a condition was introduced for filing compensation claims due to medical liability before the courts, which is that the medical liability committees must be resorted to and presented before filing them, otherwise, they will be unacceptable. This is based on the fact that claims for compensation that are filed before the courts due to medical liability are not acceptable except after resorting to and presenting to the medical liability committees and issuing their final report on the existence of the medical error or not - in accordance with the provisions of this aforementioned decree-law (Al-Bashir, 1980). In the event that the lawsuit is filed before the courts before the Supreme Committee for Medical Liability decides on the grievance submitted to it by the complainant or the practitioner of the profession against whom the complaint is made, as the case may be, the court must stop hearing the case until that committee decides on the grievance presented to it. The court may rely on the report of the Medical Liability Committee, and the court may appoint a forensic physician whenever it deems it necessary to do so in the interest of justice (Hanna, 2007).

The Dubai Court of Cassation ruled that the text of Articles 15 and 16 of Federal Law No. 10 of 2020 referred to indicates that "the trial court should seek the assistance of the Supreme Committee for Medical Liability to indicate the extent of the alleged medical error, along with an explanation of its cause and the resulting damages, if any and the causal relationship between the error, the damage, and any other matters requested of it is a permissible matter for the court to resort to, and it may also assign forensic medicine or any other party it deems appropriate to seek assistance in this regard." (Civil Appeal No 2021/430, 2022)

1.5 Conditions for compensable damage

The conditions for compensation for medical error are as follows

1.5.1 Violation of a right or legitimate interest.

Damage is a violation of a legitimate interest of the injured party that has a financial value. When the legitimate interest is absent, the reason for compensation is absent. Medical error is considered an attack on the human body and is considered a violation of a legitimate interest, which is the human right to the safety and integrity of his body, which is a right protected by the law.

1.5.2 The damage must be personal

The damage must be inflicted on the personally injured patient, and if the injured person refrains from filing a civil lawsuit against the person causing the medical error, the right does not transfer to anyone else, and the reciprocated damage is considered personal damage to the person who reciprocates it (Mansour, 1999).

1.5.3 The damage must be realised

The actual damage means that it actually occurred or that it will inevitably occur at a later time. The actual damage includes the current damage and the damage that was caused by it, even if the effects of some of them are slow or postponed to the future, such as the failure to detect cancer before surgery is performed, and as a result the patient's condition worsens and the treatment becomes difficult due to the cancer reaching an advanced stage (Al Musalla, 2012). It is established in the jurisprudence of the Dubai Court of Cassation that: "For a ruling on compensation for material damage related to a breach of a financial interest of the injured person, the damage must be proven by having already occurred or its occurrence in the future is inevitable and can be estimated. However, the mere possibility of the damage occurring in the future is not sufficient to award compensation. The onus is on the injured party to prove the material damages he claims and their value as compensation for the loss he has suffered." (Civil Appeal No. 1990/206, 1991)

In order to be able to award compensation, the damage must be proven with certainty. This will be the case if it actually occurred, which is what is called immediate damage, whether this damage is a loss that befell the injured party or a gain that he lost. Both of them are forms of immediate damage. Examples of actual harm that actually occurred include causing death or injury, or destroying money, or defaming a merchant with the intention of damaging his/her reputation and diverting customers from him/her (Al Musalla, 2012).

It is established in the judgment of the Dubai Court of Cassation that the guarantee is estimated to the extent of the loss or damage suffered by the injured person or what he lost in profit, provided that this is a natural result of the harmful act or contractual error and that it is certain to occur actually, immediately or eventually. As for the potential damages That is, it does not occur, so compensation for it is not obligatory unless it actually occurs. However, the law does not prevent counting in the lost gain what the injured person had hoped to obtain, as long as this hope has acceptable reasons. This is because if the opportunity is a possible matter, then missing it is a definite matter that must be compensated for (Civil Appeal No. 2005/66, 2005).

