The Development of Civil Liability in Medical Negligence: The lack of provision of uniform standard of care,

A Comparative historical study of England and Kuwait

Journal of Law Journal of Law Journal of Law Journal of Law Journal of Law Journal of Law Journal of Law Journal of Law Journal of Law Journal of Law Journal of Law Journal of Law

Dr. Bashayer Al Majed
Assistant Professor of Law
Kuwait University
E-mail: Dr.Bashayer.almajed@gmail.com

"In nothing do men more nearly approach the gods than in giving health to men."
— Cicero (106 B.C. - 43 B.C.)

The Development of Civil Liability in Medical Negligence: The lack of provision of uniform standard of care,

A Comparative historical study of England and Kuwait

Dr. Bashayer Al Majed
Assistant Professor of Law
Kuwait University

Abstract

Medical practitioners hold enormous power: they literally hold our lives in their hands. As such, the profession is revered and respected, and rightly so. Historically, however, this has led to doctors' positions, decisions and actions effectively being unquestioned. This cannot be right. Medical error is unavoidable, and victims who have been wronged need a remedy. Currently, when faced with issues of medical liability for negligence, most countries provide different avenues for redress, including internal disciplinary procedures, claims in medical negligence and prosecutions for criminal offences. This paper will focus on the tort of medical negligence and, in particular, its development in Kuwaiti Law, as a recent attempt by Kuwaiti authorities to reform this area of law. Special focus will be given to the need to more accurately define 'medical error' and to establish a workable and fair balance between the rights of victims of malpractice and the rights of doctors to do their best to promote patient wellbeing without living in fear of being sued, in comparison with United kingdom law. This is also a topic that is currently under legal review in many other Middle Eastern countries, with the recently passed medical laws of the UAE presenting a particularly interesting comparison.

Keywords: Medical Error, Medical Negligence, Tort Law, Standard of Care, Civil liability, UK Law, Civil Compensation.

تطور المسؤولية المدنية للخطأ الطبي وتمايز معيار العناية،

دراسة تاريخية تحليلية مقارنة بين القانون الكويتي والإنجليزي

د. بشاير الماجد
أستاذ القانون المساعد
جامعة الكويت

الملخص

على الرغم من الطفرة التشريعية في تحديث القوانين الطبية في منطقة الخليج العربي مؤخراً إلا أن القواعد الحاكمة لمعيار الخطأ الطبي ومسؤولية الطبيب المدنية ما تزال عامة وغير محددة الأطر، حيث تركز على المسؤولية عن الفعل الضار وتوافر معيار السببية

وسعياً لتقييد المطلق وتخصيص العام نقدم دراسة تاريخية تحليلية مقارنة نبحث فيها تدرج المسؤولية الطبية من حيث التمييز الدقيق بين الخطأ الطبي الجسيم والإهمال الطبي، والفرق في التكييف بين القانون الإنجليزي والقانون الكويتي، ومدى ملاءمة تطبيق القواعد العامة في القانونين، ثم مسؤولية المتبوع في مواجهة المضرور عن الضرر الذي يحدثه تابعه متى كان واقعاً منه في أثناء أداء وظيفته الطبية أو بسببها، ثم توضيح أسس قيام المسؤولية التقصيرية بين القانون الكويتي والإنجليزي

ثم نناقش تفصيلياً معيار العناية الذي رأيناه يتمايز في أحكام التمييز في المحاكم الكويتية ...

الكلمات الدالة: المسؤولية المدنية، تاريخ القانون، القانون الإنجليزي، الخطأ الطبي الجسيم الإهمال الطبي، معيار العناية، المسؤولية التقصيرية.

Introduction

Medical negligence is an important area of tort law, with a significant impact for the State of Kuwait, both financially and in terms of public health, trust and well-being. As such it is vital that the law strikes the right balance: too heavily in favour of doctors and innocent victims are left with no compensation; too heavily in favour of the patients, and doctors will be afraid to practice. Some argue that carelessness, incompetence, and error should not, save in exceptional cases, be the business of the criminal law, with only conduct pursued with disregard for the life of others meriting punishment. Recklessness, not merely a minor, inconsequential negligence, should transform mishap into crime.[1] However, this leaves the law open to many different interpretations based on circumstances, patient and practitioner. It makes better legal and equitable sense to define a set of guidelines.

The regulation of medical liability in Kuwaiti law is yet to be brought under a comprehensive legal regime. Kuwait authorities did commission a white paper to address the issues. It proposed legal reforms, developed clear definitions, which had been lacking, and presented a draft bill; however, in the summer of 2019 the paper was rejected.

The research presented in this article revolves around the clarification as to what is considered a medical error in particular, as well as what gives rise to tort liability arising from medical error in Kuwaiti law in general. In this regard, the very recent Kuwaiti White Paper's analysis and proposals for reform form an important basis to this study. The UAE has also recently broached this problem with new a definition of 'gross mistake' as a key part of their 2015 reforms, which is analysed in this article.

This article thus offers an brief overview of the current landscape (Part I), Kuwaiti law on medical negligence (Part II); a comparison with the UAE's law on medical negligence (Part III), and an analysis of the Kuwaiti White Paper and proposed Bill with consideration of the additional problem regarding the recognition of women as competent legal guardians (Part IV). Recommendations for change are given in the conclusion.

1.M. Brazier & N. Allen, 'Criminalizing Medical Malpractice', In Charles A Erin & Suzanne Ost (Eds) The Criminal Justice System and Health Care (2007, University Press Scholarship, Oxford University Press)

Part I: The current landscape: Kuwait vs the UK and other regions

The United Kingdom Cabinet Office has set up a 'nudge unit' with health as a priority; behavioural approaches are being integrated into health-related domestic policy in a number of areas.[2] The problem is equally recognised by the Kuwaiti authorities but has not been satisfactorily addressed, despite other MENA countries (Tunisia, Lebanon, Syria and Jordan) taking steps to address the problem.

The regulation of medical liability in Kuwaiti law is yet to be brought under a comprehensive legal regime. There is no clear consensus whether the duty of the doctor is to achieve a specific result, or simply to meet a certain duty of care in patient treatment. Civil claims and criminal prosecutions are increasingly being made based on harm suffered, regardless of blame. The objective/subjective standard issue is unclear and there are problems regarding informed consent. Medical practitioners are treated under common negligence legislation, with a lot of discretion given to investigative authorities and a lot of pressure to bring employment tribunal and criminal prosecutions. Furthermore, the number of medical claims has increased dramatically in recent years, but this is a global phenomenon. In the UK, even ten years ago negligence claims brought against the NHS amounted to £446 million; ten times the annual claims as in the 1950s. In comparison the annual claims for Germany was three times that of the UK.[3]

Returning focus to Kuwait the Head of Forensic Medicine at the Ministry of the Interior, Dr. Assad Taher, recently stated that medical claims (both criminal and civil) increased 900% over the past 13 years,[4] to bring him 450 cases daily. Of these he states that 90% of the claims are invalid, being consequences of legitimate and appropriate treatments, rather than due to medical negligence. Society is confused about the distinction; to clarify, Dr. Taher stated: "We need a proper law to make society understand the difference between the doctor's mistake and the medical consequence, which is usually

---

2. Muireann Quigley, Nudging For Health: On Public Policy And Designing Choice Architecture, Medical Law Review, (2013) 21, 4, (Oxford University Press) 588,

3. Stauch M, The Law of Medical Negligence in England and Germany: A Comparative *Analysis*, (2008, Hart Publishing, Oxford UK), 129

4. I. Awadh, '900% The increasing Average of The Medical Mistakes and Yet The Ministry of Health is Careless', (Interview) 16th April 2018

explained well to the patient before”.[5] In the UK, the matter is more clear-cut, with a three-part test to determine if medical negligence has occurred:[6]

1- Did the medical professional owe a duty of care?
2- Was the duty of care breached?
3- Was the patient harmed as a direct result of that breach?

Even then complications in determining if a cause of harm was due to negligent medical care may arise if the patient had pre-existing injuries or conditions which may have contributed. If care was found to be in breach, compensation is then owed to a value required to return the patient to the state they were in prior to the harm suffered.[7]

In light of this lack of clarity, the Kuwait authorities commissioned a joint research study from the research institute, the Kuwait Foundation for the Advancement of Science, and the Kuwait Public Policy Centre, to carry out a detailed review of the law and make proposals for reform. This was a watershed opportunity for the law of medical negligence. In its White Paper, ‘Therapy for treatment conditions: A proposed legislative comparison to regulate medical practice in Kuwait, including the general approach, philosophy and rights of the patient’, 22nd January 2019, the Institute recognised that the current system creates a negative environment for doctors, engendering “fear, weak sympathy, and lack of initiative”.[8] The White Paper, incorporating a draft Bill, makes many interesting proposals, including (1) the establishment of a dedicated Medical Court; (2) a list of clear definitions and terms, to help the courts and insurance companies; (3) a stronger emphasis on patients’ rights; (4) quality assurance, and (5) that medical negligence should be dealt with purely as tortious liability and excluded from criminal consequences.

Following two years’ work, this White Paper and draft Bill were rejected in 2019, leaving existing legal problems unchanged. Instead a Committee was established, under the Minister of Health and a Legal Responsibility Council, to focus on medical negligence, receive complaints, create a database, set

5. ibid
6. Jo Samanta, Medical Law Concentrate, (2018, Oxford University Press, Oxford, UK)
7. Daniele Bryden, ‘Duty of care and medical negligence’, Continuing Education in Anaesthesia Critical Care & Pain (2011) 11, 4, (Oxford University Press) 124
8. Dr. Mashael Alhajeri & Raed Syed Hashim, ‘Therapy for treatment conditions: A proposed legislative comparison to regulate medical practice in Kuwait, including the general approach, philosophy and rights of the patient’, [White Paper], Kuwait Foundation for the Advancement of Sciences & Kuwait Public Policy Center, 22 January 2019, 12.

standards, and determine the balance of responsibility between doctors and the Ministry. However, as will be demonstrated from the analysis below, this is insufficient: fundamental new medical negligence laws are needed to give a solid understanding between medical professionals and patients.

In January 2020 there was a proposal to the Medical Health Committee for a new Bill to recognise women as competent medical guardians. This was also rejected. Despite guarantees of equality under the Constitution, inequality, discrimination and gender imbalance continue to permeate all areas of law. Doctors claim that the requirement to have a male guardian signee for a dependent patient, makes doctors vulnerable to claims should they carry out a well-intentioned, correct procedure on a patient, without consent from the male guardian, should there be an unfortunate outcome.

One of the major issues is that medical negligence in Kuwaiti law is founded on the concept of medical error, and yet, this is a concept that has eluded precise legal definition. There is debate over the term among the legislature, scholars and the judiciary, in both criminal and civil contexts. The distinction between a result-based definition of error and a treatment-based definition is critical. A doctor’s responsibility can be regarded as the responsibility not to produce a certain outcome, or the responsibility not to act below a certain standard of care. The actual standard required from the medical practitioner is also a controversial topic, with the difference between objective and subjective criteria. Evidential burdens of proof are also complex. All of these issues, however, can only be understood within the context of tort liability in general.

Part II: Kuwaiti Law on Medical Negligence

The previous law regarding medical negligence in Kuwait is founded on the law of the 1981 Decree Law No 25 Concerning the Practice of the Profession of Human Medicine and Dentistry and Associated Professions (25/1981). As per Article 13, this codifies the duties and responsibilities of medical practitioners as a special class of tort. Article 13 states that the doctor is not responsible for harm to the patient if they have used the necessary care, means and skill that someone in their circumstances should have used in that situation. Liability is only found if a mistake is committed based on ignorance of technical matters that all reasonable doctors should know or experimental

techniques are used on the patient.[9] However, these provisions are limited to stating the duties and obligations of physicians, without imposing civil sanctions in case of breach, and without laying out which breaches lead to eliminating the application of general rules in civil liability.[10] As such, general tort negligence is the main body of law that is applicable.

