

The Nature of Medical Obligations in the Light of Comparative Study

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ABSTRACT

Contemplating about the nature of the obligation of medical professionals, one realizes that although the jurists have not explicitly specified medical professional obligations such as the obligation to result or to instrument, this is obvious from the tenor of their words and statements. In the Shiite jurisprudence, the majority of jurists hold that the physician liability may only be aborted by receiving absolutions before surgery. In the Sunnite jurisprudence, however, the majority of jurists opposes the opinion of Shiite jurists and basically consider physician's obligation as the obligation to the instrument. In the laws of Islamic countries, France, and in General Law, physician's obligation is basically regarded as the obligation to the instrument, too. In the statutory laws of Iran, it also seems that unlike the legislature's view that has apparently deemed the physician's obligation is a obligation to the result, following the majority of jurists, the physician's obligation is principally the obligation to the instrument in the case of obtaining permission and having proficiency; but in some particular cases and based on reasonable grounds, the nature of medical professionals obligations has been introduced as a commitment to the outcome. Therefore, the nature of medical obligations and its manifestations are studied in this paper using a comparative view. For this purpose, the analytical discussion of the obligations of the medical professionals and their affiliates in some of their disputed, common, and involved applications such as prostheses, blood transfusions, medical trials, anesthesia processes, guaranteeing the patients' health and cosmetic surgeries have been addressed.

Keywords: the nature of the obligation, the obligation to the result, the obligation to the instrument, medical professionals

INTRODUCTION

After the verdict was known Mercier by the Supreme Court of France on twenty May 1936, most lawyers consensually agree that the relationship between physicians and patients is principally contractual [Panneau, 1996, p.22]. Following the issuance of the above-mentioned verdict, after the above-mentioned verdict the contractual liability of the medical profession was accepted in most countries [Verge et Nyc, 1997, p.63; Ripert, 1953, p.431]. Under the common law system, although the liability of the medical profession has been examined less in contractual terms [Markesinis et Deakin, 1999, p.260], but in many cases medical liability are

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considered to be resulted from the contract under that system, too. [Kennedy, Grubb, 1988, p.288]. In Iran, it also seems that the general principle regarding the physician's liability is a contractual one [Abbasi, 2010, p60].

The obligation to the result obligation is the base in the contractual obligations, but abiding to this, will have impacts on contract treatments and there are some questions in this regard that have not been addressed. Are the obligations of the medical professional's obligation to the result or to the instrument? Which one is the principle and which one is the corollary? What are the most important exceptions to the principle and why? Do the principle and corollary have a relation to the public discipline and/or is it likely to be changed?

To settle the question of what is the subject of the obligation, lawyers have divided it into two kinds, obligation to the instrument and obligation to the result [Flour, Aubert, Savaux, 2002, pp 26-27], and some others have added obligation to guarantee to it as well [Malory & Ines, Obligations, No.472 cited by Katouzian, 2008, Vol.4, p151].

Under this division, sometimes the obligor undertakes to provide the means to achieve a desired result and to apply all his capabilities; but in obligation to the instrument, proving the fact that the contract has not achieved its final goal, is not sufficient for citting the non-execution of the contract, since the obligor has not undertaken to achieve that goal [Katouzian, 2008, Vol.4, pp.151-2]. Although this division has been criticized by some lawyers [Shahidi, 2007, Vol.3, pp.151-213, Riper & Boulanger, Vol.2, No.783, cited by Katouzian, 2008, Vol.4, p.152], that is beyond the scope of this paper, it is apparently sufficient for the separation of the

nature of obligations, particularly the obligations of medical professions, furthermore, the opponents' arguments do not have a strong foundation and credibility [Salehi, Fallah, Abbasi, 2010]. Now that the advantages of this division have been clarified, we will deal with the comparative study of the nature of the medical professionals' obligations.

Part I: Study of the Nature of Medical Obligations in Legal Systems

Chapter I: Nature of Medical Obligations under Legal Systems of France and England

I. France

Before 1936, physician's liability was studied within the framework of extra-contractual liabilities in France legal system as the centerpiece of the Roman Germanic legal family member countries, but after the delivery of the Mercier verdict, it was considered as being contractual and a great development occurred in the State law [Verge, 1953, p.431]. That verdict held that the physician's liability was a contractual one and his obligations are obligation to the instrument, except in exceptional cases [Flour, Aubert et Savaux, 2002, pp. 26- Panneau, 1996, pp. 26-27] and put an end to this accepted theory of a century based on the obligatory liability of the physicians [Panneau, 1996, p.22]. The majority of French lawyers hold that the medical professionals' obligations are in principle obligations to the instrument not to the result [Savatier, 1956, p.244, Montador, 1979, p.42- Kornproobst, 1957, p.587].