1.5.4 The damage must be direct

Direct damage is the natural result of the harmful act, and is the component of the causal relationship between it and the error that caused it. Compensation includes direct damage only,

not indirect damage, in implementation of the rule of the doctor's responsibility for direct damage only, which the injured person could not have prevented by making a reasonable effort. The person responsible for the damage must compensate the injured person for all damages that befell him, whether material or moral. This goal cannot be achieved unless the compensation is appropriate to the reality of the damage actually incurred and comprehensive of all the loss the injured person has suffered and the gain, he/she has lost (Abdul Ghani, 2017). It is established in the judgment of the Dubai Court of Cassation that "the damage must be direct and certain, and therefore it is not permissible to compensate for indirect damage, that is, not related to the injured person, nor is it permissible for potential damage, and compensation must be limited to reparation of the damage caused to the injured person himself." (Civil Appeal No. 2012/180, 2012)

It is also established in the judgment of the Dubai Court of Cassation that "every person has the right to the integrity of his body, and that assaulting him or causing injuries to him is considered harm for which compensation must be made. This damage is one of the types of material damage that befalls the injured person, even if it does not result in harming his ability to earn or incurring losses or expenses for treatment, taking into account that the human right to life and bodily integrity are among the rights guaranteed by the law and that it is a crime to violate them." (Civil Appeal No. 2018/423, 2018)

Hence, harming the integrity of the body by any harm would violate this right as it is an element of physical harm. This physical harm includes compensation for temporary health disability and continuous partial disability, and moral harm is everything that affects dignity, feeling, or honour, including psychological pain.

1.6 Estimating compensation for medical error

The judicial estimate of compensation is considered in the event that the provisions for calculating it are not specified by law or when the parties concerned do not agree on its estimate, and the scope is open before the judiciary to estimate compensation, and this judicial estimate of compensation is focused on the damage caused to the injured person. The judge has discretionary authority to estimate the compensation that compensates for the damage, and to determine the method he deems appropriate to determine compensation for material and moral damages. Estimating the damage and determining the compensation for it is one of the issues of fact in which the trial court is independent as long as it has clarified these elements and the extent of the right of the injured party to them (Abdul Ghani, 2017). The trial court is subject to the supervision of the Court of Cassation, as the trial court must weigh with the balance of the law the evidence and data presented to it regarding the occurrence of the harm and determine its elements (Al-Jumaili, 2009).

It is established in the judgment of the Dubai Court of Cassation that "estimating the elements of damage and taking into account the circumstances in determining the amount of compensation to be compensated for is one of the issues of fact that the court is independent of, and there is no objection to the ruling as it did not specify a mathematical standard for estimating compensation for the material and moral damages that befell the injured person. As long as the law does not require following specific criteria for assessment, and this court does not comment on that, as long

as it clarifies the elements of damage and directs the claimant's entitlement to compensation for it based on what is presented to it in the papers." (Appeal No. 2018/1129, 2018)

Controls that must be taken into account in estimating compensation: In estimating the value of compensation, the trial court must take into account the following: (Al-Jumaili, 2009)

1. Compensation must be complete and comprehensive for all damages incurred, and must also include material losses and expenses that the injured party incurs or that he will inevitably have to spend to repair the consequences of the damage he suffered. It must also include compensation for lost profits, as well as compensation for moral and ethical damages. Where it is established in the Dubai Court of Cassation's jurisprudence that "although the estimation of compensation that compensates for the damage is one of the issues of fact in which the trial court is independent, that does not make the Court of Cassation take a negative position, since the judge's power of assessment, like any discretionary power, must find its limit in what is decided. Legally, in terms of controls and restrictions and the legal values it has established in this regard, the most important of which is that the compensation estimate be reasonable and acceptable, redressing the damage, and being equal, without excess or parsimony. The apparent incompatibility between the damage and the compensation decided as a penalty for the debtor's liability takes the issue from the scope of legality to the scope of illegality. Therefore, the estimate of compensation must be based on its elements established in the papers and its justifications, in which the basis of compensation is balanced with the reason for its imposition, so that it appears to be equivalent to the damage without exceeding it." It is established in the judgment of the Dubai Court of Cassation that "Estimating the elements of damage and taking into account the circumstances in determining the amount of compensation to be compensated for is one of the issues of fact upon which the court of the matter is independent, and there is no objection to the ruling as it did not specify an arithmetic standard for estimating compensation for the material and moral damages sustained by the injured person. As long as the law does not require certain criteria for evaluation to be followed. This court will not be held accountable for that as long as it has explained the elements of damage that are included in the calculation of compensation and the basis of the entitlement of the person seeking compensation for it based on what is presented to it in the papers. It may also order total compensation without committing to detailing the amounts awarded for each element of damage separately." The trial court has the right to take into account the circumstances and circumstances in which the damage occurred to estimate the value of compensation. What is established in the Dubai Court of Cassation ruling is that determining the damage and taking into account the circumstances in determining the amount of compensation to be compensated are issues of fact in which the trial court is independent. As long as the law does not require that specific criteria be followed for its assessment and there is no oversight by the Court of Cassation in this regard, as long as it clarifies the elements of the harm and the extent of the claimant's entitlement to it based on what is presented to it in the papers.

