PROOF OF MEDICAL ERROR REQUIRING CIVIL LIABILITY

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Abstract:

get compensation, the burden of proof is distributed between the patient and the doctor, yet it is required to be distinct and stable, regardless of whether it is normal or technical, serious or easy, but the criteria for its discrimination are defined by the personal standard and the objective criterion and after their criticism the mixed standard related to the unusual act appeared.

As for the burden of proof, it is distributed between the patient and the doctor according to the nature of the latter's commitment, and it is proven either by the medical file and medical certificates that have the authenticity of the customary papers, or by medical expertise that is not binding on the judge.

key words: *Error; doctor; Patient; Proof; liability.*

Introduction:

It is no secret to everyone that the doctor does a humanitarian work because he provides treatment and reassurance for many patients who suffer from health problems and diseases, which are sometimes intractable. Nevertheless, we find the owners of the white aprons seeking to find a cure. They present a sublime humanitarian message.

But this does not mean that they do not make mistakes that require accountability, Even if medicine and law are two different fields in terms of their scope or field and topics, they are complementary in terms of purpose, as medicine is a profession that needs regulation; the law is a system.

The principles of law governing medical practices are among the most important challenges facing scientific research in the medical field. Given that the legal system aims to keep pace with medical sciences, the law does not stand as an obstacle to scientific progress in the medical field.

However, with the wide spread of advanced medical machinery and equipment and hazardous materials in the health field, patients have become vulnerable to risks and damages through mistakes made by doctors while performing their duties, and this leads to accountability for their mistakes that have caused harm to others, which is what is called medical error, on the basis of which the civil responsibility of the doctors is based.

The medical activity is characterized by complexity and difficulties as it pertains to the human body. Moreover, the overlapping of medical activities among them leads to the difficulty of identifying and proving the medical error and obligating the official to compensate. In addition to knowing who is liable to prove the medical error.

To prepare this research; the descriptive approach and the comparative-analytical approach were relied upon, according to the requirements of each part of this study due to the specificity of medical error and the difficulty of proving it. And accordingly; we pose the following problem: **How to prove the medical error that requires doctors to be held accountable before the judiciary?**

To answer this problem, we will adopt the following division:

First main title: The concept of medical error.

First subtitle: Definition of medical error.

second subtitle: Types of medical error according to distinguishable criteria.

second main title: Proof of medical error.

First subtitle: Bear the burden of proof of medical error.

second subtitle: Means of proving medical error.

THE FIRST TOPIC:

The concept of medical error

Before addressing the concept of medical error due to the responsibility of doctors, the nature of medical responsibility must first be exposed, the French judiciary went on to consider it a default liability, after the decision of the French Court of Cassation on June 18, 1835, which recognized the responsibility of the doctor while carrying out his duties for the harm that befalls him After he made an obvious mistake. (M.M. Hannouz, 2000, p. 20)

And he embraced this principle until another decision was issued by the same authority on 05/20/1936 in the Mercier case, where the judiciary's view in this area shifted from default responsibility to contractual liability, as it was stated

in this decision that 'a real contract arises between the doctor and his patient.' (Vialla, 2009, p. 128)

However, the doctor may have a default responsibility in some exceptional cases such as work medicine, a public sector employee, a social security doctor.... Etc.

What is known is that the basis of the doctor's civil liability, whether it is a contract or a default, is error, and whoever has been done we will try to define his concept by addressing its definition and characteristics and defining its elements and scope, then we will address its types and criteria for determining it.

First requirement: Definition of medical error

We will be exposed to the definition of medical error and its characteristics, and then determine its elements and scope.

First section: Identifying medical error

The error in the field of civil liability in general is that the debtor does not implement its contractual obligation and refrain from it or delay in its implementation so that it is a mistake arranged for the contract liability, but in the area of default liability is deviation from the usual behavior and the vigilance it requires so as not to harm others, it is enough to make the mistake just to neglect caution. (Arafa, Without a year of publication, p. 43) In general sense, the error is a breach of an earlier obligation, and this breach is measured by the standard of the average man or the so-called abstract man, from which the jurists derived the definition of medical error of civil responsibility of the doctor.

In fact, medical legislation is devoid of a text that establishes the responsibility of doctors for their mistakes, and so the Algerian legislator, like all other legislations, did not set a definition of medical error, but left this matter to explain the laws and jurists.

was defined by some as 'a failure in the behavior of a doctor that does not occur with an attentive doctor who was found in the same external circumstances that surrounded the doctor in charge'. and others defined it as 'the doctor's failure to fulfill the special obligations imposed on him by his profession.