Tort Law Liability

Tort liability arises from any breach of a legal duty that does not directly pertain to a contract; rather, the source of the obligation is the law. As Holyoak points out, 'A doctor cannot be expected to guarantee the success of an operation'.[11] For medical cases where there is an absence of official contract between the doctor and a patient, civil responsibility can only lie in negligence, based on damage resulting from a cause that is outside of the expected treatment, separate from any contract, or in the event that the doctor-patient medical contract is invalid. It is, therefore, natural that when there is no contract between the patient and the doctor, the fault of the latter who harms his patient will lead to the establishment of civil liability against the doctor, in negligence.[12]

Therefore, medical error is subject to the general principles of tortious liability. Under the Civil Code 1980, Law No. 67, Article 227, anyone who commits a legal mistake that causes harm has to compensate, whether the harm was direct or indirect. The error is the basis of responsibility in general, and medical responsibility in particular. An important factor within the framework of medical responsibility is the first hurdle: the doctor cannot be responsible unless a wrongful act has taken place. The relationship between the patient and the doctor requires that the doctor must take all reasonable precautions and exert all the care required by the medical profession in their care of the patient. This negates the risk of recklessness or negligence and

9. 1981 Decree Law No 25 Concerning the Practice of the Profession of Human Medicine and Dentistry and Associated Professions (25/1981), Article 13

10. Ibrahim Ali Hammadi Al-Halbousi, Occupational and Common Mistake in the Context of Medical Liability: A Comparative Legal Study, Al-Halabi Human Rights Publications, Beirut, Lebanon, 2007, p. 17.

11. Jon Holyoak, 'Negligence and the Professions' (Ch.) in Ray Hodgin, Professional Liability: Law and Insurance, (1999, Informa Law from Routledge, UK),

12.Mohsen Abdel Hamid, His Modern View Of The Fault Of The Doctor Posing Responsibility, University of Kuwait Publications, 1993, 77.

fulfils their Hippocratic Oath to not harm others.[13]

Moreover, medical negligence is a special tort, partly because there is an imbalance of power between the parties. The patient does not have the specialist knowledge and is in a vulnerable position because of the disease suffered; they may even be unconscious at the moment of the act or actions constituting the alleged error. This makes it exceedingly difficult to prove the extent of care that the doctor exerted. Therefore, the patient cannot use any evidence to prove the doctor's fault, nor can expertise always be relied upon as evidence as experts may cover up for their fellow doctors or justify their own behaviour[14].

Medical practice, therefore, is the necessary care to be provided by a vigilant physician, provided that it does not violate established scientific principles and rules. In the event that evidence of care is taken, the special circumstances of the patient must be taken into account, along with the medical condition and existing pre-conditions of the patients.[15]

Modern jurisprudential and judicial direction broadens the scope of tort liability at the expense of contractual responsibility, aiming to protect the victim as the weaker party. This is particularly so given the potentially serious consequences of doctors' mistakes, the technical nature of the treatment and the multiplicity of treatment methods, which can lead to an increase in medical error and thus an increase in the risk of harm to patients.[16] One of the key definitions in which harm emerges as a basis for responsibility is that given by Savati:

Responsibility must be defined as the obligations that are taken on the shoulders of those who are responsible for the results of the activity that he is carrying out, and accordingly there is no alienation that we make this responsibility over the activity free of any mistake.[17]

13. Budour Rida, Civil Liability for Medical Errors and Insurance, Faculty of Law and Political Science, Hajj Lakhdar Batna University, 2013-2014 AD, p. 9; Joseph Dawood, Civil and Criminal Medical Liability and Doctors 'Responsibility for their Mistakes, Syria, Al-Insah Printing Press, 1987, pp. 33-35 and Balqa Sami Nour El-Din, Research in the Civil Responsibility of the Doctor, Faculty of Law and Political Sciences, University of Mouloud Mamari, 2017-2018, p. 6.

14. Hamad Hudaili, The Variation of Legal Centres in the Medical Relationship and Its Implications for Evidence, Ibid., 9.

15. Hisham Abdel-Hamid Faraj, Medical Errors, Mnarif Foundation, Alexandria, 114.

16. Mustafa Ahmed Ibrahim, "The Rules of Medical Work and the Establishment of Civil Liability: A Comparative Study, between Egyptian Legislation and Islamic Law", Journal of Law and Economics, Faculty of Law, Cairo University, 2017, p. 41.

17. Jabbar Taha, Establishing Responsibility For Unlawful Work On The Damage Component,

The Definition of Medical Error

Medical error is the main pillar of the establishment of medical responsibility, whether this error occurs due to the doctor, or one of his or her subordinates, or through the machines and medical devices under his or her control.[18] Since a medical error by the doctor while practicing medicine is different from an error committed by the ordinary person, and due to the technical and scientific nature of the medical work, there have been scholarly, statutory and judicial definitions of medical error that I will briefly review.[19]

Jurists have given many definitions of medical error. Some state that medical errors occur when the doctor does not fulfil the special obligations imposed on him or her by the profession, because anyone working within the profession requires special knowledge and is obliged to take note of the scientific assets enabling the practitioner to carry out the work and is already at fault if he or she is oblivious to them.[20]. However, this definition does not see the medical profession as any different from any other profession of skill and expertise. Others have defined it as a failure of the doctor's conduct, which would not have occurred from an attentive doctor in the same circumstances.[21] Others still talk of it being the mistake committed by the doctor while practicing his or her profession, in violation of care and is manifested every time the doctor does not do his work with caution. Additionally, the Doctor does not take into account the available scientific assets, taking into account all the exceptional circumstances in time and place.[22].Based on the aforementioned definitions, medical error can be understood as an error committed by the doctor while practicing his or her profession, in violation of established scientific principles, theories and science at the time the work was undertaken, with the reason for the breach being due to the doctor's neglect, thus making a case for civil liability.

University of Salah El-Din publications, DT, p. 18.

18. Bin Dashash Nasimah, Civil Liability of The Doctor In Public Hospitals, Faculty of Law and Political Science, Akli Muhannad Oulhaj University, 2013AD, p. 53.

19. Ali Suleiman, The General Theory of Commitment: Sources of Commitment in the Civil Code, (Algerian University Press Office, Algeria, 2005) 142; Nour Al-Huda Bu Aaysheh, Responsibility for Medical Fault, College of Law and Political Science, Al-Arabi Bin Mahdi University, 2013-2014 8.

20. Hassan Zaki El-Ibrashi, Civil Liability of Doctors and Surgeons in Egyptian Legislation and Comparative Law, 1951, 118.

21. Wafa Helmy Abu Jamil, Medical error, an analytical, The Arab Renaissance House, 1987, 38.

22. Abd al-Latif al-Husayni, Civil Liability for Occupational Errors, 1987, p. 119

Statutory definitions of medical error

Most legislation has omitted definitions of medical error, leaving it to the understanding of the judiciary, and by extrapolation of the provisions of the Civil Code. Indeed, one of the major problems in Kuwait law is that there is no specific definition of medical error, leaving it to the definition of error in general tort law and what is contained in medical reports.

As such, the Kuwaiti legislative states that for general civil liability, 'mistake' includes "Anyone who has wrongly caused damage to others shall be liable to indemnify him, whether in direct or causal harm". [23]

According to the above Kuwaiti law, 'medical error' is defined as a deviation from the behaviour of the ordinary person, that is, in the same external circumstances that surrounds the person who committed the act, whether it is causing harm. This applies regardless of whether the perpetrator is rational, distinctive or indiscriminate. [24]

This clause therefore covers acts in such a way that the ordinary person would not, if found in his circumstances, be characterized by recklessness, negligence, negligence, inattention or lack of observance of regulations.

English law perspective on medical error

Other jurisdictions are also interesting. English law does not focus on the actual error as such, but on breach of duty and the expected standard of that duty. It takes the perspective that a civil offence in tort occurs when a person acts against the legally protected interests of others and for which the victim receives remedies for reparations, usually in the form of compensation.[25]

The most significant category of tort is that of negligence, which has been an important influence on the development of the concept in other legal systems.[26]. In English law, liability for medical error is based on normal tort rules of negligence whereby the doctor owes the patient a duty of care and that duty is breached if the doctor acts below the standards of a reasonable,

---

23. Khaled Ali Jaber Al-Marri, Civil Liability of the Medical Team between Islamic Sharia and Kuwaiti Law, Faculty of Law, Middle East University, 2013, 46.
24. Ibrahim Abu Al-Layl, Muhammad Al-Alfi, Introduction to Theory of Law and Theory of Truth, Lessons in the Principles of Law of the College of Sharia and Islamic Studies, 1986, 298.
25. Edwards, l, Edwards, S, Kirkley, well, p.2012, Tort Law, 5th edn, New York, Delmar Engage Learning, p3.
26. Atef Al-Naqeeb, The General Theory of Responsibility Resulting from Personal Action, Error and Damage, 2nd edition, 1999 75

competent doctor and is therefore liable if the patient suffers harm as a result. It is interesting to note that the definition focuses on blame that is the specific error of the doctor and not on the rights of patients, thus giving rise to a 'blame culture'.[27] The legal historian, Harvey Teff, writes that: "…in England, the doctor's duty of care and skill was simply not articulated in terms of patients' rights". [28]

Based on the above, a medical error is therefore a mistake carried out by a person in the capacity of a physician or medical practitioner who does not display the same care and safe result, as a vigilant physician found in the same circumstances. It can also be defined as the failure of the doctor to fulfil the special obligations imposed by his profession. If harm is caused, there is the basis of a claim in medical negligence. There is of course an issue where such consideration of blame culture begins to erode the long-standing relationship and trust in the UK between medical staff and patients.[29] Already in our modern society with technology literally at our fingertips, we are prone to search for medical solutions online with which to challenge our trained medical professionals' conclusions and recommendations.[30] That trust will only erode further.

When it comes to an error resulting in patient death in the UK, there is a growing consensus that, due to complications in interpretation, or lack of clarity of the true cause of the death, 'negligent criminal liability' or 'medical manslaughter' are outdated. Instead these can be covered within Health and Safety Law or Homicide law.[31] Again it is important that patients feel safe and feel there are consequences should it be necessary to report negligence. Yet, trials of this nature are career enders and it is vital they are judged correctly.

---

27. Rahul Prakash Deodhar, 2019, 'Common Law and Indian Cases on Medical Negligence', University of Mumbai, SSRN, < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3350915>, accessed 23rd January 2020

28.Kim Price, 'The art of medicine Towards a history of medical negligence', The Lancet, 2010, Vol. 375, No. 9710, p. 195, <www.thelancet.com/action/showPdf?pii=S0140-6736%2810%2960081-5>, accessed 26th February 2020

29. Stauch M, The Law of Medical Negligence in England and Germany: A Comparative Analysis, (2008, Hart Publishing, Oxford UK)

30. Christine Dedding, Roesja van Doorn, Lex Winkler, Ria Reis, 'How Will e-Health Affect Patient Participation In The Clinic? A Review Of E-Health Studies and The Current Evidence For Changes in the Relationship Between Medical Professionals and Patients' (2011) 72 (1) Social Science & Medicine, 49

31. Charles A. Erin and Suzanne Ost, 'The Criminal Justice System and Health Care', (2009, Oxford Scholarship Online, Oxford University Press, UK)

The judicial definition of medical error[32]

The Kuwaiti judiciary has defined medical error as a violation of the rules of practice, which itself is defined as any activity related to the human body practiced by a doctor licensed by law, established according to the science of medicine in the best interest of the patient.[33] The Kuwaiti judiciary therefore recognizes the responsibility of the doctor if the relevant error involves a clear and definite dissolution of recognized scientific facts and established techniques.[34] Accordingly, 'error' here is a legal concept resulting from judges' assessments of the facts of the dispute before him and the circumstances of the case. The judge finds medical error when a breach of the physician's commitment is clearly defined and distinguishes him from the standard of performance by a comparator (i.e. another professional physician).[35]

Types of medical error

Given the specialized and expert nature of the medical profession, it is not surprising that the law in Kuwait views 'medical error' as falling under one of two categories:

- Material works that are not related to the art or expertise of the profession, called ordinary work or normal error.
- Medical works related to the art of the profession called specialized/expert works or professional error.