Despite of this, the physicians should apply all their efforts and resources to improve the patient's health, but are not obligated to the achievement of the result and guaranteeing the patient's healing [Montador, 1979, p.42- Mazeau, 1931, p.48]. Under these kinds of

obligations, the claimant (the patient or his relatives) have to prove that the medical professionals was in fault. Some lawyers regard just the infliction of damages as the indication of the physician's fault and relieve the claimant from establishing the burden of proof and some others propose the theory of presumed fault reasoning that the patient is under the physician's control [Mazeau et Tunc, 1965, pp.103-4- Drosner-Dolivet, 2003, p.121]. In another verdict delivered on 18 December 1987 [Drosner-Dolivet, 2003, p.123], the Supreme Court of France explicitly declared the nature of medical professional obligations as being the obligation to the instrument [Drosner-Dolivet, 2003, p.123]; of course, this has also been emphasized in Articles 32 and 40 of the 1995 Medical Ethics Codes of the country [Flour, Aubert et Saveaux, 2002, pp.26-27]. To justify this point of view, French lawyers hold that medical professionals, basically do not act under the control of anyone, aside from God, except their own conscience and honor and professional ethics and it is somehow unjust to hold them to hold them obligated to the result, considering the relative shortcomings of medical science [Malicier, 1999, p.101]. The famous phrase "je l'ai pansé, Dieu le guérit" in this country, clearly shows the negation of obligation to the result] in respect of medical professionals obligations. The point of view of obligation to the result for physicians has few proponents in France [Panneau, 1996, p.133] and the Patients and Health System Act approved on 04/03/2002, has also laid, except in exceptional cases, the physician's liability based on fault [Welsch, 2003, p.9 et suiv_Evin, 2003, p.9 et s-Guigue, 2006, p.82].

2. England

Although some common law lawyers maintain that the physician's liability does not

result from the breach of the contract and his obligation to compensate damages, cure and care, is a resulted from the Law [Markesinis and Deakin, 1999, p.260], this does not mean ignoring the contracts, and in cases which the patient privately agrees with medical professionals and the treatment process is carried out based on this agreement, a contractual relation between the patient and the medical practitioner is created, the breach of which will create responsibility for the medical practitioners [Kennedy and Grubb, 1998, p.288]. In England, if a physician guarantees a particular result; the courts will, without considering the guaranteed obligation by him, examine whether he has exerted the same desired and sufficient effort and skill, shown by a common individual holding the same extent of skill and belonging to the same group, or not? [Margaret, Brazier, 1992, 9137] and if the respondent (the physician, the surgeon, etc) cannot prove common care, then he will be considered as breaching his duty for care which is in fact a typical critreion [Hunt, 2000, p.219]. Also in America, whenever the physicians have provided the patient care with the obligation, the liability will be based on default and their obligation will be obligation to the instrument. [Jampion Junior, 2007, p.117].

Chapter 2: Nature of Medical Obligations in the Legal System of the Islamic Countries

I. Jordan

Article I of the Jordanian Medical Law has provided that the physician's obligations are basically obligation to the instrument (Obligation to focus attention) not achieving a certain result (obligation to the result) [Afif shamsodin, p.106, cited by Shojapouriyani, 2010, p.159].

Even before that, the Court of Appeals had introduced the obligations of medical

professionals, as obligation to the instrument, according to the case filed on 07/07/1980 [Neghaba-Al-Mohamin-Al-Ordoniah Journal, Appeals Court 90/1246, No.10 & 12, 40th year, p.1709, cited by Al-Hyari, 1429, pp.46-47]. The lawyers of this country also hold physicians, only liable for their mistakes, by considering their liability as obligation to the instrument. [Al-Samaadi, 2008, p.8].

2. Algeria

In Algeria, physician's obligations are deemed obligation to the instrument, pursuant to the verdict of the Supreme Administrative Tribunal issued on 13/01/1990, and if the hospital personnel including physicians, nurses, midwives, etc – do not thoroughly perform their duties during the process of treatment and do not do their best in this regard-without necessarily guaranteeing the patient's healing - the hospital will be held responsible [al-Majalla al-Ghazae Al-Jazaeryiah, 1429, p.46]. The lawyers of this country also consider the physician's obligation in the treatment contract, in principle, as obligation to the instrument [Ben chaabane, 1995, p. 771-Hannouz et Hakem, 1992, p.121]. However, in cases which harm has been inflicted on the patient or his relatives, they use the theory of presumed fault and the burden of proof for absence of fault lies with the physician [Sahrawi, 2004, p.64 et seq].

3. Syria

Although the verdicts issued by the Syrian courts have deemed the physician's liability non-contractual and these verdicts have been issued following the verdict of the Supreme Court of Egypt in 1936 [as-Sanhuri, 1952, Vol.I, p.821], most lawyers of this country believe that the physician's liability result principally from the contract, and therefore they regard the nature of the medical professionals obligations

and their affiliates as obligation to the instrument, following the Shafi'i Jurisprudence and new court and Egyptian lawyers' verdicts [Saleh, 2006, p.136].

4. Kuwait

The Kuwaiti lawyers believe that the nature of the obligations of the medical professionals and their affiliates is, in principal, obligation to the instrument, although the nature of their obligation is the obligation to the result in some medical actions due to the progress of medicine and other elements, but these cases are regarded as exceptions to the principle [Sharaf Al-Din, 1986, p.43].