There are those who combined the error represented by a breach of liability arising from a contract or agreement and that represented by a breach of a legal duty in one definition, so he defined the medical error as' the doctor's breach of his private and public obligations, that is, those imposed on him by the medical profession, or those imposed by the law upon him when he performed Work or abstain from work. (Mulla, 2012, p. 123)

During the course of his medical work, the doctor must be in accordance with the rules required to practice the profession or take all necessary precautions,

So that his work doesn't do harm to others, as he's not his guarantor. (Al-Fajal, 2009, p. 401)

However, we tend to define it as a doctor's breach of the obligations imposed on him by the profession. Whereas, the obligation placed on him is not based on a contract nor on the general duty to not harm others, but rather to the rules and principles of the medical profession.

The doctor's mistake is a mistake of a special nature because of its complex technical nature, and therefore it is not the fault of an ordinary person, but it has characteristics that distinguish it, as expressed by the French Court of Cassation in its famous decision of 20/05/1936" it is Attentive oneness care corresponding to learned scientific facts " . Although medical error shares some characteristics with civil error, it has certain characteristics that make it different from it. The law requires the medical error to be:

Detective and not unbearable

Distinguished because it is related to the practice of the profession of the doctor.

Sure, steady, and detective, Confirmed by scientific origins with certainty. (Ghaffar, 2010, p. 234)

And whoever has been done, the doctor is not asked about probable and unstable errors and not on the basis of suspicion, but rather for definitively fixed errors.

These characteristics have been confirmed by the French jurisprudence and judiciary, and both the Egyptian and Algerian judiciary followed this approach, so we find the Algerian State Council ruled in its decision issued on 03/28/2007 in the case of the health director in Tadlus indirectly stipulating that the error must be Fixed and investigator "Whereas, despite the argument being pushed to not accept the case as long as the professional error is not fixed ..... and as the expert did not conclude that it is possible to firmly assert that there is a professional error." (Mourad, 2010, pp. 42-44)

However, in addition to these characteristics, there are elements that must be met in the medical error and to determine its scope, so that the doctor can be held accountable for it, and this is what we will address

second section: Error elements in various fields of medical work

The medical error is not like any other professional error, but rather there must be elements in it in order for it to be considered in order to hold the doctor accountable, and its application is not absolute, but rather has a specific scope and field, and this is what i will discuss in the following:

The error elements are three and they are:

The doctor's violation of medical rules and principles at the time of performing the medical work: Meaning that to prove the doctor's error, the latter must violate medical rules and principles when performing his duties. And what is meant by medical rules and principles are those established and recognized rules in the medical field and among the practitioners of this profession, which every practicing physician should be aware of.

In this regard, we find that the Algerian legislator stipulates in the code of medical ethics in the text of Article 1, 'Medical ethics is the sum of the principles, rules and norms that a doctor, dental surgeon or pharmacist must observe or inspire in the exercise of his profession." (Article 01 of Executive Order No. 92-276 of July 6)

By extrapolating the text of this article, the Algerian legislator implicitly stressed the need for the doctor, dental surgeon or pharmacist to respect the rules, origins and medical customs in the exercise of his duties, but these scientific principles and data require the availability of several conditions, which are:

- The treatment method should not be announced until appropriate biological studies have been carried out and by a specialized body that monitors. (- Article 30 of the Algerian Medical Ethics Code)
- Ensure that this treatment is of direct benefit to the patient. (Article 18 Algerian Code of Ethics of Medicine)
- Enough time has elapsed to demonstrate the efficacy of this treatment method.

Breaching the duties of prudence and vigilance: The scholars of civil law agreed to consider the law, custom and basic experience as a source of duties, caution and vigilance, and considers the doctor to be a breach of the duties of caution and caution in the field of medicine, as he violated the behavior of the duty to follow from an attentive doctor found in the same circumstances. It's like the doctor knows the seriousness of the work he's doing, expects the serious consequences that he can have, but he doesn't take adequate precautions to prevent these results from being achieved.

Such as not taking precautions and making sure that a doctor performs surgery while he suffers from difficult health conditions, or he uses non-sterile surgical tools as a result of damage to the sterilization apparatus, or performs a surgery on a patient without preparing the necessary tests (Hisham Abdel-Hamid Farah, 2008, pp ;108-109)

Provides the psychological relationship between the will of the doctor and the serious result: It is considered one of the most important components of a medical error, and if the doctor's mistake did not result in any subsequent harm to the patient, such as disability or death, there is no room for accountability, meaning that the mistake caused by the doctor leads to a grave consequence for the patient.

The scope and field of medical error is determined by the stages of the medical work that the doctor performs. The error may be issued during one of these stages and he will be responsible for it.

The first stage: the pre-treatment

It is the stage that precedes the stage of treatment, and it is known as the preliminary or preparatory stage, which includes initial examinations such as radiological examination, medical analysis, or clinical analyzes.