Normal error

It is an error that has nothing to do with professional origins, that is, it is an error outside the framework of the medical profession, caused by mere

32. Muhammad Sheta Abu Saad, The Origins of Tort liability in Sudanese Civil Transactions Law, Book One, First Edition, 1984, pp. 105-107.
33. Malalha Abdul-Rahman, Doctor's Criminal Responsibility: A Comparative Study, Faculty of Law and Political Science, 2015-2016, p. 9.
- Mamdouh Muhammad Khairy Hashem Al-Muslimi, The Legal System, For Practicing Alternative Medicine And Civil Liability: A Comparative Study, Arab Renaissance House, 2005AD, P.176
34. Murad bin Saghir, Medical Error In The Rules Of Civil Liability, A Comparative Study, Faculty of Law and Political Science, 2010-2011, p. 27.
35. Tariq Juma Al-Sayed Rashid, "Medical Responsibility in Public and Private Hospitals between Judicial Compliance and Legislative Autism", Journal of Legal and Economic Sciences, Faculty of Law, 2017, p. 38.
Suheir Montaser, Civil Liability for Medical Experiments in the Light of the Civil Liability Rules for Doctors, Dar Al-Nahdah Al-Arabia, DT, pp. 90-91.

human behaviour, or a breach of the general rules of obligation. All people must abide by them. This type is called material works, since medical material works are not related to the technical origins of the medical profession, and apply to the doctor as a normal person, and not because of his/her capacity as a doctor. Normal error in a medical context is caused by the behaviour of the doctor as a human being, and not by the professional practices of the doctor towards the patient, that is, the error did not arise in the context of professional practice.[36] Therefore, it can be said that normal error is a mistake committed by the doctor when practicing his or her profession without the error being related to the established rules of the medical profession, i.e. a deviation from the normal behaviour of the ordinary person.[37]

Professional error

This is a mistake that occurs when a doctor violates the rules and procedures required by the medical profession; it is directly related to the art of the medical profession, including such as diagnosis and treatment and to ensuring the validity of medicines. To prove professional error, one must show that the doctor is in his/her actions has done something opposite to the normal, undisputed medical practice, due to ignorance or carelessness, and this causes harm.[38] More precisely, it is based on ignoring the facts and scientific expert knowledge and shows a violation of scientific procedures and departure from medical rules and resources prescribed by science, both theoretical and scientifically recognized in medical circles. [39]

This type of error cannot be assessed by a judge, but necessitates the use of expert witnesses, usually from the Ministry of Health Committee – namely people with medical expertise, including forensic doctors and academic medical professors. As seen in English law, however, and the reaction to the Bolam case,[40] the problem is that this effectively excludes the judge from the legal process: it means that the court decision is based not on the expert

36. Aladdin Khamis Al-Obaido, Medical Liability for Others 'Act, Legal Book House, D.T., p. 140. Mansour Omar Al-Ma'atah, Civil and Criminal Liability in Medical Errors, 1st edition, Naif Arab University for Security Sciences, Riyadh, 2004 AD, p. 47.

37. Hussein Amer, Abdul Rahim Amer, Civil Liability, 2nd edition, 1979 AD, p. 194.

38. Kuwaiti Court of Cassation, No. 86 Civil [1999] 18 October

39. Samira Al-Sawy Majeed, Responsible of the Follower for Acts Followed in the Medical Field, Faculty of Law, 2016 AD, p. 83.

40. Bolam v Friern Hospital Management Committee, [1957] 1 WLR 582

reasoning of the judge but on the opinion of a medical practitioner. In Bolam, the English courts effectively held that if another doctor agreed with the defendant's medical treatment and decision-making, then it was not for the court to say it was unreasonable, even if the majority of doctors would not have acted in such a way. The House of Lords laid down that:

"a medical professional is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art . . . Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view."[41]

This empowered doctors as from "then, doctors had complete power of diagnosis and they essentially governed the law of medical negligence. Patients had fewer rights in law, diagnosis, and policy than ever before".[42]

Not only is this undesirable as it disempowers the court, but it opens the gate for accusations of protectionism by medical practitioners who, unsurprisingly, may wish to support their colleagues and not be the one who effectively 'accuses' a colleague of being unprofessional. The English courts addressed this problem in Bolitho v City and Hackney Health Authority.[43] In this case, a further prong of the test was inserted, namely that not only must the treatment be supported by a reasonable body of medical opinion but it must also be logical and defensible to the court. Thus, the law was changed so that, even if a given medical action is supported as not being an error by medical experts, judges can still decide otherwise if there has been a glaring and unjustifiable lack of reasonableness in the decision to take that action. This re-empowered the court, rather than the doctors, as final decision-maker as the decision must be 'capable of being logically supported' to the judge who therefore no longer has to rely simply on the opinion of other doctors.[44]

In Kuwait, it is not necessary to hold doctors responsible for all professional errors, but certainly in the case of a serious mistake, surgeon Muhammad Bakhitan Al-Harbi writes that it must be proven to the court that the doctor's negligence or lack of mental capacity has resulted in a failure to implement

41. ibid

42. Kim Price, 2010, 'The art of medicine Towards a history of medical negligence', The Lancet, Vol. 375, No. 9710, 195, <www.thelancet.com/action/showPdf?pii=S0140-6736%2810%2960081-5>, accessed 26th February 2020

43. Bolitho v City & Hackney Health Authority [1997] 3 WLR 1151

44. ibid

his commitment to perform sincere and serious care in conformity with the most recent available science.[45] 'Serious mistake', however, is difficult to define and it is not obvious where to draw the line as to which errors should be compensated and which not.

So, Western perspectives of negligence dictate an intention to provide, and the actual provision of, a medical service to the patient, where that provision is less competent than the level of care required. This definition is not always practical, given the varying level of medical services in many countries. Indeed, the Kuwaiti White Paper highlights how there is a significant mixture of nationality of practitioners in Kuwait, who obviously have different backgrounds and training, so there is a need for a universal standard of care.

There is the possibility of overturning a ruling of negligence if the doctor can show that the benefits of the treatment overcome the medical damage done and can convince the court committee that this is the case.[46] One could argue that doctors should not be questioned about the occupational errors they make while doing medical work if it is in good faith and in the interests of the patient. Perhaps only serious or gross inexcusable error should be taken into account, on the basis that if a doctor is continually questioned about non-serious mistakes committed during the exercise of his or her profession, this may lead to a restriction on freedom to work and weaken the doctor's confidence and trust in their own work. However, legislators wish to provide set, consistent guidelines for the profession and protect the community and individuals from chaos and medical errors. The current trend in jurisprudence and among the judiciary has been to adopt the view requiring doctors to question every mistake committed during the exercise of medical work, assessing whether the error is normal or professional, serious or not.[47]

Not all acts that result in an unfortunate outcome are due to error. There are two basic criteria for measuring errors of a practicing physician: the personal standard (a subjective standard) and the objective criterion. The balance and

---

45.Muhammad Bakhitan Al-Harbi, Victims of Medical Errors, Riyadh, 1438 AH, p. 115, cited in Ahmed Sharaf Al-Din, Physician Responsibility, Civil Liability Problems in Public Hospitals: A Comparative Study of Islamic Jurisprudence in the Kuwaiti and Egyptian-Egyptian Courts, 1986 AD, p. 37.

46. Muhammad Bakhitan Al-Harbi, Victims of Medical Errors, Riyadh, 1438 AH, 115

47. Supreme Court No. 86 (1999), Civil 18 October 1999

Mansour Omar Al-Ma'athah, Civil and Criminal Liability in Medical Errors, 1st edition, previous reference, p.

argument between the two require careful research and consideration. [48]

Accordingly, this paper will address the following issues:

- Objective criterion.
- Personal standard.
- The most likely criterion for estimating medical error.

Objective criterion

The abstract objective criterion means comparing the behaviour of the doctor to that of the responsible person, not by how that particular person would usually behave, but by what is expected by a person in general, based on the ordinary person level. [49]

A mistake according to this criterion has only one meaning: that a person behaves in a manner contrary to that of the ordinary man in carrying out his obligation.

Under the objective approach, the behaviour of a physician who is at fault is measured by the behaviour of another physician of the same level and degree, taking into account the external circumstances surrounding him at the time of the doctor's medical intervention and his or her specialty, excluding internal conditions that change from person to person.[50] Accordingly, the objective criterion includes the need to take into account the external circumstances that surround the doctor when doing his work, which is the seriousness of the patient's condition, maybe requiring quick first aid where specific resources may not be available, as well as the circumstances of time and place where the error occurred, such as distance from hospitals and possible lack of availability of nursing assistance. It is an external circumstance that does not relate to the person causing the damage itself, as is the case for the temporal and spatial conditions in which the damage occurred, for example, depending on its occurrence at night or day, or in a remote place outside the population. [51]

48. Ahmed Shaaban Muhammad Taha, Civil Liability For The Professional Mistake Of Both The Doctor, Pharmacist, Lawyer, and Architect, Dar Al Jadida Al Jadida, 2005AD, 117
Boukhars Belaid, Physician Error During Medical Intervention, previous reference, 36

49. Nabil Ibrahim Saad, The General Theory of Commitment, New University House, Alexandria, 2017, 393

50. Nour Al-Huda Bu Aaysheh, Responsibility for Medical Fault, previous reference, 18.

51. Mohamed R, Civil Doctors' Responsibility for Disclosure of Professional Secret, Critical Journal of Law and Political Science, Faculty of Law, University of Mouloud Mamari, p. 1, 2008 AD, p. 16, and Talal Ajaj, Civil Doctor's Responsibility, Modern Book Foundation, Tripoli, Lebanon, 2004, 222.

Although the majority of jurists see the objective criterion as the sole measure of medical error, there remains some criticism. This criticism is in the form that these grounds make it difficult to estimate external conditions, that it cannot be applied as regards certain internal conditions such as age, for instance, the behaviour of a newly graduated doctor cannot be compared to a doctor with long experience.

Personal Subjective Standard

Personal standard means the commitment of that particular doctor to exert the usual vigilance and insight and must therefore be compared to the case of the doctor who made the same mistake, i.e. to look at the aggressor person, not to the infringement itself, taking into account his own capabilities and degree of care, if it turns out that he could avoid the harmful act attributed to him or her, but did not count on being wrong and questioned. However, if the doctor is not in a position to avoid that and is prepared to take the necessary care of vigilance and insight, this is not counted as a mistake.[52] For example, under this standard, if a doctor out of lack of experience or knowledge caused the death of one of his patients, while being in complete good faith as he believed he did everything he could to save the patient, but unfortunately his means were limited, then if the personal criterion in the judgment was his own limitations, he must be relieved of responsibility, although any other physician could have saved the patient.[53]

This standard has been criticized for the difficulty of its application. Evidential issues are a problem as it requires research in the circumstances and conditions of each doctor with control of his actions and conditions and knowledge of whether his behaviour constitutes a mistake or not. Also, it effectively allows an honest but incompetent doctor to be exonerated. Thus, it can lead to unacceptable results. [54]

---

52. Masoudi Houry, Assisted Abd al-Salam, Medical Fault, Faculty of Law and Political Science, 2014-2015 AD, 14-15.
- Ahmad Shaban Muhammad Taha, Civil Liability for Occupational Mistake, previous reference, 117
53. Khaled Bakhit Al-Da'jah, Civil liability of the anesthesiologist, a comparative study between the Egyptian and Jordanian laws, Faculty of Law, Ain Shams University, 2015 CE, 186.
54. Abdel-Razek Ahmed Al-Senhouri, Al-Wajeez in the General Theory of Commitments, Mantafat Al-Maarif, Alexandria, 2004 AD, 332

The most likely criterion for estimating medical error

The assessment of the error of the physician requires the determination of the nature of his commitment on the one hand and the measure by which the behaviour of the doctor is measured, on the other hand; the criterion that is estimated by the doctor's error varies depending on the nature of the work in which the breach of the obligation occurred. The standard by which error is generally measured in the obligation to exercise care is an objective criterion taken from the normal behaviour of the ordinary person; i.e. taking into account stupidity, inertness, ignorance and lack of care.