5. Lebanon

After the issuance of the verdict by the Appeals Court of Beirut, a physician treating a patient is not obliged to cure him completely and definitively, but he should truly do his best based on the latest medical innovations and observe the rules and principles of the medical profession in his own field of specialty. He is not liable in this respect; the nature of the obligations of the medical professionals and their affiliates has been principally considered as obligation to the instrument [Al-Houseini, 1987, p.105].

6. Egypt

The Egyptian lawyers believe that the nature of the services provided by a physician to a patient in accordance with the treatment contract is obligation to the instrument [al-Sanhouri, 1952, Vol.I, p.101]. The Supreme Court of the country also held on 22/03/1966, that the physician's liability is not principally based on the the result, i.e. the patient's healing. Nevertheless, he is obliged to truly do his best for the patient improvement and should not violate the established principles of medicine

[Mansour, 1999, p.205, al-Seyyed Omran, 1992, p.8, Sharaf Al-Din, 1986, p.51]. After the issuance of this verdict, various ones were issued based on it [verdicts of the Egyptian Court of Appeals, 03/06/1969 and 21/12/1971 cited by al-Jamili, 1430, pp.223-4]. Most lawyers of this country maintain that unlike other contractual obligations, the nature of the medical professionals and their affiliates' obligations in the treatment contract is principally obligation to the instrument [Nadyieh, 2008, p.5, Jamal Al-Din Zaki, 1978, p.37].

Chapter 3: The Nature of Medical Obligations from the point of view of Muslim Jurists

1. Shiite Jurists

It seems that the division of obligations into obligation to the result and obligation to the instrument has not been common among jurists as the same way that is among lawyers. Although great jurists have not explicitly stated these titles, this meaning may be inferred from their statements [Salehi, 2009].

The Shiite famous jurists deem the physician obliged to the result invoking Ijma' (consensus), Itlaf (waste) rule and the Sokouni narrated from Imam Ali (Peace Be Upon Him) [Motahari, 1403, p.59, Feyz Kashani, 1401, p.116; Najafi, 1402, Vol.43, p.46; Mohaghegh Ardebili, 1416, Vol.14, p.227, al-Ameli al-Fagha'ani, 1418, p.319; al-Tabatabaee, 1404, p. 533] and hold the physician liable for any harm to the patient by rejecting the Baraah (clearance from obligation) principle and the generality of the Ihsan (beneficence) rule, even though he has adequate skill and proficiency in his practice and has obtained the permission for treatment [al-Ameli, vol.10, p.270 cited by Meqdadi, Bita, p.52; Shahid Thani 2004, Vol.2, p.118; Shahid Awwal, Bita, Vol.10, p.108; Khuee, 1428, Vol.42, p.273]. Some jurists have claimed consensus on this issue by

stating "without opposition" (Takhalof) and "by consensus" (Ijmaan) [Najafi, 1402, Vol.42, p.44; Mohaghegh Hilli, 1403, p.1020].

Some other jurists who are in the minority, believe that skilled physicians and veterinarians who have permission to treat and do not make mistakes, will not be held liable and in fact, their obligations have been considered obligation to the instrument. [Ibn Idriss Hilli, 1411, Vol.3, p.273, Ibn Fahad Hilli, 1413, Vol.5, p.359; Housein Rohani, 1414, Vol.26, p.201; al-Jawaheri, Bita, pp.45-48; Sharareh Bita, pp.98-104]. Some modern jurists have shown a tendency towards this theory and have held physicians and veterinarians not liable, if they have received permission and observed scientific and technical standards [Almousavi al-Khomeini, Bita, Vol.2, p.289; Mousavi Bojnourdi, 1993, pp.41-44]. However, there is no dispute concerning the liability of the uninformed and unskilled physicians and veterinarians, and all hold them absolutely liable.

2. Sunnite Jurists

Among the preceding Sunnite jurists, one named Halwani, regards as incorrect the obligations of a surgeon who had been obliged to the result, and argues that since various elements are involved in the treatment, the physician may not guarantee the result of the surgery [Abbasi, 2007, p.63]. The majority of modern jurists also regard the obligations of the physicians and veterinarians as obligation to the instrument [as-Samawi, 2007, pp.4-5]. Since the guarantee of the patient's health and his healing is beyond the limits of power and authority of the physicians and veterinarians [Salehi, 2009], and if a physician acts within the limits of religion and custom and is skilled as well, but incidentally inflicts harm on the patient, he will not be held liable, since no mistakes have occurred in his practicing as usual [Aljazaeri, Vol.3, p.153, cited by Mousavi

Bojnourdi, 1993, p.43]. This group of jurists base their fatwa (religious statement) on the traditions quoted from the Prophet of Islam (Peace Be Upon Him), and for not blocking the path of medicine, in addition to the generality of the sacred verses "ما على المحسنين من سبيل" [beneficents will not be reproached-Holy Quran, 9:91] and "إذا مرضت فهو يشفين"

(Whenever I am sick, he heals me-Holy Quran, 36:80) [as-Samadi, 2008, pp. 5-7]. According to Abo-Hanif Fatwa, if a physician practice in confirming medical custom, he is not liable and he believes that the physician and veterinarian can not guarantee the result of treatment and considers the result condition in this case as void. [Abozohre, Aljarime & Aloghobe fi feghh Islami, p.482, cited by Abbasi, 2009, p.64]

Finally, all four Sunnite schools believe the obligation of uninformed and unskilled physician like Shiite jurists is obligation to the result and consider him/her absolutely liable.