The second stage: the therapeutic stage

which is the stage in which the treatment begins, in which the scientific principles recognized in the medical profession are followed, such as conducting surgery or prescribing medication. (Article 17 of the Algerian Medical Ethics Code "The doctor or dental surgeon must refrain from exposing the patient to undue danger during his medical examinations or treatment."[)]

The third stage is the post-care stage

known as the convalescence stage, and it is a post-treatment stage. so the doctor supervises and supervises the effects of the treatment, and any error that occurs at this stage is considered a breach of the follow-up commitment.

second requirement: Types of medical error according to distinguishable criteria

Medical errors vary by the variety of perspective sought by both in terms of the nature of the work, divided into ordinary error and professional error, or in terms of severity to a minor error and serious error, yet it must be based on specific criteria to distinguish between medical error and other errors and this is what we will present below.

First section: Types of medical error

There are several types of medical error, but they are classified according to the angle from which they are viewed:

In terms of the nature of the work:

the medical error is divided according to the nature of the work into a normal or material error and into a technical or professional error.

A normal or material error arises from the doctor's breach of a general obligation as a member of the community, for example, performing surgery while he is drunk, and he is held accountable for these errors in accordance with the general rules of liability. (oualhassi, 2002, p. 10)

As for a technical or professional error, it is a mistake made by a doctor in his professional capacity and not as an ordinary person, and in it is a deviation from technical assets such as the medical profession, and whoever has been made is a breach of a commitment from the special obligations that the doctor dictates to

his profession. Suitability of treatment for the patient's condition. However, in the opinion of the jurists, the person in the profession (the doctor) is not asked about a professional error unless it is serious, so that the fear of responsibility does not make him lose his profession with the freedom and confidence that he ought to work in. (Al-Sanhouri, p. 931)

The reality is that dividing the medical error according to the nature of the work into a normal error and a technical or professional error has not been spared criticism, because it is not always affordable to distinguish between what is a material error for the doctor and what is considered a technical error for him, because most of the errors attributed to the doctor necessarily include Technical aspect, which cannot be separated from his technical and professional specialization. (Al-Fajal, p. 407)

In terms of the degree of error

the medical error is divided in terms of degree into serious error and minor error. A simple mistake is a mistake that an ordinary person does not make in his care, and a serious mistake is the mistake that comes from the least visionary people. (Ahmad, p.129)

However, there may be conflicting opinions about the idea of serious technical error, so that part of the French jurisprudence went on to say that the doctor only asks if the error is serious based on the division of medical works into material [2]works and professional works of art, which entails a physical error and a technical error, so that the doctor is not attributed to a mistake in this second section, except if it is physical, and not the probable nature of the medical work, which requires not being held accountable for His mistakes are easy because it restricts his freedom and keeping pace with scientific development for fear of making any mistake.

However, the position of jurisprudence has been criticized as exaggerating the consequences of dividing medical work into works of art and material works, and that holding the doctor accountable for technical error, whatever its degree, and if it is easy, is not an intervention by the judiciary in the research and discussion of scientific issues, and should not provide the necessary amount of freedom and appreciation of the doctor in the exercise of his work in exchange for wasting the interest of the patient and his right not to be exposed to the mistakes of the doctor.

And the most important thing that is taken from the idea of a serious technical error is that there is no legal text for it, since the law does not differentiate between two types of error, so the error that causes liability, whether civil or criminal, came in general without distinguishing between its types. (Al-Fajal, pp; 410-411)

As for the position of the judiciary, the French judiciary has embraced the idea of a serious mistake to hold the doctor accountable for his mistakes, but it has changed the distinction between a serious mistake and a simple mistake, considering the sufficiency of the slight error for the doctor's responsibility when it is in violation of the established treatment rules that are not in dispute, and one of the French courts ruled That **'the doctor is responsible for the mistakes he commits during the exercise of his profession, and it is not necessary for his responsibility to be a serious mistake, but to ask about a small mistake when it is clear and certain'** (Muhammad Abdullah Mala Ahmad, p. 130)

And then the doctor's accountability for his mistake has become in accordance with the general rules of civil liability, regardless of his degree and whatever types, and if the doctor needs reassurance and confidence to do his work, the patient needs to be protected from these technical errors.

The Egyptian judiciary and the Syrian judiciary have followed this approach, but in Algeria, the legislation related to health, Law No. 18-11 of Shawwal 18 1439, corresponding to July 02, 2018 recognizes the responsibility of the doctor for every failure or mistake by a professional committed during the exercise of his profession or By the occasion of carrying it out, it would harm the safety of the patient, cause him permanent disability, endanger his life, or cause his death. (Article 413 of Law 18-11 related to health.)