2. The court must take into account the gravity of the damages committed by the official. Among the established principles in the Dubai Court of Cassation's jurisprudence is that what matters in estimating compensation is the seriousness of the damage rather than the seriousness of the error,

given that compensation is a remedy for the damage. If the error occurred by multiple people, the court must oblige them to join hands in what is required to compensate the injured person or obligating each person to pay a certain amount of compensation if the court decides to determine the percentage of each person's contribution. It is established in the judgment of the Dubai Court of Cassation that the stipulation in Article 282 of the Civil Transactions Law stipulates that "every harm to another obliges the perpetrator, even if he is not discerning, to guarantee the harm," and the stipulation in Article 291 of the same law stipulates that "If there are multiple persons responsible for a harmful act, each of them shall be responsible in proportion to his share in it, and the judge may rule equally, jointly, or jointly among themselves." It indicates that anyone who harms others in person or property must compensate for the damage in full, and if there are multiple persons responsible for an illegal act in causing a specific damage, they are joint in their obligation to compensate the damage and the responsibility among them is equal. If one of them pays all of the compensation or more than his share, he has recourse against the rest in accordance with the general rules. Therefore, it is permissible for the injured party to recourse to any of the officials for full compensation. It was also decided in the Dubai Court of Cassation's jurisprudence that the text in Article 291 of the Civil Transactions Law indicates that "the judge, with his authority to collect and understand the reality in the case and evaluate the evidence presented to him in it, has the right, when it is proven to him that there are multiple persons responsible for carrying out the harmful act on others, then they are They are all committed to the guarantee, and it is an option according to what he deems appropriate based on the circumstances and context of the incident. Either they must pay compensation jointly, or divide it equally among them, or in proportion to what each of them contributed to committing the harmful act. It does not change this if the injured person or whoever took his place, legally or by agreement, has litigated with one of them, demanding full compensation for the damage he suffered, without suing the rest of them who are responsible for this damage. The judge still has full authority to recover those who contributed to causing the harm and divide the guarantee between them, even if it is proven that the injured person did not contribute to the error that resulted in harm to him/her"

1.7 The court's estimate of the value of compensation

The process of estimating compensation for medical error is a delicate and complex issue that requires great effort and scientific study of the medical sciences that are established in the medical sciences and medical liability, which requires the assistance of an expert with a high degree of specialization and competence. Estimating the elements of damage and taking into account the circumstances in determining the amount of compensatory compensation is one of the issues of fact in which the trial court is independent, and there is no objection to the ruling since it did not specify a mathematical standard for estimating compensation for the material and moral damages that befell the injured person, as long as the law does not require following. There are specific criteria for assessment, and this court does not comment on that as long as it explains the elements of damage that are included in the calculation of compensation and determines the claimant's entitlement to compensation based on what is presented to it in the papers. It may also award total

compensation without being obligated to state the amounts awarded for each element of the damage separately (Al-Jumaili, 2009).

It is also established in the judgment of the Dubai Court of Cassation that estimating the value of compensation for the physical, moral, and material damages sustained by the injured party is an issue of fact upon which the trial court is independent, according to what it deduces from the circumstances and circumstances of the case (Qandil, 2004).

It is established in the judgment of the Dubai Court of Cassation in accordance with Article 389 of the Civil Transactions Law, that if the compensation is not estimated in the law or in the contract, the judge shall estimate it to be equal to the damage actually caused when it occurred, meaning that if a loss resulted or damage occurred to the plaintiff due to the defendant's breach of his contractual obligation, the defendant is obligated to pay compensation equal to and compensate for the damage suffered by the plaintiff as a result. Accordingly, the court may estimate the damages incurred as a result of the medical error on the patient, and compensate those damages with fair compensation (2004).

1.8 Loss of the compensation claim

The UAE legislator introduced a short statute of limitations in the scope of liability for unlawful acts, ruling that a claim for compensation resulting from a harmful act should not be heard after three years, which begin to run from the day the injured party learns of the damage that occurred and is responsible for the person who caused it. If the illegal act constitutes a crime, which entails filing a criminal lawsuit in addition to the civil lawsuit for compensation, then the civil lawsuit will not be dropped unless the criminal lawsuit is dropped (Al-Najjar, 2022). If the two lawsuits are separated and the injured party chooses the civil path rather than the criminal path to claim compensation for the damage resulting from the crime, then the validity of the period of non-hearing stipulated in Article 298 mentioned above for him/her will cease as long as the right to file, initiate, or proceed with the criminal lawsuit remains in place (Qandil, 2004).