Chapter 4: The Nature of Medical Obligations in the Iranian Legal System

In the Iranian legal system, juridical authors are divided into several groups in respect to the nature of the medical obligations by following the viewpoints of great jurists and the methods for the interpretation of related legal texts, described as follows:

Some authors, influenced by the well-known view of Shiite jurists and taking into account articles 319 and 321 of the Islamic Penal Code, believe that physicians' and veterinarians' obligations are obligations to the results [Ghasemzadeh, 2008, p.309; Abbasi, 2009, p.65; Taheri, 1998, p.116; Meghdadi, Bita, pp.61-62; Mirhashemi, 2004, first part, p.134; Malmir, 2002, p.34; Abbasi, 2004, p.23; Goldouzian, 1993, Vol.I, p.160; Sadeghi, 2003, p.190; Goldouzian, 2004, p.106]. By this Code enactment and following the view

point of the famous jurists, the legislator has provided absolute liability for the physicians, whether the relation between the physician and the patient is a contractual or extra-contractual one [Jafaritarbar, 1998, p.77].

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Another group regards principally physician's obligation to the instrument, unlike other contractual obligations [Katouzian, 20708, Vol.I, p.71; Mousavi Bojnourdi, 2004, p.15; Goldouzian, 2008, p.90; Mousavi Bojnourdi, Hagh Mohammadifard, 2007, p.38; Katouzian, 2008, Vol.2, p.161; Shojapourian, 1994, p.21; Amouzgar, 2006, p.106].

Some others have not explicitly stated physicians' and veterinarians' obligations as obligation to the instrument, but this concept may be easily inferred from their context [Darabpour, 2008, pp.193-4]. For the purpose of evading these extremes, another group of lawyers have deemed it permissible to invoke the opposing meaning of Article 320 of the Islamic Penal Code, since it leads us to the Principle [Katouzian, 2007, p.28], and have stated that the opposing meaning of this Article is that if the performer of circumcision does not cut more than the necessary extent but damage is caused, he will not be responsible, and by the aid of some jurists' opinions and the tradition of Imam Ali (Peace Be Upon Him) they have tried to present a logical analysis of the whole Articles of the Islamic Penal Code by joining the related Articles, and also stated it in this Code, physicians' and veterinarians' obligations are the instrument. Despite of this, the holy and therefore legislative judiciary of Iran have pre-supposed the physician's fault so as to protect the patient (who is usually the weaker party), but the physicians and veterinarians may possibly prove the opposite. [Shojapourian, 2010, pp.181-3].

Although the Iranian legislator considers physician's obligations as obligation to the result following the famous opinion of the jurists, it seems that this opinion is also acceptable and applicable in foreign law and complies more with the legislator's goal in enacting law, i.e. achieving justice and regulating the relations among the members of the society. Nevertheless, if medical professionals prove that they have applied all due care and used the latest provisions of medical science, then discerning judges may modify this precept and prevent any barriers in the path of medicine and obtaining unwilling and urgent absolutions from the patients or their relatives, by doubting or denying the causal relation between the practice of the physician and the damage inflicted on the patient and his relatives, or attributing it to the defects in medical science, and considering that healing depends on power of the unique savant, God (و اذا مرضت فهو يشفين) [Salehi, 2011, p.107], Since the subject of medical liability, the enigma of our era, is like a double-edged sword that if it is not be applied skillfully, will cause irreparable damages [Katouzian, 2008, Vol.4, p.170], and in this respect is like the consumers' rights [Katouzian, 2005, p.41et.seq].

To clarify, if physicians are treated too harshly, not only the path of medicine will be blocked, they will also resort in excess to receiving absolutions from the patients, granted to physicians by the Islamic Penal Code following the Shiite jurisprudence, and in practice will not take action for treatment unless they receive absolution letters from the patients or their relatives. However, many jurists regard the absolution condition, imposed on the patient due to the misuse of the emergency situation, as invalid [Karimi, 2007, p.67; Jafaritarab, 1998, p.56], but it is clear

that proving the state of emergency situations is very difficult.

Therefore, a law aimed to protect the patients' rights, turns into their misfortune and leads to a phenomenon called defensive medicine, in appearance a law whose soul is medical ethics [Salehi, 2011; Binnet, 2005, p.103; Sharma, Gupta, 2004, p.109].

In the case of obligation to the instrument, and the presumption of fault for the medical professionals, the burden of proof of absence of fault is placed upon the physician; but this burden of proof is reversed by receiving absolution letter and it is the patient who has to prove the medical professionals fault so as to enforce him to compensate for damages occurred. However, proving of the physician's mistake is very difficult for technical reasons, and because of this, medical professionals evade many obligations using the absolution letter received, which is the result of going to extremes by the enactor of the Islamic Penal Code who deems the physician's obligations, the obligation to the instrument on one hand, and calms down by the possibility of receiving the letter of absolution on the other hand. [Salehi, Fallah, Abbasi, 2011].