As for the technical work of the doctor, the estimation of error is subject to the criterion of occupational error, i.e. the professional practitioner working to the standard of the ordinary man, i.e., the ordinary person of the same profession, at the same level of his knowledge, sufficiency and vigilance, in the same circumstances, and embodying occupational error in deviation from the ordinary technical behaviour of any form, taking into account the level of the profession when estimating the error.[55] Accordingly, the ordinary practitioner's behaviour can be taken as a criterion for estimating medical error. If the error of the doctor outside the framework of his profession and his art is measured by the error of the ordinary person, and where the error is considered a normal error or professional error, severe or minor, it will lead to the establishment of civil liability of the doctor. Accordingly, the doctor's breach of the duty of caution and care imposed upon him according to the law and the provisions of the medical profession is considered a breach if a it could have been performed safely by a physician of the same standard and circumstances in which the responsible doctor was found. Jurists have long held such a doctor responsible for his or her medical error, with a default penalty resulting from a personal breach of the general duty imposed by the law not to harm others. [56]

55. Ahmad Sharaf al-Din, Physician Responsibility, Civil Liability Problems in Public Hospitals, Previous Reference, 46.
Ibrahim Al-Desouqi Abu Al-Layl, Theory of Obligation: The Voluntary Sources of Obligation, Contract and Individual Will in Kuwaiti Law, 2nd edition, 1998, 305.
56. Abdel-Fattah Murad, Commenting on the laws of implantation of human organs and eye banks and their executive regulations and Arab and foreign related legislation, Monshaat Al-Maaref, 2015AD, 27.
Balka was named Nur al-Din, Research In The Civil Responsibility Of The Doctor, previous reference, 7.

It should also be noted that the objective criterion is not absolute, because the ordinary person on which we measure the conduct of the responsible person is not the ordinary person in general, but rather the ordinary person of the category or profession to which the responsible person belongs. [57]

The opinion has, therefore, been settled in jurisprudence and the judiciary that the general criterion of error is the objective criterion, with no neglect of the personal criterion, while the criterion of occupational error, the professional conduct committed for the harmful act, is measured by the familiar technical behaviour of the average person of the same profession and level, i.e., a similar knowledge, adequacy and attention in the light of the external circumstances surrounding it. [58]

This seems an appropriate approach. A patient has the right to expect that a doctor exercises the appropriate skills of a normally skilful and competent doctor. Although the proposals of the White Paper aim to reduce culpability of doctors, the fact that a doctor acts in good faith is not sufficient; an objective standard is needed otherwise well-intentioned incompetence would be acceptable.

Duty of Care

The Kuwaiti Court of Cassation stipulates that a physician's commitment to treating patients is not an obligation to achieve an end/a result but an obligation to exercise care.[59] [60]

In an obligation to exercise care, the onus is on the patient to prove the error. On this basis, the doctor's fault may not be assumed simply because of the patient's injury, but upon the duty of proof. The doctor can deny him by proving the opposite, that is, by establishing evidence that he has made the fulfilment of his commitment to due care. [61]

The Kuwaiti Court of Cassation ruled that it is the responsibility of the

57. Safaa Kharboutli, Civil Liability of the Doctor: A Comparative Study, Dar Al-Hadetha Book Foundation, Lebanon, 2005, 26.
58. Koussa Hussein, The Legal System of Civil Liability for a Doctor in Algerian Legislation, Faculty of Law and Political Science, University of Mohamed Lamine Dabbaghin Saif, 2015-2016, 129.
59. Kuwait Court of Cassation, No. 441 [2001] Civil, 30 September 2002
60. Khaled Ali Jaber Al-Marri, Civil Liability of the Medical Team between Islamic Law and Kuwaiti Law, previous reference, pp. 55.
61. Ahmad Sharaf al-Din, The Responsibility Of The Doctor: A Comparative Study In Islamic Jurisprudence And The Kuwaiti, Egyptian and French judiciary, 1986 AD, 65.

doctor for his mistake, whether ordinary or technical, whether minor or serious, if he or she is proven to break the recognized scientific procedures in his field of work, which are settled and no longer an area of controversy among the people of specialization, including ignorance, or negligence. It is clear to medical practitioners that the obligations of the doctor in general are within professional rules. To determine the extent of the clear violation of the principles are recognized in the medical art and can only sit with the responsibility of the doctor, who is only asked for a fixed error. [62]

It was also ruled that the physician's commitment to treating his patients is not an obligation to achieve care, but rather an obligation to practice care, yet he enquires about his technical error no matter how easy it is if the patient is injured because of him harm.[63]

Proof of error is an important cornerstone of civil liability in general, and proof of medical error is a cornerstone of medical liability in particular. Evidence is the establishment of evidence in a legal way of the truthfulness of facts based on what is right, or the alleged legal effect.

Determining who is charged with this burden is of great importance in practice. The judgment in the case depends in practice on the extent to which those who bear the burden of proof can provide evidence of what they claim, and their inability to do so means that they will lose their claim, as a result of which the judge will rule against him and his opponent[64].

Accordingly, this paper will address the following issues:

- Section I. Determination of the burden of proof.
- Section II. Difficulties related to the burden of proof.

Determination of the burden of proof

Legislation agrees on the rule of needing an adversary who claims a certain person to establish evidence of what he claims, otherwise an allegation shall be deemed to be unfounded, and thus shall be rejected. The burden of proof

62. Distinction Kuwaiti Session 4/6/1980, Appeal No. 100-108, 1979 Commercial, Judicial and Law Review, No. 3, S9, 102.

63. Kuwait Court of Appeal, Fourth Chamber, 9/9/2007 session, Appeal No. 1750, 2007 Civil Appeal.

64. Saiki and his weight, Proof Of Medical Error In Front Of The Civil Judge, Doctoral School For Basic Law And Political Science, Faculty of Law and Political Science, University of Mouloud Mamari, 2010-2011, 52

Ibrahim Ali Hammadi Al-Halbousi, Professional Error In The Context Of Medical Responsibility, A Comparative Study, 1st edition, Al-Halabi Human Rights Publications, Beirut, Lebanon, 2007, 211.

falls on the plaintiff who makes the claim. Thus, the patient has the burden to prove medical error, in accordance with the general rules in determining the burden of proof. The plaintiff must establish evidence of what he or she bases their claims of fault of the doctor[65].

The nature of the obligation of the doctor affects the determination of the burden of proof where it depends on the determination of the content of the obligation, is it an obligation to make care or commitment to achieve a certain result?

The burden of proving the obligation to exercise care

The doctor's commitment to care can be established on the basis of the rules governing the medical profession, and jurisprudence and the judiciary almost unanimously agree that the doctor's commitment to the patient is limited to the obligation to take care without achieving a result, both in the context of the contract or otherwise.

This is the responsibility of the patient who claims the damage caused by the mistake of the doctor to prove this error, which is to prove the deviation of the doctor from the behaviour of a physician middle of the same professional level, or the question of contemporary scientific and technical assets.

This deviation can be reflected in the negligence or lack of attention of the doctor, or failure to follow the technical origins of contemporary medical science.

If the patient proves this deviation was a proof of the error of the doctor, the patient is entitled to compensation unless the doctor proves that the failure to carry out his obligation and failure to care was due to an external cause and not the doctor's fault, , thus interrupting the relationship of causation and no responsibility [66].

The nature of the doctor's responsibilities, whether contractual or negligent, does not affect determining who has the burden of proving his error so much as the nature of the doctor's commitment does. [67]

---

65. Mohamed Kamel Morsi, Explanation of the New Civil Law, Obligations, The International Press, 1955, 76.

66. Abdul Khaleq Hussain Jassim Al-Janabi, Proof of Medical Fault: Comparative Study, 2017 CE, 57. Mohsen Al-Bayeh, A Recent View Of The Doctor's Fault For Civil Liability In Light Of The Traditional Legal Rules, His New Evacuation Office, D.T., 155.

- Samir Abdel Samie Al-Oden, The Legal Responsibility Of The Doctor, The Hospital, And The Pharmacist, Establishment of Knowledge, Alexandria, D.T., 78.

67.Samir Abdel Samie Al-Oden, The Responsibilities Of The Surgeon, Anesthesiologist And Their

The burden of proving the commitment to achieve a result

The basic principle is that the nature and content of the medical obligation are determined by requiring the physician to take care of the patient. In addition to healing the patient, which is called a commitment to seriousness or sheer professionalism, there are other cases in which he or she is bound.

The doctor, with the assistance of the data of modern science, is to provide his patient with medical care, the results of which do not address doubt. His or her obligation in this case is called an obligation to achieve a result. [68]

Where there are cases where the doctor is committed to achieve a result, but it is an exceptional case, the commitment is to achieve the safety of the patient. However, the commitment to safety does not mean healing, but means not subjected to any harm as a result of the use of tools, devices, medicines as well as not exposing the patient to disease or infection, whether by the environment treated in, blood transfusions or otherwise.[69].

Therefore, the use of medical knowledge and technology in the commitment to achieve a result falls on the doctor, because the patient suffices to prove the existence of a medical commitment between him and the doctor, assuming the responsibility of the doctor.

The liability of the physician shall not be established if it is proved that the damage caused to the patient is due to force majeure or the fault of the injured patient or the fault of others.[70]

Difficulties related to the burden of proof

Jurisprudence and elimination of the burden of proof of medical error has mostly stabilized, but the difficulties encountered in doing so have not been denied.

Assistants, Civil-And Criminal-And Administratively, Al-Jalal Printing, D.T., 82.

68. Munir Riyad Hanna, The General Theory Of Medical Liability In Civil Legislation And The Claim For Compensation Arising Therefrom, Dar Al-Fikr Al-Jami'a , 2011 AD, 341.

- Amal Bakoush, Towards An Objective Responsibility For The Medical Consequences, New University House, , 2011AD, 55.

69. Mohamed Hussein Mansour, Medical Responsibility, University House of Thought, 2006, 183

70. Ibrahim Al-Desouki Abu Al-Layl, Theory of Commitmen:, The Voluntary Sources of Commitment, Contract and Individual Will, 2nd Edition, Founder of Dar Al Kutub in Kuwait, 1998 AD, 307.

- Mustafa Al-Gammal, Nabil Ibrahim Saad, Ramadan Muhammad Abu Al-Saud, Sources And Provisions Of Commitment, A Comparative Study, Al-Halabi Human Rights Publications, Lebanon, 2005, 206.

Where the difficulties faced by the patient in the proof of medical error differ between whether the incident that he wants to prove negative reality on the one hand, and the difficulties of medical practices on the other hand, and the patient's acceptance.[71]

Difficulties related to the burden of proving its negative reality

Establishing evidence for a doctor's mistake is often difficult, characterized by the scientific complexity, particularly whereby the error is a technical medical one, as the patient is often ignorant of the mysteries of medicine and techniques.

The main difficulty is to prove that this kind of error 'touches its negative reality'',[72] in other words that the result or error did not already exist. The doctor can prove that he has a duty of treatment, while for the patient to prove his reality is negative is very difficult[73].

If the evidence for a case does not have an external appearance that can be easily measured or disclosed, and since the original commitment of the doctor to treat the patient was an obligation to exercise care, the weight is upon the patent to prove the doctor's fault. Such evidence would need to establish: the procedure was not performed with the required care; evidence of the doctor's negligence and deviation from the principles and procedures of medicine. Stable medical conditions, and the difficulty of proving this as a negative reality, cannot be denied. The judge usually places this with experts in the field to clarify the truth of the matter[74].