Hence, we find that the Algerian legislator did not stipulate the gravity of the error in determining the responsibility of the doctor, but only that it should be fixed. And this is what the Algerian judiciary followed through the judgment of the Naqous Court on March 13 1999 convicting the surgeon who forgot a piece of cloth in the abdomen of a woman when she underwent an operation to remove the tumor and led to her death as a result of being affected by the condition of sepsis due to the doctor's negligence. That is through resolving the medical documents and reports, so the doctor's responsibility was decided, regardless of the degree of error he committed. (The medical error that created civil liability in Algerian legislation, .qawaneen.blogspot.com.18-01-2021.18 :56)

And if the judiciary abandoned the requirement of the degree of serious error in the work of art for a doctor, but he insists that the error is fixed and certain.

Second section: The criteria for determining medical error

after we have defined the definition of medical error, it is necessary to distinguish it and determine the criterion on which it is based, but before addressing the criteria of medical error it should be noted that the standard of the careful man does not fit a general criterion that can be applied to all people, there are individuals who may be forgiven when not taking some precautions, but the issue is not the case for the doctor because he expects more from him than anyone else is expected of being trusted by the patient. And he must take into account the

obligations imposed on him by his profession, and any breach of it is considered a definite error that leads to accountability.

However, it is sometimes difficult to extract the criterion for the existence of the error, especially if it is related to the existence of a contract due to the different factors that govern the treatment process, and the criteria for determining the error are as follows.

Personal criterion

refers to the personal criterion to obligate the doctor to exert what he is accustomed to exerting vigilance and insight, it is a criterion that depends on the condition of the doctor who committed the same mistake, and the behavior that was issued from him is measured if he was less cautious and wary of the behavior he exerts in taking care of himself.

To be clear through this if he was able to avoid the harmful act, he was considered wrong, but if he was not able to avoid that after he exerted what he was accustomed to of vigilance, he was considered not at fault, this criterion takes into account the doctor's ability to pay the damage and that it is in proportion to his qualifications Medical and cultural means at his disposal. (Rais, 2007, p. 147)

However, this personal criterion has been criticized on the basis that relying on it leads to injustice, as applying this rule according to the personal criterion leads to rewarding those who are accustomed to negligence by not being held accountable for his negligence and at the same time to punishing the careful and attentive doctor for the mistake he commits. (Taha, 2010, p. 112) As a result, some jurisprudence has gone to rely on the objective criterion.

The objective criterion

The objective criterion is established when assessing the doctor's error in comparing the behavior of the doctor who is mistaken for the behavior of an intermediate doctor of the same professional level, surrounded by the same external conditions, which therefore excludes subjective qualities and external circumstances. And through this criterion we find two elements:

Comparing the behavior of the doctor with the behavior of a middle doctor of the same professional level: means the middle doctor who takes a measure, that he is not neglected in the care of the patient, and adheres to the aspect of caution and attention in his treatment, and at the same time does not deviate in his work from the origins of the profession and its fixed rules, and it is equal to that the error is normal or technical, as for the professional level, including the duration of experience in practice and the degree of scientific obtained. (Ghaffar A. A., pp; 243-244) The mistake of a general practitioner is measured against the mistake of a general practitioner like him, and it is not the mistake of a general practitioner with the mistake of a specialist doctor, and a doctor who has practiced his work for a

period of 05 years with a doctor who has practiced his work for 25 years, this is not permissible.

External circumstances External circumstances mean in the law the circumstances of the time and the circumstances of the place and the circumstances of the situation, and these circumstances are not unique to one person without another, but in which all individuals participate. For example, we must compare between a doctor in a village and a doctor in a village like him with the same qualifications, We should not compare the village doctor with the city doctor, even if he has the same academic qualification, and also the patient cannot find the same medical equipment in the village dispensary as the equipment in the university hospital in the city, in addition to the seriousness of the situation and the aid that it requires in unfavorable circumstances. External conditions that the doctor has no input into, so working in acute emergency situations is not the same as in the normal, non-emergency situation.

Despite the advantages of the objective criterion, it has also not been spared criticism of some jurisprudence, as the objective criterion is an abstract model and does not constitute a typical person, and therefore the idea of the average man on which this criterion is based is imaginary. On the other hand, the standard of the average man is critical in itself because it wastes the differences between people of different types, there are two groups of ordinary individuals and professionals, the objective criterion comes when applying equal sits between the average man and the professional man and this is not true . (Taha A. S., p. 214)In addition, he is reproached for lacking a legal basis and it is sometimes difficult to assess the circumstances whether they are external or internal.

To avoid these criticisms between the two criteria, another trend emerged that adopts the mixed standard for estimating medical error.