In Shiite jurisprudence, it also seems that opponents' reasons are more reasonable, since the destruction rule, one of the most important evidences of the famous opinion is not traditional, but Estyadi, therefore there are plenty of reasons that absoluteness does not enter into them, and the beneficence rule that is an interpretation of the precept of the practical reason does not accept exceptions and practically governs really over the destruction rule. In other words, the union of these two rules is "المكلف غير المحسن ضامن" (non-beneficent

destroyer is liable) [Mousavi Bojnourdi, 2008, p.8; Mousavi Bojnourdi, 1993, p.42].

Another reason for the famous opinion is the Hadith cited from Imam Ali (Peace Be Upon Him) that seems to be aimed at the uninformed physician, assuming the validity of the document since that Honourable Personage states in another place: *يجب على الامام "ان يحبس الفاسق من الجهال الاطباء"* (The leader should imprison the wicked unlearned physician), and together these two traditions narrated from Imam Sadiq and Imam Hasan 'Askari in this respect, will be the evidence of the accuracy of this claim [see K. Javadi and et al, 2007, pp.87-90 to see these Ahadith]. Furthermore, Consensus, a famous reason of quote, has little validity and may not be used as an independent reason. [Houseini Tehrani, 1428, pp. 224-231]. The Iranian legislator has laid down precise and relatively comprehensive obligations for the limits and boundaries of physicians' practices by enacting or joining some medical rules and/or codes such as the Nuremberg Declaration, Helsinki Declaration approved in 1964, 1975 and 2000, and the State Committee of Ethics in Medical Research Bylaw and so on, so that there is little need to regard the aforesaid individuals' obligations as obligation to the result. [Abbasi, 2009, pp.55-65 and 121-122]. In addition, judicial precedent may in cases which the permitted proficient physician has inflicted damages incidentally (while observing the scientific principles of the medicine and common customs among them), regard the destruction as resulting from the relative deficiency of medical science, and hold the physician as the principal in the infliction of a damage, the principal and stronger cause of which is the relative defect of medical science, and by presumption of fault, in the case of infliction of damage on the patient,

create a status, whose proving its opposite, possible by medical professions [Katouzian, 2008, Vol.4, pp.168, 171, for the verification of this opinion by a different argumentation see Mousavi Bojnourdi, 1993, pp.41-44].

Part 2: Explanation of the Most Important Exceptions to the Nature of the Obligations of Medical Professions and its Affiliates

Now that it is determined that the nature of the obligations of the medical professions is principally the commitment to instruments obligations, some of the important exceptions to this rule are dealt with as follows.

Chapter I: Prostheses

Some French courts (the verdict of Metz court dated 13 December 1951), at first believed that a dentist was the same as seller of false teeth and therefore held him liable for the covert defects of the tooth and regarded his obligations as obligation to the result, and this sale as conditional on experience, the breach of which would make the contract null and void, and held the physician responsible if for any reason, the tooth caused a problem for the patient [al-Shurabi, 1998, p.90; Jamal al-Din Zaki, 1978, p.394]. Lawyers criticized this practice and said that the total obligations of both parties should be considered and the contract may not be analyzed and some of its elements considered to determine its nature [Abujamil, 1987, p.94, Jamal al-Din Zaki; 1978, p.394], and this division of the contract, performed due to economic criteria, is in conflict with the human nature of the treatment contract [Savatier, 1956, p.212; Kornprobust 1975, p.857], and depending the contract on condition is not correct.

As a result of raised criticisms, some courts of this country [Dijon Appeal Court, 29

May 1952] examined the dentist's obligation considering the contract concluded with the hospital and discussed the dentist's liability in medical and technical respects and on the first respect the physician's obligation was held to be obligation to the instrument principally and on the second respect obligation to the result [al-Jamili, 1430, p.233, al-Hyari, 1429, p.52] and in this state, the physician could be released from the liability only by proving an external cause [Artime, 1994, p.85]. In some other verdicts [verdict revision of Court of Appeal, December 1956 and March 1967] including verdicts of the Supreme Court of France in years 1977-79, the physician's obligation in making prostheses was introduced to be obligation to the instrument [al-Jamili, 1430, p.223; Shojapourian, 2010, p.165]. The basis of these verdicts has been that the characteristic of the treatment and combination of teeth is a technical medical act in which there is the probability element. Therefore, the physician's obligation will be obligation to the instrument [Abd al-Rahman, 1985, p.140]. In the Iranian law, considering the enormous costs for the supply of prostheses, particularly dentistry and the ever-increasing raise of patients' discontents and complaints against these professionals [Sheikh Azadi et al, 2007, p.172], it seems that in the medical respect, the dentist's and prosthodontist's obligations will be obligation to the result and in the technical respect such as proper prosthesis and appliance, etc, these practices will be obligation to the instrument contrary to the medical respect.