Medical damage – the need for harm

Damage is the second pillar of tort liability, and also its essence, as it is not sufficient for the responsible party to make mistakes, but for this risk to cause harm, as if there is no damage, there is no responsibility, and where there is no responsibility, there is no compensation.[75] According to Kuwaiti law, damage is the harm caused to a person following an infringement of one of his rights,

---

71. Saiki and his weight, Proof of Medical Fault in Front of the Civil Judge, previous reference, 63.
72. ibid, 63.
73. Ali Essam Ghosn, Medical Error, Zain Human Rights Publications, Lebanon, 2006 CE, 116
74. Samira Al-Sawy Majeed, Responsibility for Follow-up Acts in the Medical Field, previous reference, 88.
75. ibid, 102.

or his legitimate interest to him.[76] The definition of harm in the medical field, is defined as a condition resulting from a medical act that harms the body. This damage can also be calculated in terms of harm financially, emotionally, or to morale.[77]

Causation

It is not sufficient for the responsibility to cause a person to commit an error, and to do harm; the harm must be the result of that error and there must be a causal relationship so as to prove that, had it not been for the error, such damage would not have occurred.[78]

Causal relationships in the medical field means that there is a direct link between the medical mistake committed by the doctor or the hospital and the harm to the patient, with the necessity that this error led to harm suffered.[79] The presence of a causal relationship in the circle of medical responsibility is difficult, due to the nature of the human body and its tolerance to the complications of disease, so often the developments of one disease differ for no known reason until the doctors find the origins, via their profession and art. It may, in some cases, take many months or years to puzzle out these developments and complications without being able to explain the factors that affected the course of the disease or the outcome of treatment.[80] The relationship of causality in the scope of medical responsibility and in the scope of civil responsibility is of great importance.[81]

The causal relationship consists of two elements, a material element that begins with the cause of the harm that leads to the damage, and a moral component. It includes the mental relationship between the perpetrator and the damage that occurred by breach of his duties. According to the general rules, the onus is on the patient to prove the causal relationship between the

76. Abdul-Rasul Abdul-Ridha, Jamal Fakher Al-Kannas, Al-Wajeez in the 'General Theory of Commitments, First Book', Sources of Commitment and Evidence, 2nd edition, 2006-2007, 237.
77. Musa bin Muhammad bin Hamoud Al-Tamimi, 'Civil Liability of the Doctor', Journal of Legal and Economic Studies, No. 4, 2015 CE, 255.
78. Musa bin Muhammad bin Hamoud Al-Tamimi, Physician Liability: Doctor, previous reference, 257.
79. Hassan Zaki El-Ibrashi, Civil Liability of Doctors and Surgeons in Egyptian Legislation and Comparative Law, 1959, 190.
80. ibid, 190.
81. Muhammad Swailem, Physician and Surgeon Liability and Reasons for Exemption from it in Civil Law and Islamic Jurisprudence, Part 2, Obligation Provisions, 1990, 243.

doctor's fault and the harm done. The doctor can dissolve responsibility if he establishes evidence that the harm has arisen from an alternative cause.[82]

Vicarious Liability

Under normal rules of vicarious liability, the hospital trust is accountable for errors of the medical team under its authority. The Kuwaiti Civil Code governs and regulates the responsibility of the supervisor for the team being led. There is a recognized dependency link between the hospital or clinic, the doctors, and all members of the medical team, that is, the doctors lead and the team follow. The hospital's responsibility, in other words, extends beyond the scope of the doctor's personal actions to those actions committed by the medical staff for whom the doctor has responsibility to monitor and supervise. Article 240 is the basis for vicarious liability in Kuwait. It states that a legal person is responsible for harm caused by someone acting under them, who follows them in his work, i.e. if the junior person committed this mistake while doing his job or because of his job. Under Article 240(2), the vicarious liability relationship is considered even though the person in charge was not responsible for selecting the follower and was not free in his choice. In the case that the job is assigned to the subordinate, this gives the doctor an actual duty of control and therefore the vicarious liability relationship is imposed. The law needs only prove the dependency relationship between the supervisor and supervised, in addition to the supervised person being at fault.[83] Upon the supervisory task being assigned and accepted, the supervisor is determined to be in control of the subordinate in the performance of their tasks.[84] The doctor who represents the medical team or those affiliated with him or her is responsible for the actions of assistants, subordinates and those involved in the work. When a member of the medical team commits a mistake that leads to harm to the patient, this patient has the right for reparations from the supervising doctor on the basis of tort liability, as it follows that the error is assumed on his part due to the doctor's negligence in selecting his

82. Ibrahim Al-Desouki Abu Al-Layl, Theory of Commitment: The Voluntary Sources of Commitment, Previous Reference, 308.
83. Samir Abdel Samie Al-Oden, Responsibilities of the Surgeon, Anesthetist and Their Assistants, previous reference, 89
84. Ibrahim Abu Al-Layl, Muhammad Al-Alfi, Introduction to Theory of Law and Theory of Truth: Lessons in the Principles of Law of the College of Sharia and Islamic Studies, previous reference, 300.

subordinates or in monitoring and supervising them.[85] A doctor who issues specific tasks to his or her assistants whereby harm is caused to the patient as a result, will be considered vicariously liable, should it be proven that the tasks were incorrectly ordered or were not appropriate for the case in hand. In 1990, the court ruled that a surgeon was responsible for the actions of the medical team, where the surgeon had ordered the patient to be transferred from the operating room to the ward, contrary to the normal medical practice used in this type of transfer.[86] Accordingly, the responsibility of the physician in general, whether alone or at the head of a medical team in Kuwaiti law, is subject to the general rules of civil responsibility. It is important to note, however that, as mentioned at the start of this section, that the hospital trust itself could carry the liability, and as such the person responsible for the work of the team could claim back from the trust all that he pays to the injured party as compensation for his illegal work.

Compensation

The direct reparation of civil liability for medical error is compensation. The patient, after the clauses of medical responsibility have been proven, has the right to compensation. He or she has the right to file a civil liability case by going to the judiciary and filing the case before the competent courts as a result of incompetent medical treatment and the damage caused as a result of this work.[87]Accordingly, this topic will address the following sub-topics: compensation of the injured under medical responsibility, and the assessment of compensation arising from medical liability.

Compensation is the fruit of medical liability, i.e. a cash alternative that the doctor pays to the patient to compensate for the damage he or she has suffered. It is a penalty for the liability resulting from the error causing harm to the patient.[88] Compensation is defined as a penalty in return for the damage suffered by the injured or by limiting the patient's right. It is presented after

85. Musa Abu Mallouh, Responsibility for Faults of the Medical Team, 1999, 3
86. Mohsen Abdel Hamid, his recent view of the fault of the doctor responsible for responsibility, previous reference, p. 63; Kuwaiti Appellate Misdemeanor, Case No. 65/90, 25/1/1990.
87. Hasan Alawi, Civil Liability for Medical Errors in Public Hospitals, Saja, Faculty of Graduate Studies, Birzeit University, 2017-2018, 100.
Faisal Ayed Khalaf Al-Shoura, The Medical Mistake in Jordanian Civil Law, Middle East University, 2015 CE, 72.
88. Karim Ayouch, Medical Contract, Dar Houmah, 2007, 209.

the attack on this right, or the damaged interest or person, thus compensation is intended to correct the balance that was disturbed, or the loss incurred as a result of the damage done. It should return the injured person to the condition the injured party would be expected to be in, should the harmful action had not occurred.[89] Compensation is defined in medical responsibility as a means of eliminating the effects of the actual harm affecting the patient or at least alleviating his or her suffering. It should provide a care for rights and aim to achieve justice. [90] Compensation is also a penalty that holds responsibility to account, i.e. the result of the person at fault being held to the value of the damage he has done to the victim, to return them to a place of health before the occurrence of the damage, or the optimal expected or to cover accident compensation.[91] Compensation is the inevitable consequence of the establishment of civil liability, as when the injured person seeks responsibility to obtain compensation for the damages incurred by him, the compensation must be complete.[92]

The damage must be assessed, and can include material or moral, for the compensation to be calculated. [93] Material damage covers a violation of the victim with a financial value, or the victim's legitimate interest has financial value. Moral damage is harm that does not affect the financial liability in any way. Under Article 231(2) moral harm includes in particular, the sensory or psychological harm inflicted on a person as a result of prejudice to his life, body, freedom, honour, reputation, social or moral position, or his financial position. The moral damage also includes what a person feels of sadness and sorrow, and what he misses of love and tenderness as a result of the death of a loved one. However, it is not permissible to award compensation for moral damage resulting from death, except for spouses and relatives up to the second degree. Caselaw and statute show that it is permissible for a patient to

89. Ibrahim Al-Desouqi Abu Al-Layl, Compensation for Damage in Civil Liability: An Analytical Study, Descriptive of Compensation Estimation, Kuwait University Press, Kuwait, 1995, 13.

90. Bodour Rida, Civil Liability for Medical Errors and Insurance, previous reference, 172

91. Nasser Miteb, Al-Kharing Building, Agreement on Exemption from Compensation in the Kuwaiti Civil Law: Studying a Comparison with Jordanian Law, Faculty of Law, Middle East University, 2010 CE, 11

92. Sami Abdullah Al-Duraie, 'Some Problems Raised by the Judicial Estimation of Compensation', No. 4, P. 26, Law Journal, Kuwait University, 71.

93. Sami Haroun Sami Al-Zari, The Idea of Professional Error Is The Basis Of The Professional Responsibility Of The Self-Employed Doctor, previous reference, 288.

claim compensation for the moral harm he or she has suffered, covering both reputations and feelings.[94] The Al -Watan newspaper reported that the Court of Appeal awarded compensation of 15kd for actual and moral harm caused by an ophthalmologist. This covered sadness and depression caused by the negligence, as well as the actual loss of sight.[95]

Personally, as a result of the doctor's fault, the right to claim compensation for moral harm suffered, however, is limited. A patient's relatives relate to his death over the deceased's husband and relatives to the second degree. Jurisprudence and the judiciary have also clarified that compensation for moral damages is not transferred by inheritance unless it is determined by virtue of an agreement, or if a creditor demands it before the judiciary.[96]

Those who have the right to claim compensation for material damage include:

1. The injured patient

Whereas material damage is a breach of the financial interest of the injured party, the injured patient is the plaintiff in the suit of medical liability, as he or she has been damaged by poor medical treatment.[97] Each individual medical error resulting in material damage to the victim necessitates the liability of the doctor to compensate to the extent of the damage caused to the patient, that is, both the loss and loss of profits.

2. Beneficiaries to the patient's estate (if deceased)

A material injury may consequently affect a person by means of damage to another person, similar to that inherited by the deceased patient. Jurisprudence states that it is permissible for heirs to claim the right of their inheritor in terms of the harm he or she was caused. Since the death of the patient due to the fault of the doctor necessitates the liability of the doctor and establishes the right to compensation, so this right may be transferred to the deceased patient's heirs if they institute a lawsuit provided they can prove that the death

---

94. Kuwait Civil Code, 1980, Article 301. The Civil Code section, 'Responsibility of Personal Actions', Kuwait Civil Code 1980, Articles 231 and 232, is therefore incorporated into 'Performance with Compensation', Kuwait Civil Code 1980, Articles 293 – 306.

95. Kuwaiti Court of Appeal, 1st September 2013

96. Hamdi Abdel-Rahman, The Mediator In His General Theory Of Obligations, the second book, section two, Involuntary Sources, Arab Revival House, Cairo, 2009-2010, p. 458. Abdel Razek Ahmad Al-Sanhouri, Mediator on Explaining the Civil Law, previous reference, p. 1215.

97. Bader Jassem Al-Yaqoub, The Origins of Commitment in the Kuwaiti Civil Law, I 1, 1981 AD, p. 349.

of their heir has caused them harm. And he lost a fixed right on them, as the violation of his financial interest to the injured and the fact that the damage was real would make the judgment of compensation[98].