The stay remains in effect until the criminal case expires, and this expiration occurs when a final ruling is issued by the Court of Cassation or the ruling issued by the trial court becomes final due to the expiration of the deadline for appealing it or for another reason for the expiration. From the date of this expiration, the period of not hearing a claim for compensation for a harmful act will begin to run. This is because the fact that the right to file, initiate, or proceed with a criminal lawsuit remains in force is considered, within the meaning of Article 481/1 of the Civil Transactions Law, an obstacle that makes it difficult for the injured party to claim his/her right to compensation (Al-Najjar, 2022).

Conclusion

The civil liability of the doctor for his medical errors is one of the important topics raised among researchers to address and cover its aspects, due to the development witnessed in the medical field in its fields and specializations and the high rate of medical errors. This is what prompted the legislator in some countries not to be satisfied with the civil liability provisions in the civil law, and to resort to developing special legislation, such as the Emirati legislator, which issued Federal

Law No. 10 of 2008 regarding medical liability and then Federal Decree Law No. 4 of 2016 regarding medical liability. The UAE Federal Civil Transactions Law remains the public law that complements the aforementioned private law. The Medical Liability Law regulated the method of filing a medical liability lawsuit, and stipulated prior submission to the Medical Liability Committee, which is concerned with determining medical error. The law specified the way to appeal the decision issued by this committee before the Supreme Medical Liability Committee. The court has the authority to estimate compensation for the damage after verifying the fulfillment of the conditions for civil liability, including medical error and harm caused to the patient due to this error. The conclusion of the research sheds light on some important points in the subject of the research by stating its results and recommendations, as follows: The doctor's obligations towards his patients vary between an obligation to exercise care and an obligation to achieve a result in some cases. Medical error is every violation or departure by the doctor in his behavior from the medical rules and principles that require knowledge. The error may be technical or it may be professional, such as error in treatment, lack of follow-up, or ignorance of technical matters with which knowledge is required or performing experimental and unprecedented surgical operations on humans in violation of the rules regulating that, conducting experiments or scientific research that are not based on the patient, or giving medication to the patient as a test, or using medical devices without sufficient knowledge of how to use them, or without taking precautions to prevent damage resulting from use. The judge has discretionary authority to estimate the compensation to compensate for the damage, and to determine the method he deems appropriate to determine compensation for material and moral damages. Estimating the damage and determining the compensation to compensate for it is among the issues of fact in which the trial court is independent as long as it has clarified these elements and the extent of the right of the injured party to them. The trial court is subject to the supervision of the Court of Cassation, as the trial court must weigh with the balance of the law the evidence and data presented to it regarding the occurrence of the harm and determine its elements. The researcher calls on the Emirati legislator to amend Federal Decree-Law No. 4 of 2016 regarding medical liability by adding an article that includes the formation of a committee to estimate compensation for medical errors, whose mission will be to clarify the damages caused by medical error and estimate the value of compensation that redresses the damage. The mission of this committee follows that of the Medical Liability Committee, provided that the Medical Liability Committee is committed to referring the medical file and medical condition to the Committee for Assessing Compensation for Medical Errors. The latter is obligated to submit its report within a maximum period of 30 days from the date of referral to it, and its decision shall be appealed before a higher committee. The researcher recommends that all countries establish special laws to regulate medical liability. The researcher recommends the necessity of establishing and adhering to a compulsory insurance system against civil liability resulting from medical errors. Because this gives reassurance to doctors and medical staff before, during and after they perform their work, and compulsory insurance against civil liability resulting from medical errors also gives reassurance to patients.