Chapter 2: Blood Transfusion

The lawyers have considered the physician's obligation to receive or inject the healthy blood that is compatible with the patient's blood group as obligation to the result and have stated that there is no conflict

between the physician's obligation that is obligation to the instrument and the obligation to guarantee the blood's safety. Since, the patient does not expect healing from the granted or received blood, but he does expect reasonably that the blood grant or injection does not add to his pains or cause the deterioration of his illness [Abd al-Rahman, 1985, p.110, Abujamil, 1987, pp.75-76; Shojapourian, 2010, p.161]. French courts, in various verdicts [verdicts of the French Supreme Court on 12 April 1995 and 13 February 2001 and the Appeal Court of Paris on 28 November 1991 and 17 December 1954] have regarded the obligation of blood transfusion centers as the obligation of safety to the result and have held the physician profession in this job to be obliged to the result [Abd al-Zahir Housein, 1992, p.74; al-Jamili, 1430, p.229].

There are two theories in this respect in the common law. Some ones have deemed the blood transfusion as a sale and believe in the absolute liability, while some others deem it a service provision and refuse to accept the liability in this regard [Jafaritarabar, 1998, p.127]. Also in France, some lawyers formerly believed that the physician's obligation in these cases was obligation to the instrument. It seems that this group of lawyers has mistaken the guarantee of the safety of blood products that is a obligation to the result for the physician's main obligation (obligation to the instrument) and as it was stated these two apparently contradictory obligations are not in conflict and the verdicts that were later issued in this respect are the evidence for the validity of this claim. In France, in accordance with the Compensation Act, approved on 31 December 1991 those who suffer from HIV through blood transfusion enjoy the legal presumption of causality and those who grant blood gratuitously will enjoy the advantages of the

absolute liability of the governmental institutions provided in the Article 6649 of Healthcare and Public Health Act of this country if a damage is inflicted on them [Panneau, 1996, p.29]. However, some lawyers do not regard the enforcement of the contents of these Articles in practice as to be so successful and have used the provision in favor of third party undertaking in cases where there is no contractual relation between the damaged person and the physician or the blood transfusion institute or the specialized physician and have presumed the relation between the damaging and the damaged parties to be contractual [Abd al-Zahir Hosein, 1992, p.74; al-Hyari, 1426, p.50].

In the municipal law, although there are no regulations and judicial decisions in this respect in this form [Boudan, 2003, p.7ff.; Amjad, 1419, p.162] but the legislator has shown its sensitivity in this regard through Articles 12, 13 and 14 of the Method of Prevention of Sexually transmitted Diseases and Infectious Act (approved on 11 March 1941 with subsequent modifications). Furthermore, it has and control infections by Articles 22 and 23 of the abovementioned provided decisions and plans to prevent Act and paragraphs 1 and 2 of Article 4 of the Bylaw of the Supreme Council of Planning for the Prevention of HIV Infection and its Control and the managing director of the blood transfusion Organization is a member of the State workgroup to combat and prevent from HIV infection in accordance with the paragraph 13 of the Article 8 of the aforesaid Act.

There is a legislative gap on the establishment of a fund for the compensation of HIV victims [Abbasi, 2003, p.3] and considering that the professional insurance of

the medical professionals and affiliates is not obligatory [Daryabari, 2004, p.8] there is very probable that the damaged person does not succeed after spending time and money and passing hearing procedures; hence the legislator is expected to remove the aforesaid gap as soon as possible and in the best way.

Noting the pitiful history of this issue in our country that led to the hemophilic infection by the entry of the HIV-infected blood, it seems that the Iranian legislator and particularly the Supreme Court of the Country may tend to the liability without mistake in these cases to compensate for the patients' damages by considering these professions as obligation to the result [Abbasi, 2009, p. 105]. Finally, the blood transfusion enjoys a particular importance in the advanced legal systems so that there have been provided the absolute liability of government to obtain public trust for compensating the damages resulted from the blood transfusion [Abbasi, Shekaramarji & Mohammadi, 2009, p.70; Karimi & Azin, 2007, p.101].

Chapter 3: Anesthesia

The anesthetist's obligation is also obligation to the result, since except for emergencies; the patient will not be anesthetized before making sure of the health of his heart and respiratory and urinary systems. In a case, the anesthetist were held to obligation to the result since he had not become assured of the emptiness of the patient's stomach and had anesthetized him and caused his death and even has been considered obligated to compensate for the damage resulted from the loss of opportunity of the patient's life [al-Jamili, 1430, p.421 et seq.; Kazemi, 2001, p.200 et seq].

The French Supreme Court has also provided in this respect on 10 June 1980 and 11 December 1984 that the anesthetist's obligation continues until the patient recovers completely and he should accompany his patient to this stage [Abbasi, 2008, p.57; Shojapourian, 2010, pp.174-5]. Also, the French lawyers consider the anesthetist's obligation as to be an obligation to cure the patient and do not limit his obligation to the care [Malory & Ens, no.469 et seq. cited by Katouzian, 2008, p.161].