3. Creditors

It is also possible for creditors to file a lawsuit in the name of their injured debtor in order to claim via the liability of the doctor. It can be questioned whether in this case the inalienable right of the aggrieved is a personal right or a winning financial right. This right was a personal right inherent in the aggrieved party, as creditors are prohibited from using this right in the name of the debtor, because the scope of the indirect lawsuit does not apply in this case. Compensation is a personal right of his own, and his creditors may not use it on his behalf. But if the inalienable right of the aggrieved party is a financial right, even if on the occasion of the aggrieved party suffers a disability or illness as a result of the medical mistake, compensation in this case amounts to compensation for the loss sustained and the loss of profits, in this case creditors may file the indirect lawsuit.[99]

Legislative changes in recent years regulating compensation in the civil law show Kuwaiti legislation as considering compensation to be an inevitable consequence of the establishment of civil responsibility. The current rule governing the assessment of compensation for damages requires that the awarded fee be sufficient to compensate for the loss. According to Kuwaiti law, monetary compensation is the primary remedy, leaving the judge to act with discretion in choosing his or her compensation method in kind if that is possible[100]. It should not be more or less and should not include a value for anything other than the damage directly caused by this error.[101] It is worth

98. Abdel-Razek Ahmed Al-Sanhouri, The Mediator In Explaining The Civil Law, The First And Second Volumes, the Arab Renaissance House in Cairo, 1981, p. 1198. Ahmed Mahmoud Saad, The Responsibility Of The Private Hospital For The Errors Of The Doctor And His Assistants, Arab Renaissance House, 2007, p. 581.

99. Abdel Moneim Al-Badrawi, The General Theory of Obligations in the Civil Law, Part 2, Obligation Provisions, 1990, 188.

100. Nasser Muteb Biniyeh Al-Kharing, 'Agreement on Exemption from Compensation in the Kuwaiti Civil Law,' previous reference, p. 18.

101. Ahmad Sharaf al-Din, The Responsibility Of The Doctor: A Comparative Study In Islamic Jurisprudence and the Kuwaiti, Egyptian and French judiciary, previous reference, p. 113.
Nada al-Mahdi al-Mukhtar Muhammad al-Thatoumi, Civil Liability for Plastic Surgery, Comparative Study, Faculty of Law, 2015.

noting that monetary compensation is the predominant form in cases of tort liability, because every loss can be compensated, and therefore circumvents the problem where the judge does not see a way for non-monetary compensation to amend the fault.

The estimation of compensation is thus one of the issues that the judge must consider. The value is dependent on the individual elements that constitute damage to the person. These values are legally stipulated by the Court of Cassation but are considered a legal adjustment of reality; in other words, it is case dependant, depending on the personal situation of the victim and how that injury affects him or her.[102]

Likewise, the judge takes into account and grants compensation for the damage caused to the injured party at the time of the judgment, if it is not possible for him at the time of the judgment to determine compensation for future losses. The judge may permit the injured person the right to demand compensation for up to a certain period of time, providing an estimate of the amount to be lost in that period for review by the judge. In assessing damages at the time, the judgment is issued, it is understood that the actual damage may increase or decrease. The patient may develop an increase in symptoms; for example. an injury becomes a permanent disability, or symptoms may lessen or be less serious than original assessments predicted. It may be that the damage itself may not change but its value changes by changing prices, and in such cases the judge must determine the amount of compensation based on the value of the loss at the time the judgment is pronounced.[103]

The Kuwaiti Court of Cassation has held that assessing compensation for material and moral damages is one of the roles of the trial judge, and depending on the case they can potentially integrate material and moral damages, estimating the compensation as a whole[104]

According to English law, compensation for damage includes any material loss suffered by the claimant, whether it affects the person personally or

102. Muhammad Swailem, Physician and Surgeon Liability and Reasons for Exemption from it in Civil Law and Islamic Jurisprudence, Part 2, Obligation Provisions, 1990, 395; Supreme Court No 59 [1993] Commercial 7 Dec 1993

103. Nada al-Mahdi al-Mukhtar Muhammad al-Thatoumi, Civil Liability for Plastic Surgery, Comparative Study, Faculty of Law, 2015, 150.

104. Journal of Judiciary and Law, Q. 21, C 2, 1998 AD, 200; Supreme Court No 59 [1993] Commercial 7 Dec 1993

financially.[105] However, the English judiciary generally does not grant compensation for moral damage arising from a breach of contract, but it does not deny the right to claim compensation for moral damage arising from the harmful treatment incurred by the patient.

Part III: Comparison with UAE Law on Medical Negligence

The issue, therefore, is that the dedicated laws for clinical malpractice in Kuwait are relatively old and do not cover many of the key areas of modern controversy. The general tort laws, on the other hand, are not designed to cover such areas of specific expertise and are not necessarily fit for purpose. Specific occupational tort law, on the other hand, is a better vehicle for recognizing the requirements of specialised industries. Because of this, it is interesting to see the approach taken by other Middle Eastern countries. Libya, Syria, Jordan and Tunisia are all in the process of reforming, or attempting to reform, their medical negligence laws.

The UAE has recently successfully passed new regulatory legislation via their 2019 Cabinet Resolution N.40. These regulations build on the 2016 Federal Law on Medical Liability (Law No. 4 of 2016),[106] as published in the UAE Official Gazette on 15 August 2016.

Analysing the reforms made in UAE, and the current systems they have adopted, it can be determined what works well and what presents challenges with regards to both the rights of the patient, the rights of the medical practitioner, and the practicality of carrying out those reforms. These findings can be used to develop and suggest reforms for Kuwait's own system, using the knowledge to make amendments to the suggested reforms in the White Paper.

One major reform is that 'gross error' is now defined, under Article 5. Article 5(1) states that an error is considered to be gross if it includes:

- Death
- Loss of a body part
- Loss of a body part function
- Any other great mistake

However, it is obvious that there is a major problem with this approach. Firstly, it focuses on result, not care. This contrasts with the approach taken

105. R Mulheron, Principles of Tort Law (2nd Edn, Cambridge University Press, 2020) 567, 576
106. U.A.E. Federal Law on Medical Liability, Law No. 4, 2016

by the Kuwaiti Supreme Court, as well as the approach taken in common law countries. More importantly, the definition is circular. It is hardly helpful to prescribe a list of three serious, negative outcomes and then to add a catch-all definition which brings the law back to where it was in the first place. Defining a gross error to include 'any other gross error' is a tautology.

Article 5(2)[107] also states that for a mistake to be considered great the reason for the mistake has to come from the following list, whereby the medical practitioner:

- Has no knowledge whatsoever of the normal technique used in treatment
- Uses an unusual method
- Carries out an unjustified intervention (based on what is normal)
- Is taking drugs or under the influence of drink, or other mental abnormality
- Is completely careless
- Deliberately does his/her job in a different way from normal doctors
- Uses new, untested methods
- The problem with this prescriptive list is that it is too narrow. In effect, this means that a doctor who causes the death of his patient as a consequence of being extremely tired will not be liable because that is not one of the categories. Of course, it could possibly be argued that this would come under complete carelessness. But is this carelessness in his/her actions, or carelessness in allowing him/herself to be so tired in the first place? After all, an exhausted doctor who commits a gross error may be taking extreme care, to the best of his/her exhausted capacity.

Under these new laws in the UAE medical cases will now be referred to the new Medical Liability Committee, which will report to a new Supreme Committee. Only after a decision by both Committees will the cases be passed on to the judicial authorities. The focus here is to have specialists review the facts first, to determine whether there is a case to answer. In this way, the law offers a certain amount of protection to doctors, eliminating vexatious claims and ones where non-specialist judges feel heavily influenced by media pressure. The new laws also do not allow any criminal proceedings, including arrest, imprisonment or investigation, until the Medical Liability Committee has issued its final report.

107. 2019 Cabinet Resolution N.40, of U.A.E. Federal Law on Medical Liability, Law No. 4, 2016, Article 5(2)

In the new UAE law, there is also a strong emphasis on reconciliation and settlement. Indeed, one major change introduced by the new law is that settlement between the parties now means that any possible criminal action is forfeited, as shown in Article 35. This even applies after judgement has been handed down, allowing for post-judgement settlements so that for instance, if a doctor barred from practice by the court, and then reaches a settlement with the victim, the bar will be lifted. This, again, is designed to reduce pressure on medical practitioners, which is to be welcomed. However, it does mean that the Public Prosecutors are now powerless to bring a prosecution if they feel that it would be in the public interest, if the case has already been settled. Equally, it undermines the authority of a judicial decision. Crimes are not only offences against the victim but against society as a whole, and there may be instances in which a doctor continuing to practice will pose a danger to the public. As such, there is a difficult balance to strike. The medical profession are an essential public service and we need them to perform well, without undue stress, but the public interest of the law as whole is not to be underestimated, it is not enough simply to compensate victims.

Thus, in summary of UAE's reforms as regards civil law, the focus of this paper, a new Medical Liability Committee to assess negligence cases would be a welcome introduction to Kuwaiti Law. A permanent, sitting Committee under the Ministry of Health, as opposed to the current ad hoc ones, would provide some continuity in opinion and approach, making the law easier to access and understand for both victims and lawyers. Its reports would be influential but not binding on the court. This would be particularly valuable as temporary committees do not garner the same level of respect, not having the requisite degree of expertise, as a permanent and specialised committee does. The proposed committee would not have the right to decide whether civil cases could be brought, however, as this could be unconstitutional.[108] Equally, although settlement is to be encouraged, the idea of post-judgement settlements superseding the decision of the judge is not acceptable. However, it is reasonable the committee would be the sole decider of whether criminal charges could be brought, as an expert body effectively taking the role of the public prosecutor. As shown below, however, the approach by the very recent Kuwaiti White Paper and proposed Bill did not focus on a committee but on

108. Kuwaiti Constitution, Article 166

an actual new medical court, which is far more problematic.

Part IV: The Kuwaiti White Paper and Proposed Bill

Key findings of the White Paper

The current legal framework in Kuwait is complex. The earlier discussion shows that medical negligence is based on general negligence, as applied to medical practitioners. At the same time, the field of medical science has been developing at pace. The result is that certain scholars and legal practitioners now think that medical negligence should be covered as a specific branch of law dedicated solely to Medical Law. The problem is not only a theoretical one, but a practical one too, and it comes at great cost to both patients and doctors.

It was the recognition of this issue that was the reason the Kuwaiti Institute for Scientific Research was asked by the Kuwaiti authorities to research the law, its effect on medical practitioners and to assess whether it provides a proper balance between the rights of doctors and those of patients. Recommendations for reform constituted a key part of the paper, and a draft Bill was introduced.

The Institute found that the situation in Kuwait is highly unsatisfactory. As they state in the White Paper:

The current situation negatively affects the performance of doctors, in that it creates among them fear, weak sympathy, and lack of initiative in the working environment; people may feel hostile to them …the work environment for doctors has become impossible to maintain: it is not an appropriate environment in the sustainable range of practicing the task of medicine as a preventive measure. In addition to this, the patient is impacted, as they will be affected by the fear of the doctor, his/her patients, and it is not at all consistent with global practice, especially in the case of a mistake.

The Institute therefore highlighted what has been a matter of much public debate. Doctors are under pressure to perform increasingly complex and intricate procedures. The public have higher and higher expectations. Failure is not considered to be acceptable. And yet failure does not necessarily mean error. Indeed, one of the major problems is that the investigative authorities often classify medical mistakes as serious mistakes, without cause. However, this is mistaken: a harmful result does not necessarily mean there was a legally harmful action. The reason the authorities do this, according to the Institute,

is not because they necessarily disagree with this principle but because the criminal option is always a possibility, and there is great pressure for them to bring criminal prosecutions, and so the classification of the harm as a serious mistake is needed.

The paper does not focus on criminal guilt; one of the key proposals for reform was that medical negligence should be confined to the civil law field and excluded from criminal law liability. According to the White Paper, medical law should focus on compensation for the victim, to right any wrong done, and on the investigative phase, to try and find the root of the problem and ensure it does not repeat.