* **Mixed criterion**

which is the criterion that took advantage of the previous standard (personal and objective), which is based on the familiarity of the act from its unfamiliarity, regardless of the personality of the person who made it, meaning that the error is measured through the act itself, and if the action is familiar in itself, then there is no For the error, although it is not familiar, prove the error. (al-Ghaffar, p. 252)

this criterion is based on considerations are:

The theoretical consideration : Theoretical consideration is based on the protection of the patient, which requires the consideration of the magnitude of the results, regardless of the degree of error of the doctor or its type, due to the modern and continuous development of medical sciences and the use of the tools developed and high technological in this field.

Legal consideration : This consideration is based on the need for the doctor to abide by the rules of caution, and vigilance in addition to those imposed by the

medical profession so that doctors are not in a better position than ordinary people, thus achieving the rules of justice and equality before the law.

Thus, if the doctor committed a medical error in performing his duties and caused harm to the patient, he is obliged to pay compensation, but his obligation to compensate is only that if it is proven that the cause of the damage is the doctor's fault, and it is done, the doctor's error must be proven so that the patient can obtain compensation and this is what will We deal with it in the next topic.

THE SECOND TOPIC:

Proof of medical error

Considering that a medical error is an act that requires compensation for those who have been harmed by this error, it must be proved in accordance with general rules that the proof is based on the legal fact which is either a legal act or a material act such as a harmful act, and the proof of the aforementioned incident leads to the proof of the right arising. (Fayed, 2006, p. 05) So, are the general rules of proof in determining the burden of proof and the traditional means of proof are the same in the field of proof of medical error requiring civil liability? This is what we will answer later.

First requirement: Bear the burden of proof of medical error

The burden of proof means determining the litigant who must prove the disputed fact, and determining the person on whom the proof is located is of great importance in practice, as the outcome of the lawsuit depends on him in many cases. And the one on whom the burden of proof is placed is the creditor according to Article 323 of the Algerian Civil Code 'The creditor must prove the commitment and the debtor must prove his disposal', so the proof of who claimed, and who has been charged with the burden of proof is the patient in accordance with general rules, and who is the burden of proving the elements of liability, including medical error, but the process of proving medical error has many difficulties as opposed to proof of damage, since the burden of proof varies according to the nature of the obligation in the field of medical liability.

First section: Burden of proof depending on the nature of the obligation

Proof of medical error varies according to the nature of the obligation to which the doctor is obliged, from the obligation to take care, an obligation to achieve the result and finally the obligation to inform.

The burden of proof in the obligation to take care of:

The general principle is that the doctor is committed to the care, which guarantees that the doctor is not required more than to put in the service of his patient the means he has and to exercise all his care and speed up the

implementation of the contract, and to provide the best he has and all he can in order to do so. Under this commitment, he pledges to try to achieve his goal and to take all means to achieve it without directly committing to achieving a result. (Saleh, p. 77)

And whoever has been done, what the jurisprudence and the judiciary have settled on is that the doctor is not obligated to heal the patient, but rather he must exert sufficient and necessary care during the initiation of treatment.

This obligation results in the patient being affected by a medical error who proves the error. The French judiciary applied this rule, whether it was the alleged error of medical art, the artistic origins of the profession or errors related to medical ethics.

It should be noted that since the famous decision of 20/05/1936, which is mercier's decision, it has been established that the responsibility of the doctor is a contractual liability, and here in accordance with the rules of proof, the mere proof of non-implementation of the obligation contained in this contract and the occurrence of the damage is proof of the doctor's fault, and the doctor has to prove otherwise.

The burden of proof in the commitment to achieve a result:

It is an exception to the previous principle, and its content is that the doctor is obliged to achieve the result of the patient's direction, and this situation arises either by legal text or agreement between the parties to the contract of treatment, here the doctor is bound for the safety of the patient not from the consequences of the disease, but from the risk of accidents that may occur to the patient.

The doctor is obligated to achieve the desired result from his medical work in some cases such as blood transfusion to the patient, conducting medical analyzes, using medical devices, some types of plastic surgeries ... etc. And this kind of commitment has been imposed in order to protect patients. It is sufficient for the patient to prove the harm he or she suffered without the need to prove the error, for mere proof of the damage is sufficient to hold the responsibility of the doctor, and the doctor cannot deny that responsibility except by proving the foreign cause, or by proving that the harm suffered by the patient is due to force majeure, or The patient's fault or the fault of others. It should only be noted that there are some cases in which the judiciary tends to emphasize the responsibility of doctors, such as surgeries that do not require treatment for the patient, such as plastic surgery. (Mansour, p. 123)

That is, in the event of failure to implement the obligation to achieve the result, liability is assumed once the causal relationship between the doctor’s action and the resulting damage is proven without discussion of whether the doctor’s action was a mistake or not.