In the first paragraph of the Act concerning unauthorized practices in the clinics approved on 27 December 1976 by the Board of Directors of the Central Medical Council, all practices accompanied with general anesthesia and also practices which need anesthesia have been declared forbidden in medical and dentistry clinics. Therefore, also in the municipal law, it seems that the anesthetist's obligation is obligation to the result noting the risk of anesthesia and the reasonable sensitivity of the legislator in respect of this matter.

Chapter 4: Medical Tests

Medical diagnostic tests such as blood test have usually accurate results by the ever-increasing medical progress. Therefore, the laboratory's physician should perform tests accurately and with utmost precision and he will be held liable for just giving incorrect results [Mémentau, 2001, p.334]. The percentage of mistakes has become very limited or negated using modern laboratorial tools and devices and consequently the obligations of the professionals will be principally obligation to the result [al-Hyari, 1426, pp.49-50; Shojapourian, 2010, p.165]. Also in France, although the courts primarily considered the obligations of the laboratories' physicians in respect of the

unreal announcement of the patient's cancer etc as obligation to the instrument. [al-Abrashi, 1951, p.86; Mansour, 1999, p.232], but afterwards, on 18 November 2000, the General Board of the Supreme Court of France issued a controversial and important verdict in this regard that has gained publicity as Proche case [Abbasi, 2003, p.32; Mémentau, 2000, n.270-Jourdin, 2002, p.892] and later created various debates among the lawyers of this country on indemnification to a disabled baby born due to the mistake of the laboratory's officials [Aubert, 2001, pp.489-492; Kayser, 2001, p.1892]. In that case, the mother of Nicolas Proche intended to abort her fetus due to suffering from Measles but the tests introduced it as to be healthy and therefore she did not abort her fetus, but after the birth of the disabled baby she filed a complaint against the laboratory's officials and after a controversial and long hearing, the Supreme Court of France issued its verdict as follows: "Whereas the physician's and Laboratory's fault deterred Mrs. Proche from abortion to prevent from the birth of a disabled baby, therefore the baby may claim for the compensation of damages occurred due to the aforesaid fault." The precedent verdicts provided the compensation for the children in addition to the parents for the first time so that in case of the parents' death, the compensation is not negated. Notwithstanding the fact that, some lawyers regarded this type of compensation in conflict with the ethics. The French legislator abrogated this verdict by the enactment of the so-called Anti-Proche Act and provided that "nobody may benefit from the compensation of damages resulted from his own birth". This Act faced many debates and opponents and some call it demagoguery and deem its approval under pressure and threats of profiteering groups like the insurance and the physicians [Abbasi, 2003, p.35].

This matter is not limited to the France and is considered as a big dilemma of the medical society throughout the world and in the municipal law, the issue becomes more complicated considering the prohibition of the abortion by many famous scholars [Allame Tehrani, 1410, p.157 et seq] and other limitations which exist in this regard is beyond the scope of this paper. Therefore it seems that in the Iranian law the obligations of these physicians should also be regarded as obligation to the result unless in the exceptional cases like tests the results of which could not be foreseen exactly noting that the science is not yet so advanced and/or some tests that are implemented in the laboratories of deprived regions and villages that have limited resources and in these cases, the judge may consider the physician's obligation as obligation to the instrument noting the circumstances of the case.

Chapter 5: Guarantee of the Patient's Health

The guarantee of the patient's health does not mean to undertake the patient's healing, but it means that the medical professionals do not expose the patients to another illness in the process of treatment, the tools and devices that they use due to non-disinfection of devices or the environment [al-Jamili, 1430, p.225 and Mémenau, 2001, p.339]. The damages inflicted on the patient that are not directly and completely related with the treatment process and are aside from the medical operations- in its exact meaning- the subject of the obligations of medical professionals is obligation to the result, but the damages resulted from the process of treatment or technical and professional features in which the element of probability is concealed are in

principle obligation to the instrument. [al-Jamili, 1430, p.226, Shojapourian, 2010, pp.176-177].

French lawyers and judges have applied criteria to separate the related and unrelated issues with the treatment process and in short, cases in which the actions of the physician and/or the hospital are related with the traditional and exact concept of the treatment process, it will be obligation to the instrument and in other cases, obligation to the result. Since, an implicit condition in the contract of treatment is that no pain is added to the patient's pains due to being hospitalized or using the hospital's facilities such as clothes, tools, etc [Jamal Al-Din Zaki, 1978, p.53, Abd-Al-Rahman, 1985, pp.21-131; Savatier, Auby et Pequignot, 1956, p.218].

Various verdicts have been issued in this regard in France, including the one that has deemed the surgeon obliged to sterilize the tools and devices used in the surgery and to make sure of their safety (Court of Lyon verdicts 13 December 1961). Also in other judgments, the hospital has been held liable for damages inflicted on the patients due to fire [verdicts 20 December 1962, 26 November 1953]. In these verdicts, the courts have based their verdicts on the separation between medical and professional services and other presented services that are not related with the medical professions and science [Emran, 1980, pp.102-3; Abd Al-Rahman, 1985, pp.131-2] and finally, in 1993 the French State Council accepted the physician's obligation for the guarantee of the patient's health without being committed to the patient's healing [Abbasi, 2005, p.281]. In the municipal law, during a case, the physician was also sentenced to the payment of damages to the plaintiffs for non-observance of health and safety principles and infectious effects resulted

from the surgery operation that had caused the blindness of patients [judgment no.84-1043 dated 06 December 2005, branch no.107 of Ahvaz Criminal Court]. Therefore, it seems that in such cases, also like the French legal system, the obligations of medical practitioners are principally the outcome obligations in the Iranian law.