Despite this, confusion arises as Kuwait Law has no clear definition of medical mistake. In the general law of mistake, there is intentional mistake and also simple and great mistake where the result is not intended.

There are three categories in current jurisprudence:

- Simple mistake
- Major mistake
- Great mistake

However, the Kuwait Supreme Court has not defined ‘serious mistake’. In some cases, it has referred to ‘personal-harm guarantee’ which distinguishes between great mistake and major mistake. ‘Great mistake’ (or ‘gross error’) is defined in caselaw, meaning a completely abnormal, but not intentional, mistake, what might be referred to as gross negligence. Thus, it is a very major mistake but still one step away from being intentional (Case Commercial Court, Appeal No 1001, 2004, Commercial 3, Session 18th June 2005). However, this is rather circular – such a definition still keeps a large amount of discretion for the court, it still does not say what the mistake is, or what exactly is meant by ‘great’. It is not particularly helpful to say that a great mistake is a very serious mistake that is simply tautology.

However, for a major mistake, the Supreme Court has not given any specific directions. Rather, the court has retained discretionary power to itself. As such, the problem of the lack of serious mistake is further exacerbated.

The Institute was at pains to stress that great mistake and great harm are completely different concepts. As per page 29 of the White Paper, Kuwaiti law has a great deal of confusion about what this is and when it happens. A very minor mistake in terms of doctor care can, unfortunately, sometimes cause

great harm and, likewise, a serious mistake by the doctor can, fortunately, sometimes produce no harm at all. The problem is that the public do not see the difference and therefore definitions need to be clear.

Proposals for Reform

Definition of mistake

The Institute therefore produced proposals for reform. The White Paper notes that there should be three definitions of mistake:

- Simple
- Intentional
- Great mistake

According to the White Paper, a 'great mistake' is one where the actor intentionally intends the action, but not the result. At the same time, the result must have been foreseen by the medical practitioner carrying out the act, or the result must be foreseeable to a reasonable person. This seems a sensible suggestion. It should be noted that the White Paper does not link this to any harm caused. Under this definition, a minor harm could count as a great mistake. This is because the doctor's duty is of care lies in the treatment, rather than in the result of the treatment.

Communication

The proposal also targets duty of care, which currently does not define the quality or level, or standard of care required. The White Paper suggests that as there is a great mixture of different nationality practitioners in Kuwait we need a clear, universal standard, and that the duty of care should be based on a normal doctor, not a specialized one (as per Supreme case no 42, 1975, Commercial, 3 Nov 1976). Further proposals for reforming duty of care include an increased focus on patients' rights. Informed consent is integral to patients' rights as patients cannot give informed consent unless they have received proper diagnosis and treatment. They must also be correctly told of alternative options, their questions answered, and the doctor must clearly state the percentage failure rate of any treatment and clearly lay out all the other risks and consequences. In other words, clear, honest, open and complete disclosure with the patient is required, so they are informed of all risks of injury and failure.

Rights of patients vs doctors: the consequences of prosecution

This emphasis on patients' rights is to be welcomed. Gone are the days when doctors were allowed to be avuncular deciders of patients' fates: personal autonomy rules mean that it is the patient who must decide their best interests, and this decision is worthless unless it is founded on proper information. However, this has to be balanced with the rights of doctors not to exercise their profession in fear, based on clinical malpractice claims every time a result is not quite as hoped. Increased insurance rates and government liability for the public sector is very expensive, with extremely negative consequences. The fear of criminal prosecution, is even more worrisome, disruptive and likely to lead to practitioner stress, causing even more errors, or doctors leaving the field. Neither serves the interests of the general public. The related question of whether to de-criminalise medical negligence is an interesting one, and one that has been suggested in other countries, such as England, after several high-profile and much criticized cases. However, this question requires specific analysis which is not possible in this paper which is focused purely on the tortious liability of medical practitioners.

Medical Court vs Medical Committee

Another recommendation from the White Paper includes a dedicated Medical court which, as discussed in relation to the UAE, has the benefit of dedicated expertise, such as medical tribunals are successfully used in many countries. With medical practice becoming more and more complex, there is some sense in this. This also ties in with the approach of the new law in the UAE, with the emphasis being on having a dedicated committee of experts to handle medical cases, rather than relying on general courts. Indeed, this also is very much in line with the tradition in the Middle East towards arbitration, and the use of industry experts for specialised areas.

Politically this is a very big step and, not unsurprisingly, was not popular with government. The Bill was rejected, largely due to the unpopularity of creating a new dedicated Medical Court, primarily because it represents major change in the court structure of the country. It is feared that it would encourage extra claimants beyond the courts' capacity and create a floodgates argument. There is also a concern that it undermines the existing court authority and might be followed in other domains, thus weakening the court

system even further going forward. This is a valid concern as the principle of the rule of law is a fundamental one in the country and law depends on a strong, functioning court system.

The reforms proposed by the Bill

The proposed Bill spells out the overarching duty of the medical practitioner under proposed Article 37 which states:

The doctor must do everything in his power to treat his patients, and that he should aim to preserve the health of the patient and his life, and to do this he must use his full information, conscience, ethics required by the medical profession to achieve this goal according to the treatment and care.

This provides a comprehensive and helpful guideline which could serve as a basis for medical negligence claims in that it provides greater clarity of the specific duties of medical practitioners, rather than the normal layperson.

The Kuwait Draft Bill, as included in the White Paper:

The proposals in Kuwait for the draft Bill took a different approach. This subdivided mistake into two categories, as in Articles 103-105:

- Medical Mistake
- Great Mistake

- Medical Mistake

Any action that has a civil law nature that does not fit with the normal practice of the profession that is committed by the practitioner or by the institute and leads to harm to the patient. In addition, it is only giving rise to civil liability, if there is a direct relationship between the action and the harm, even if there is great harm.

Great Mistake:

Includes the medical mistake above but it is mixed with a greater degree of gravity of mistake that means it is now absolutely outside the range of normal. In addition, it will develop up to the same level of intentional.

The other criticism of the proposed bill was that it eradicated all criminal liability for gross negligence. This, again, seems a step too far. Although this paper is not focused on criminal liability, there is an overlap for gross errors, and there are certain exceptional circumstances were the ability to use criminal sanctions may still be necessary and relevant.

However, in terms of civil liability, the bill makes many good suggestions. Furthermore, given the increased focus on clinical malpractice in the region, with many countries attempting serious reforms, even though it was rejected, the proposed bill shone a spotlight on the current issues and made Parliament realise that the current law needs attention.

Conclusion and recommendations

Civil liability, whether contractual or tort, is a core foundation of the legal system in today's society and, with modern developments, the scope of tort law in particular has been extended to include a greater breadth of responsibility, as well a greater duty of reparation and compensation.[109] Due to the potentially serious risks of medical intervention, Kuwaiti law has established specific rules and controls by which to protect the patient, should a medical practitioner make a mistake, which has a negative effect on the patient's health, causing harm and indeed sometimes death.[110]

While doctors have long been held legally culpable for medical errors,[111] the remit of this responsibility has in recent years received greater attention, both by the law itself and the media. This is due, not least, to the development of scientific and technological progress, the growing role of increasingly complex medical devices, tools and products, and the associated new risks[112]. Patients want to receive the newest and most sophisticated treatments. Naturally these developments contribute to an increased probability and diversity of errors in medical treatment.[113] In line with the views of the Head of Forensic Medicine at the Ministry of the Interior the public are increasingly unwilling to accept an unwelcome medical outcome, even if the risks of that outcome were clear and there is no negligence at issue in the arrival at that outcome. A 900% increase in claims over recent years, 90% of which are unsubstantiated, indicates a high level of misunderstanding, leading to increased stress on doctors and

---

109. Faisal Ayed Khalaf Al-Shoura, The Medical Mistake in Jordanian Civil Law, Middle East University, 2015 CE, p. 1

110. Boukhars Belaid, The Doctor's Mistake During Medical Intervention, College of Law and Political Science, Mouloud Mamari University, 2011, p. 7.

111. Court of Cassation, Case No. 86, 1999, 18th October

112. Ben Ali Nariman, Civil Liability of the Anesthesiologist, Faculty of Law and Political Science, Akli Mohand Uhlhaj University, 2013, p. 5.

113. Mahmoud Musa Dudin, The Individual Doctor's Civil Responsibility For His Professional Work, A Comparative Study, College of Graduate Studies, 2006, 3.

other medical practitioners, as well as wasted time, money and stress on the part of the victims and their families.

For these reasons although with recent amendments there is still an urgent need to review the current Law, amending it in line with the recommendations outlined in this article, and ensuring timely passage to create a clearer legal regime for medical negligence in Kuwait.

Suggested Recommendations

Suggested recommendations, therefore, include:

1. To enact a new, comprehensive and integrated law regulating:

- The civil liability of the medical team, which Kuwait lacks, as all matters relating to responsibility in the medical field are currently only subject to the general rules of civil responsibility. The current recent medical law is not sufficient.
- Clear definitions prescribing a physicians' default responsibility for medical error and liability, clarifying the nature and extent of the practitioner's obligations and duty of care.
- Respecting the general civil law whereby settlements are allowed only up to the date of the judgment, not post-judgment as permitted in the new UAE law.
- Defining the medical error, including type, severity and number. The recommendation for this is to accept, as a starting point, the Kuwaiti draft bill's definitions of mistake, including medical mistake and great mistake.
- Adequate protection for doctors. Unfortunately, the White Paper's suggestion of a new Kuwaiti Authority for the Protection of Medical Practitioners is very bureaucratic and time-consuming. A better approach would be to redefine breach of duty of care to include whether a doctor was acting in total good faith. Although good faith would not be a panacea for all mistakes, incorporating it as a subjective standard to help determine liability would help to settle conflicts where doctors feel afraid to act simply because an unfortunate outcome may result, but where they genuinely believe that it is in the patient's best interest.
- The implementation of a new, permanent and dedicated Medical Liability Committee, such as in U.A.E. The committee would work with the courts, as experienced specialists, providing expert reports, identifying whether

there is a fault, the extent of liability, and assess whether the case justifies a civil claim or criminal charges. This would emphasise financial settlements to repair the fault, over criminal charges, except where considered necessary for the security of the public. However, this would not include the creation of a specific dedicated Medical Court which is unnecessary and politically controversial.

- Compensation for damages resulting from medical mistakes should be clearly laid out. They should be fair and complete, so as to redress all loss suffered by the patient, whether material or moral.

2. To teach medical liability as a separate subject to students within the College of Medicine so that they have a better understanding of their professional and legal obligations.

3. Legal guardianship regulations should be amended, via statute, to give equal rights of women to guardianship, over themselves and their dependents, in accordance with their Constitutional rights.

4. To devolve judgment about medical competence to practice to a medical committee or body in cases of allegations of malpractice.

5. To keep criminal liability for medical gross negligence, in the most serious cases. The Kuwaiti proposal for reform fails to recognise the importance of possible criminal liability as a deterrent to medical malpractice.

It is clear that the law of medical negligence in Kuwait needs urgent reform. Doctors and medical practitioners are under great pressure; they work long hours; and in the utmost good faith to promote health and wellbeing amongst their patients. The principle of the Hippocratic Oath obliges them to first do no harm. But medical science is not an exact science, and there are variables outside doctors' control. With increased media focus, if an operation goes badly, for instance, doctors can be pursued relentlessly by the public and the authorities, even if there was no real blame attached. It is hoped, therefore, that further reforms can be drafted into a bill to address at least the key issues outlined in this article.