The burden of proof in the obligation to inform:

Article 23, Paragraph 01 of Law 11-18 relating to health stipulates that the doctor is obligated to inform the patient by saying, 'Every person must be informed about his health condition, the treatment he requires and the dangers to which he is exposed.' Also, we find Article 360, Paragraph 07 of the same law stating that 'The Committee of Experts informs The donor prioritizes the risks to which he may be exposed, the potential consequences of the removal, and the expected results of the transplant for the recipient '

In addition to Article 43 of the Algerian Medical Ethics Code, which also states: 'The doctor or dental surgeon must strive to provide his patient with clear and honest information about the reasons for every medical act.' As for the French law, we find the text of Article 1111-2 of the Public Health Law 03/24 / 2002 stipulates the obligation to inform. (Art l.11111-2 : "Toute personne a le droit d'être informée sur son état de santé")

Through the texts of these articles, we find that it is the doctor's obligation to inform the patient with sufficient information that enables him to make his decision to accept or refuse treatment, and this is to maintain trust in the relationship between the patient and the doctor. The necessary information about his condition and the treatment he wants to apply. The jurisprudence has expanded its scope and not only limited it to the outcome of the treatment, but also its expansion and extend to the treatment method chosen by the doctor, which may have an impact on the patient's health or external appearance. (Ali, Without a year of publication, pp; 82-83)

The French judiciary embodied this order in its ruling of 27/05/1998, when the Court overturned the ruling of the Court of Appeal, which rejected a patient's case against a doctor on the grounds that the latter is not obligated to inform about the expected dangers and said, 'The fact that the risks are exceptional and unforeseen not It exempts the doctor from his obligation to inform. (Shehida, Without a year of publication, p. 88)

The French judiciary overturned the burden of proving the doctor's breach of the obligation to inform the patient, so that he exempted the latter from proving that the doctor did not implement this obligation in its judgment issued on 02/25/1997. (Oualhassi, pp; 122-123)

The transfer of the burden of proof from the patient to the doctor is due to the difficulty of proving this negative incident, which is the lack of information, but more than that, the French judiciary went to present written notification and approved it in the same form by the patient, so that the patient would not be denied before the judge That the doctor did not inform him.

However, it should be noted that despite the distribution of the burden of proof between the patient and the doctor for the medical error or not, in reality there are difficulties in proving the medical error as follows.

second section: The difficulties of proving medical error

Proving a medical error before the judge in order to obtain the right faces several difficulties, as the relationship between the doctor and the patient is inequality in that the patient suffers from an illness and puts his trust in the doctor and aspires to help him and rid him of what he suffers. This confidence hinders his obtaining evidence that can Use it when necessary, and these difficulties can be summarized as follows:

- The obligation to maintain professional secrets in the medical environment hinders proof.

- Difficulties in applying traditional responsibility in the medical field.

- The specificity of medical results that exceed the concept of error, which makes it impossible to require proof in many cases.

- The object of proof, which is the medical error, is a negative occurrence without external manifestations that can be revealed, and thus the content of proof is determined by the content and scope of the doctor's commitment.

- If the person in charge fails to prove medical error and prove the veracity of his claims, the dispute ends in favor of his opponent. (Bekouche, 2011, p. 156)

- The medical error is of a technical nature and the judge cannot be aware of it, which leads him to seek the assistance of specialists (doctors), and this is what leads to favoritism and courtesy among doctors and their solidarity with each other, and this is an obstacle and difficulty facing the patient.

- In order to reduce the burden of proof, especially on the injured patient, the uncommon action theory emerged.

The theory of the uncommon action:

The content of this theory is that the unusual act is the duty to prove the injured patient, the medical error is measured by the doctor's action and the extent of his familiarity, the proof of the unusual act is easier because proof of the act is focused on his physical reality and is the work of the doctor, and it is easy to prove the uncommonity of the act by reference to medical custom and scientific and technical data acquired and contemporary.

The proof is by proving the care, or in the obligation to achieve the result, so the injured person is not obligated to prove the uncommon act, and it is sufficient to prove the origin of the commitment, which is the failure to achieve the result to say the doctor’s responsibility.

The justifications for the necessity to apply the theory of uncommon action in the medical field are as follows:

- The criterion for proof of the doctor's uncommon action is an accurate criterion for the criterion used in estimating the doctor's error, as it is characterized by ambiguity and difficult to prove in many cases.

- The expression of the uncommon verb is consistent with the specificity of the medical work and the proof of responsibility in this field. Proving the unfamiliar act is easier than proving the unusual behavior, since the proof of the act is focused on the act itself, while the proof of behavior focuses on the deviation in the behavior.