Chapter 6: Beauty Surgery

A beauty surgery is a kind of surgery in which the goal is not to treat any physical pain. Roje, Arbous & Castaliyola, 19992, P.92 and differs from the usual treatment [Shiavi, 2008, p.2, al-Fazal, 1995, p.37 & Katouzian, 2008, p.165]. Shi'ite and Sunnite have controversial arguments about these kinds of surgeries. Some believe them as strictly forbidden [al-Raviye al-Eslamiye le Baeze al-Hemarasat al-Tayabe, p.466 cited by Mohseni, 2003, p.212] and some permit them on conditions. [Shojapouriyan, 2010, pp.168-9, Nadiya, 2008, p.14 & Ghezmar, 1431, pp.228-261]

Beauty surgeries are divided into two groups:

1. Necessary or restorative surgeries that are performed for the removal of the organ's defects of the patient etc and also make the patient's appearance more beautiful like the plastic surgery of an individual on whose face has been poured an acid. This kind of surgeries the necessity of which is also confirmed by the custom is subject to the general rules of the physician's civil liability and it seems that the physician's obligation is the instrument obligation [Shekaramarji & Abbasi, 2008; Harichaux, Ramu, 1993, p.6; Clément, 2001, p.57].

2. Unnecessary beauty surgeries that do not aim at the recovery and treatment of the patients, but are requested merely for passion, beauty and luxury like the minimizing the nose, maximizing or minimizing the breasts and buttocks, whitening or bronzing of the skin, removing

the wrinkles of the face or body (liposuction) and so on [Abde al-haffid, 2003; p.131] which all the lawyers believe that the physician's obligation will be obligation to the result in this state [Panneau, 1996, p.9- Harichaux Ramu, 1993, p.6] [Bodrand, Plastic surgery cited by Katouzian, 2008, p.166]. The obligation of the plastic surgeon has been regarded as obligation to the result [Ben Chabane, 1995, p.771-Rouge, Arbus et Castagliola, 1992, p.125] in some verdicts of the French courts (verdict issued by Paris Court of Appeal on 5 June 1962). Some writers deem a defined line between these two kinds of surgery operations difficult and unlikely and the obligation of the beauty surgeon is obligation to the instrument in their opinions [Abujamil, 1987, pp.67-68; Al-Fazl, 1995, p.48; Shojapourian, 2010, pp.170-1].

However, considering that the plastic surgery has changed into an industry [Cubrian, Bitá, p.116] and as some insiders believe it has some consequences like the emergence of the new wave of global feminism [Kungard Black, Bitá, p.10] and the enormous costs of such practices and the personality characteristics of the volunteers for the result of beauty surgery [Saravi & Ghalebani, 2004, p.11] and that fantastic surgeries are not necessary and dozens of other elements cause that we consider the obligation of the beauty surgery as obligation to the result. Some lawyers while mentioning the arguments of proponents and opponents have not expressed their views in this regard explicitly, but they have considered difficult conditions for the plastic surgeons [Katouzian, 2008, p.166] and also have deemed their obligation to the result in many cases [Ghezmar, 1431, pp.95-96; Urefli, 1984, p.755, Shekaramarji & Abassi, 2008, p.19].

Conclusion

By comparative study of the nature of the medical professionals' obligations, this result is attained that the physician's obligation in most Islamic countries, France and in common law (America and England), is in principle obligation to the instrument. Although this principle will probably change and in some exceptional cases such as medical مستحذات issues, in the western legal systems, obligation to the result is therefore recognized. Also in French legal system, a special fund is established for supporting patients with HIV and Hepatitis. The fund provides the credit for the free treatment of patients with these diseases. In the Iranian legal system, the physician's obligations have principally been deemed obligation to the result, following the majority of Shiite jurists, but some preceding jurists and especially modern ones, and even most lawyers, regard the nature of the physician's obligation as obligation to the instrument and deem it more compatible with the realities of the society and the occurrence of justice in the relation between the physician and the patient and judicial equity.

Hence, it seems that the Iranian legislator should regard the nature of the physician's obligations as obligation to the instrument, by considering society realities and the effects and consequences of physician's obligations and the task of receiving absolution before surgery.

However, some medical practices in which science has had a lot of progress and medical professions have a considerable control in their field of specialty, regarding patient's body and the treatment process and other factors, have a small role and it seems their obligations in these cases are commitment to outcome ones like prostheses, medical tests, blood transfusions and anesthesia. Also in some other

practices, the physician's obligations will be principally commitment to outcome due to the high cost of treatment and sometimes lack of necessary factors in their outcome like exceptional surgeries. However, the exceptionality of the nature of medical obligations is not limitative and it is likely that they decrease or increase in the future and/or the principle-in the nature of medical obligations- itself changes.

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