References

- Abd al-Razzaq Ahmad al-Sanhouri, *Al-Waseet fi Sharh al-Civil Law, Part One*, Al-Halabi Legal Publications, Peru, 1998.
- Abdul Majeed Al-Hakim, Abdul-Baqi Al-Bakri, Muhammad Taha Al-Bashir, *Al-Wajeez in the Theory of Commitment, Sources of Commitment, Part One*, 1980.
- Abdul Rashid Mamoun, *The Treatment Contract between Theory and Practice*, Arab Renaissance House, Cairo, 2000.
- Al Amaren, Emad Mohammad, Ahmed MA Hamad, Omar Farouk Al Mashhour, and Mohammed Ibrahim Al Mashni. "An introduction to the legal research method: To clear the blurred image on how students understand the method of the legal science research." *International Journal of Multidisciplinary Sciences and Advanced Technology* 1, no. 9 (2020): 50-55.
- Asaad Obaid Al-Jumaili, *Error in Civil Medical Liability*, Dar Al-Thaqafa for Publishing and Distribution, 2009.
- Hania Muhammad Ali Fakih, *Medical Confidentiality in the Lebanese Legal System*, research published on the Internet via the link, <http://77.42.251.205/researchesView.aspx>? Access date: 05-29-2022.
- Hassan Akoush, *Contractual and Tort Liability in the New Civil Law*, Dar Al-Fikr Al-Jadeed for Printing and Publishing, 2000.
- Jihad Jamil Al-Shawabmeh, *The Doctor's Civil Liability for Medical Errors in the Field of His Profession*, Master's Thesis, Middle East University, 2011.
- Kholoud Hisham Khalil Abdul Ghani, *Medical Error: A Study of the UAE Medical Liability Law of 2016*, Master's Thesis, United Arab Emirates University, College of Law, 2017.
- Mounir Riya Z. Hanna, *Civil Liability of Doctors and Surgeons in French and Egyptian Jurisprudence and Jurisprudence*, Dar Al-Fikr Al-Jami'i, Alexandria, first edition, 2007.
- Muhammad Abdul Hamid Othman, *Al-Mufid fi Sharh Civil Law, Sources of Obligation*, Second Edition, 2005. Mustafa Al-Jamal, *Civil Liability of Doctors and Medical Institutions, in Light of the Provisions of the UAE Civil Transactions Law and Comparative Jurisprudence and Judiciary*, 2009.
- Muhammad Hussein Mansour, *Medical Responsibility of the Physician and Surgeon, Dentist, Pharmacist, Nursing, Clinic and Hospital, Medical Equipment*, New University House, Alexandria, 1999.
- Noura Ahmed Al Musalla, *The Doctor's Technical Error in Emirati Law*, Master's Thesis, University of Sharjah, United Arab Emirates, 2012.
- Saeed Al-Sayyid Qandil, *Mechanisms for Compensation for Environmental Damage, A Study in Light of Preventive Systems and International Agreements*, 2004 edition, New University House, Alexandria, 2004.
- Saeed Fattouh Mustafa Al-Najjar, *Compensation for Medical Errors "A Study in Light of the Rulings of the Dubai Court of Cassation,"* *Journal of Legal and Economic Studies*, 8 (2022): 1-58.
- Shana Zawawi, *the obligation to conceal medical secrets is understood, the limits, and the penalty*, research published in *Al-Haqiqa* magazine, issue 18, dated 04/15/2019.

Suleiman Markus, Al-Wafi in explaining the civil law regarding obligations in harmful acts and civil liability, 1992.

Suleiman Morcos, Lectures on Civil Liability in the Codifications of Arab Countries, Part One, General Provisions, with the Department of Arab Studies of the League of Arab States, 2015.

Appeal No. 2021/383 Civil Appeal and 2021/430 Civil Appeal and 2021/448 Civil Appeal dated 12/23/2021. It can be accessed via the link <https://www.adjd.gov.ae>, access date 5/15/2023.

Appeal No. 2021/234 Civil Appeal and 2021/239 Civil Appeal and 2021/252 Civil Appeal dated 9/23/2021. It can be accessed via the link <https://www.adjd.gov.ae>, access date 5/15/2023.

Appeal No. 2020/102 Civil Appeal and 2020/148 Civil Appeal dated 06/25/2020 can be accessed via the link <https://www.adjd.gov.ae>, access date 5/15/2023.

Appeal No. 2019/251, Civil Appeal dated 07/18/2019, appeal No. 2019/198, real estate appeal dated 11/13/2019, can be accessed via the link <https://www.adjd.gov.ae>, access date 5/15/ 2023

Appeal No. 2018/423 Civil Appeal dated 11/29/2018, accessible via the link <https://www.adjd.gov.ae>, access date 5/15/2023.

Appeal No. 2018/1129, Commercial Appeal dated 03/17/2019, accessible via the link <https://www.adjd.gov.ae>, access date 5/15/2023.

Appeal No. 2012/180 Civil Appeal dated 01/27/2013, accessible via the link <https://www.adjd.gov.ae>, access date 5/15/2023.

Appeal No. 2005/66, Civil Appeal dated 6/26/2005, accessible via the link <https://www.adjd.gov.ae>, access date 5/15/2023.

Appeal No. 1990/206, Appeal of Rights, dated 02/10/1991, can be accessed via the link <https://www.adjd.gov.ae>, access date 5/15/2023.