- Working with the theory of uncommon action reduces the burden of proof on the injured patient and helps him obtain his right. (Al-Ghafar, pp ; 327-329)

second requirement: Means of proving medical error

It is legally prescribed that any person who claims to have a right, he must prove it with proof in accordance with article 323 of the Algerian Civil Code, and if a patient claims that he has been harmed by a mistake committed by the doctor, he must establish material evidence before the judge in order to award him compensation. (- Article 323 of the Algerian Civil Code "The creditor must prove the obligation and the debtor has to prove acquittal.")

According to the general rules, the means of proof are writing, witnesses, confession and swearing in addition to technical expertise in the event of a technical dispute, the judge must seek the assistance of the competent persons. However, due to the nature of the medical error, we have limited our study in this part to two means that can be used, namely, medical documents and medical expertise.

First section: Medical documents

Medical documents are medical documents and reports that are created to confirm a person's medical condition, edited by doctors and their assistants, in which the patient and physician are identified, diagnosed the current situation and treatment instructions, and these medical documents are used to plan and follow up medical care, and means of communication between doctors and other professionals involved in the care of patients, as well as written proof .

These documents may be in the patient's possession, or in the services assigned to treat him, whether it is a private clinic or a public hospital, and they can be referred to when there is a judicial dispute in order to use them as a means of proof:

- **The medical file (Dossier Medical)**: which contains documents such as x-rays, reports of medical tests, resuscitation ... and can be referred to in order to know the extent of an error in the diagnosis or in the treatment.

- **Medical prescription:** It has several indications, the first of which is the existence of a medical contract between the doctor and his patient, as it refers to the treatment and from which the diagnosis of the disease reached by the doctor and the degree of its development through the doses specified in the prescription.

- **Medical Certifications (Les Certificats Médicaux):** Which relates to the ability of the person to practice his professional activity, and is used to obtain the prescribed compensation in addition to the letters and telegrams between the doctor and his patient.

As for the authenticity of these medical documents, they have the evidence of customary papers as long as they are written, signed and dated, so they have authority to prove whether between the parties or in the face of others if they are fixed in date, and the authority of the customary papers is not forfeited except in the case if the doctor denies that it is not in his handwriting or that it is not Sign it on condition that it be explicit, and if the doctor is silent and does not explicitly deny it, this is an implicit acknowledgment attributed to him. (Article 323 of the Algerian Civil Code) In the event that the doctor denies these medical documents, her argument is temporarily lost, so the patient has the right to request the matching of lines according to the provisions of Articles 164 and 165 of the Algerian Civil and Administrative Procedures Law (Law 08-09 of Safar 18, 1429, corresponding to February 25, 2008 includes the Code of Administrative Civil Procedures).

These medical documents are called the silent witness who will defend the doctor when filing a medical liability suit, which often serves and defends the doctor, and the incomplete registration in the medical documents weakens the credibility of the doctor, so there is a rule in cases of medical responsibility that says 'good **documentation** leads to a good defense, and poor documentation leads to a weak defense, and the lack of documentation definitively invalidates the defense definitively. (Faraj, p. 2018)

second section: Medical expertise

Cases of technical or scientific issues may be presented to the judge, so he may seek the assistance of specialists and experts. So expertise is a technical means that the judge uses to obtain a technical opinion, and the Algerian legislator has authorized the judge to resort to experts in order to clarify technical matters that are outside his jurisdiction Before final settlement of the dispute brought before him. The Algerian legislator has regulated expertise provisions in Articles 125 to 145 of the Civil and Administrative Procedures Code, and considering medical error is contrary to the rules of science and the medical profession, the judge cannot address directly to discuss these issues and assess the doctor’s error for not being familiar with medical knowledge.

Expertise in the medical field is a work of art consisting of providing opinion and advice to the judiciary regarding a dispute concerning medical work

and its role is mainly to examine and study the acts caused by the damage, as well as explaining the technical rules to be observed in the analysis of the incident in dispute, describing the appropriate technical data for the case in question. (Fattahi, p. 96)

The judge may take the report of the expert in its entireright or some or even appoint another expert, the opinion of the expert is not binding on the judge and has discretion in the extent to which he accepts or not, it is not obliged to take the opinion of the experts, as it appears that it contradicts other facts more convincing from a legal point of view. (Article 144 of the Civil and Administrative Procedures Law 'The judge may base his judgment on the results of expertise.")

However, it should be noted that the judge, upon reviewing the experience accomplished by the expert, must take into account that he is also a doctor and from the same medical environment, and between him and all the doctors there are ties of collegiality and friendship, and the favoritism of the expert doctor for his colleague appears, so the judge must deal with the experience cautiously.

Conclusion:

Through our study to prove the medical error on the basis of which doctors must be held accountable, we came to the following results:

1- A medical error is a breach of the rules and principles of the medical profession.

2- Medical error has the characteristics of being certain, constant, and related to the practice of the medical profession.