Bibliography
Cases
UK
Bolam v Friern Hospital Management Committee, [1957] 1 WLR 582
Bolitho v City & Hackney Health Authority [1997] 3 WLR 1151

Kuwait
Court of Appeal, Fourth Chamber, 9/9/2007 session, Appeal No. 1750, 2007 Civil Appeal
Civil Court No 312/2015 Civil Court 26 Dec. 2016
Commercial Court, Appeal No 1001 [2004] Commercial 3, 18th June 2005
Commercial Court, Cases 573 and 627 [2010] Commercial 24, 2 2011
Supreme Court No. 86 Civil [1999] 18 October
Supreme Court No 42 [1975] Commercial, 3 Nov 1976
Supreme Court No 441 [2001] Civil 30 Sept. 2002
Supreme Court No 583 [2013] Civil 20 April 2015
Supreme Court No 583 [2013] Civil 20 April 2015
Supreme Court No 1078 [2014] Commercial 20 May 2015
Supreme Court No 1960 [2010] Commercial 13 Dec 2011
Supreme Court No 11692 [2012] Civil 18 June 2013

Egypt
Egyptian Supreme Court Case no 111 Hearing 26 June 1969

Laws
France
French Civil Law 2002-303, 'Loi Relative aux droits des malades et à la qualité du système de santé', March 4, 2002

Kuwait
Kuwait, 1981 Decree Law No 25, Article 13
Kuwait Civil Code 1980, Article 1
Kuwait Civil Code 1980, Articles 18 - 20
Kuwait Civil Code 1980, Law No. 67, Article 227
Kuwait Civil Code, 1980, Article 248 and 251
Kuwaiti Constitution, Article 166

Kuwait Constitution 1961, Article 29

U.A.E.
U.A.E. Federal Law on Medical Liability, Law No. 4, 2016
U.A.E. Cabinet Resolution No (40), 2019
U.A.E. Federal law No 4 2016

Religious Texts

Hadith, Abu Dawud, Sunan, no. 3207
Hadith, Ibn al-Qayyim, Al-Jawāb al-Kāfi 1/8
Hadith, Ibn Qayyim, Dar al-Fikr, Beirut, 1397H, 327
Hadith, Jabir, Sunan Abī Dāwūd 336
www.binbaz.org.sa Hadith, as related by Amr bin Shaib, accessed 14 June 2020

Personal Testements/Interviews

Awadh I, (Interview) 16th April 2018

Secondary Sources

--, Journal of Judiciary and Law, Q. 21, C 2, 1998
Aaysheh NAB, ‘Responsibility for Medical Fault’, (2014)
Abdel-Qader S, Abu Atta, Medical Errors Department, Governmental Hospitals, Palestinian Ministry of Health, Gaza Strip, MA, Faculty of Commerce, Islamic University, 2015
Al-Badrawi, AM, The General Theory of Obligations in the Civil Law, Part 2, Obligation Provisions, 1990
Al-Bayeh, A Modern View Of The Doctor’s Line Of Positive Civil Responsibility, In Light Of The Traditional Rules, His New Evacuation Office, 1990
Al-Din AS, The Responsibility Of The Doctor: A Comparative Study In Islamic Jurisprudence And The Kuwaiti, Egyptian and French Judiciary, (Kuwait University, 1986)
Al-Din MM Concept Of Civil Liability In Islam And The Law Of Torts, (Lahor, Pakistan: Islamic Publications Ltd. 1982)
Al-Ghamidi, Mas’uliyyah al-Tabib al-Mihaniyyah, (Jeddah: Dar al-Andaus, 1997) 283
Al-Halbousi, IAH, Occupational and Common Mistake in the Context of Medical Liability: A Comparative Legal Study, (Al-Halabi Human Rights Publications, Beirut, Lebanon, 2007)
Alhajeri M & Hashim RS, ‘Therapy For Treatment Conditions: A Proposed

Legislative Comparison To Regulate Medical Practice In Kuwait, Including The General Approach, Philosophy And Rights Of The Patient', [White Paper], Kuwait Foundation for the Advancement of Sciences & Kuwait Public Policy Center, 22 January 2019

Al-Harbi MB, Victims of Medical Errors, Riyadh, 1438 AH

Al-Husayni, AA, Civil Liability for Occupational Errors, 1987

Al Khalidy K, 'The Increasing Medical Mistakes In Kuwait', Al Araby News, 31st October 2018, <www.alaraby.co.uk/society/2018/10/31/أخطاء-طبية-متزايدة-في-الكويت-1>, accessed: 18th March 2020

Al-Kharing, NMB, 'Agreement on Exemption from Compensation in the Kuwaiti Civil Law,' previous reference

Al-Layl IAA, Theory of Obligation: The Voluntary Sources of Obligation, Contract and Individual Will in Kuwaiti Law, (Kuwait University 1998) (II)

Al-Ma'atah MO, Civil and Criminal Liability in Medical Errors, (Naif Arab University for Security Sciences, Riyadh, 2004) (I) 47

Al-Marri, KAJ, Civil Liability of the Medical Team between Islamic Sharia and Kuwaiti Law, Faculty of Law (Middle East University, 2013)

Al-Muslimi MMKH, The Legal System, For Practicing Alternative Medicine and Civil Liability: A Comparative Study, (Arab Renaissance House, 2005)

Al-Obaido AK, Medical Liability for Others' Act, (Legal Book House, D.T.)

Al-Naqeeb, A, The General Theory of Responsibility Resulting from Personal Action, Error and Damage, (2nd edition, 1999)

Al-Qasim MH, 'Medical Error in The Scope Of Civil Responsibility', Journal of Law and Sharia (Kuwait University, 3/1(1979)), 11

Al-Shoura, FAK, 'The Medical Mistake in Jordanian Civil Law', (Middle East University, 2015)

Al-Thatoumi, NAAM, Civil Liability for Plastic Surgery¸ Civil Liability for Plastic Surgery, Comparative Study, Faculty of Law, 2015

Belaid, B, The Doctor's Mistake During Medical Intervention, College of Law and Political Science, (Mouloud Mamari University, 2011)

Brazier M. & Allen N., 'Criminalizing Medical Malpractice', In Charles A Erin & Suzanne Ost (Eds) The Criminal Justice System and Health Care (2007, University Press Scholarship, Oxford University Press)

Bingham T, The Rule of Law (1st Edn, Allen Lane 2010, Penguin 2011)

Brenner L, Brenner A and Awerbuch E et al. Beyond the Standard of Care:

A New Model to Judge Medical Negligence. Clinical Orthopaedics and Related Research, 470(5) (2012), 1357

Bryden, D, 'Duty of care and medical negligence', Continuing Education in Anaesthesia Critical Care & Pain (2011) 11, 4, (Oxford University Press)

Dawood J, Civil and Criminal Medical Liability and Doctors' Responsibility for their Mistakes, (Al-Insah Printing Press, Syria, 1987) 33-35

Dedding C, van Doorn R, Winkler L, Reis R, 'How Will e-Health Affect Patient Participation In The Clinic? A Review Of E-Health Studies and The Current Evidence For Changes in the Relationship Between Medical Professionals and Patients' (2011) 72 (1) Social Science & Medicine, 49

Deodhar RP, 'Common Law and Indian Cases on Medical Negligence', (University of Mumbai, 2019), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3350915>, accessed 23rd January 2020

Destro RA, 'Lessons in Legal and Judicial Ethics From Schiavo: The Special Responsibilities of Lawyers and Judges in Cases Involving Persons with Severe Cognitive Disabilities', in Charles A. Erin and Suzanne Ost, The Criminal Justice System and Health Care, (2009, Oxford Scholarship Online, Oxford Unicersity Press, UK);

Dudin, MM, The Individual Doctor's Civil Responsibility For His Professional Work, A Comparative Study, (College of Graduate Studies, 2006)

Edwards, l, Edwards, S, Kirkley, Tort Law, 5th edn, New York, Delmar Engage Learning

El-Din BSN, Research in the Civil Responsibility of the Doctor, (Faculty of Law and Political Sciences, University of Mouloud Mamari, 2018)

El-Ibrashi, HZ, Civil Liability of Doctors and Surgeons in Egyptian Legislation and Comparative Law, 1951

Erin CA and Ost S, The Criminal Justice System and Health Care, (2009, Oxford Scholarship Online, Oxford Unicersity Press, UK)

Faraj, HAH, Medical Errors, (Mnarif Foundation, Alexandria)

Fathalla W, 'The Medical Mistake, Its Concept and Effects', in The American Medical Institute Report, To Err is Human (November 1999)

Hamid MA, His Modern View Of The Fault Of The Doctor Posing Responsibility, (University of Kuwait Publications, 1993)

Holyoak, J, 'Negligence and the Professions' (Ch.) in Hodgin, R, Professional Liability: Law and Insurance, (1999, Informa Law from Routledge, UK)

Hudaili, H, The Variation of Legal Centres in the Medical Relationship and Its Implications for Evidence,

Ibrahim MA, ‘The Rules of Medical Work and the Establishment of Civil Liability: A Comparative Study, between Egyptian Legislation and Islamic Law’, Journal of Law and Economics, (Faculty of Law, 2017) 41

Jamil, WHA, Medical Error, An Analytical, (The Arab Renaissance House, 1987)

Jourdin, The Principles of Civil Responsibility, 5th Edition, Dalloz, Paris, 2002

Majeed SA, Responsible of the Follower for Acts , Followed in the Medical Field’, (Faculty of Law, University of Alexandria 2016)

Malalha Abdul-Rahman, Doctor’s Criminal Responsibility: A Comparative Study, (Faculty of Law and Political Science, 2016)

Montaser S, Civil Liability for Medical Experiments in the Light of the Civil Liability Rules for Doctors (Dar Al-Nahdah Al-Arabia, DT)

Muhammad Muslih al-Din. Concept of civil liability in Islam and the law of torts. (Lahor, Pakistan: Islamic Publications Ltd. 1982)

Nariman,BA, Civil Liability of the Anesthesiologist, Faculty of Law and Political Science, (Akli Mohand Uhlhaj University, 2013)

Nasimah BD, Civil Liability of The Doctor In Public Hospitals (Faculty of Law and Political Science Akli Muhannad Oulhaj University 2013)

Nemie P & Kassim J, ‘Medical Negligence In Islamic Law’ Arab Law Quarterly, 20/4 (2006), 400

Penneau, The Responsibility of Medicine, (3th Edition, Dalloz, Paris 2004)

Perry JE, Churchill LR & Kirshner HS, ‘The Terri Schiavo Case: Legal, Ethical, And Medical Perspectives’, (2005) 143 (10) Ann Intern Med, 744

Price K, ‘The Art of Medicine Towards A History Of Medical Negligence’, 375/9710 The Lancet (2010), 195

Quigley, M, Nudging For Health: On Public Policy And Designing Choice Architecture, Medical Law Review, (2013) 21, 4

Rashid TJA, ‘Medical Responsibility in Public and Private Hospitals between Judicial Compliance and Legislative Autism’, Journal of Legal and Economic Sciences, (Faculty of Law, 2017) 38.

Rida B, Civil Liability for Medical Errors and Insurance, (Faculty of Law and Political Science, Hajj Lakhdar Batna University, 2014)

Saad NI, The General Theory of Commitment, (New University House, Alexandria, 2017)

Saghir MB, ‘Medical Error in The Rules of Civil Liability, A Comparative Study’ (Faculty of Law and Political Science, 2011)

Samanta, J., Medical Law Concentrate, (2018, Oxford University Press, Oxford, UK)

Sami A., 'The Medical Mistake the Theat For Everyone', Al Jarida', 3rd September 2015, www.aljarida.com/articles/1468384690786106100/, accessed 20th March 2020

Silver T, 'One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Malpractice', Wis. L. Rev. [1992] 1193

Swailem, M, Physician and Surgeon Liability and Reasons for Exemption from it in Civil Law and Islamic Jurisprudence, Part 2, Obligation Provisions, 1990

Stauch M, The Law of Medical Negligence in England and Germany: A Comparative Analysis, (2008, Hart Publishing, Oxford UK)

Suleiman A, The General Theory of Commitment: Sources of Commitment in the Civil Code, (Algerian University Press Office, Algeria, 2005)

Taha, J, Establishing Responsibility For Unlawful Work On The Damage Component, (University of Salah El-Din publications, DT)

Tumelty, ME, 'Medical Negligence Litigation and Apologies: An Empirical Examination', European Journal of Health Law (2020) 27, (4), 386