3- The medical error due to the doctor's civil liability consists of three elements: deviation from the rules of origin during practice, breach of the duty of caution, in addition to the availability of the psychological relationship between the will of the doctor and the result.

4- Medical error is divided according to the nature of the work into a normal error, a technical error, and according to the degree of severity, into a serious error and a minor error.

5- The accountability of the doctor arises regardless of the type of error and whatever its degree. Only it must be clear and certain, and this is what the Algerian law and judiciary went to.

6- The personal and objective criterion for determining medical error has been undone and has become based on the mixed standard based on the familiarity of the act committed by the doctor and its asymmetry, so it does not ask in the first but in the second case.

7- Transfer the burden of proof from the patient to the doctor according to the nature of the obligation, if an obligation to take care falls the burden of proof

on the patient, but if an obligation to achieve a result or a commitment to inform transfer the burden of proof to the doctor and the patient only to prove the harm.

8- Medical documents have the authority of the customary editors in their established power when they are edited, signed and dated, unless challenged by the doctor, but his silence on them is an implicit acknowledgement.

9- The judge has the right to resort to medical expertise to make sure that the error occurred or not, as it is a purely technical matter, but it does not bind the judge, but rather is subject to his discretion.

10- The judge should take into account the factor of collegiality and favoritism between the expert doctor and the doctor who is accountable.

References:

1. Abdou Al-Razzaq Ahmad Al-Sanhouri, Mediator in Explaining the New Civil Law, Al-Halab Human Rights Publications, p. 931

2. Abed Abdel Fattah Fayed, Proof System in Civil and Commercial Materials, Dar Al-Nahda Al-Arabiya, p. 05.

3. Adel Abdel Hamid Al-Fajal, Provisions for the disposition of human blood, menchaat el-maaref, p ; 401.

4. Ahmed chaaban Mohamed Taha, Civil Liability from Professional Error, for the Doctor, Lawyer and Architectural Engineers, New University House, p. 112

5. Amal Bekouche, Toward Objective Responsibility for Medical Consequences, A Study in Algerian and Comparative Law,New University House, p-p; 156-161

6. Anas Mohamed Abdel Ghaffar, Civil Responsibility in the Medical Field, A Comparative Study of Law and Islamic Sharia, , House of Legal Books, Shatat Publishing and Software House, p. 234

7. François Vialla, the major decisions of medical law, IGDJ. Editions, p. 128.

8. Hicham Abdel-Hamid Farah, Medical Errors, Dr. Hisham's series in forensic medicine, Al-Wala'a Modern Press, p.p; 108.109

9. Jaber Mahjoub Ali, The Role of Will in Medical Work, A Comparative Study, Dar Al-Nahda Al-Arabiya, p.p; 82.83 .

10. M.M. Hannouz, A.R. Hakem, Medical law brief for use by practitioners of medicine and law,Opu , p.20.

11. Mohammed Hassan Mansour, Medical Responsibility, Civil Liability for each of the surgeons, dentists, pharmacists, public and private hospitals, nurses, Monchaat Al Maarif, p. 123.

12. Muhammad Abdullah Mulla Ahmad, The practice of doctor work between legalization and criminalization - comparative study -, University Press, p. 123.

13. Rais Mohamed, Civil Responsibility for Doctors in Light of the Medical Law, Dar Huma, p. 147

14. Sayed Abdul Wahab Arafa, civil liability in the light of jurisprudence and the judiciary of cassation, responsibility and compensation rules, almaktab alfani lilmawsouat kanounia; p ; 43

15. chehida kada, The Doctor's Obligation to Inform the Patient, Content, Limits and Penalty of Breach, Encyclopedia of Legal Thought, Medical Responsibility File, Center for Legal Studies and Research, Hydra, Algeria, , Issue 01,2003; p.88.

16. Fattahi Mohamed, Medical Error and the Problems It Raises in the Domain of Civil Responsibility, Journal of Legal and Administrative Sciences, Faculty of Law, University of djilali Lyabis Sidi Bel Abbas, Algeria, Issue 03, p ;96.

17. Jamil Saleh, Nature of responsibility for medical error, Journal of The Encyclopedia of Legal Thought, Center for Legal Studies and Research, Hydra, Algeria, Issue 01,2003, p.77

18.

19. Ben Saghir Mourad, Medical error in light of the rules of medical responsibility, a comparative study, a doctoral thesis, Abou Bakr Belkaid University, (2010-2011) ,Tlemcen, Algeria.

20. Oualhassi soumia Badr Al-Badour, the Doctor's Civil Responsibility, djilali lyabes University, (2002-2003) Sidi Bel Abbas, , Algeria.

21. The medical error that created civil liability in Algerian legislation, qawaneen.blogspot.com .(consulted on 18-01-2021.18 :56)