



LEGAL ANALYSIS OF JORDANIAN MEDICAL
NEGLIGENCE WITH REFERENCE TO CIVIL LAW
SYSTEM

BY

WADAH Y.A HAJJAT

A dissertation submitted in fulfilment of the requirement for
the degree of Doctor of Philosophy in Laws

Ahmad Ibrahim Kulliyah of Laws
International Islamic University Malaysia

MAY 2016

ABSTRACT

This research focuses on issues of medical negligence and laws governing the relationship between the physician and patient. It sheds light on the mechanisms of implementing the law relating to the medical negligence through an analysis of the liability of the physician in Islamic law and civil law systems, bearing in mind that Jordanian legislation does not specifically cater for issues relating to the medical liability, resulting in the absence of a clear method to secure the right of the patient-victim. The study attests to the similarity between the rules of Islamic law and those of most modern legal systems. This goes on to emphasise the fact that Islamic law is ever relevant to any place and period. Furthermore, the research contains a detailed exposition of the legal nature of civil liability affecting physicians as grounded in contractual and negligence liability, their pillars, as well as divergent opinions regarding their adaptation. Reference is made to the principles developed by the judicial system of Egypt, France and Jordan including the views of jurists as adopted by the courts. The research analyses the elements of medical liability, highlighting the position of the Jordanian legislation which differs from other systems in the protection of the interest of the patient. General rule that the obligation of the physician is to make competent efforts, while the obligation to achieve the result is an exception. In the end, one has to admit that it is difficult to come to a definite conclusion on the issue of civil liability of the physician. This is in view of the sensitivity and the unique features of the human body. The contribution of the research is reflected in the suggestions and recommendations which will provide a firm basis to address legal problems and challenges facing lawyers and judges owing to the flaws inherent in the Jordanian legislation. This humble research is expected to enrich the Jordanian law library on medical negligence.

ملخص البحث ABSTRACT IN ARABIC

يركز هذا البحث على قضايا الإهمال الطبي والقوانين التي تنظم العلاقة بين الطبيب والمريض. يسلط الضوء على آليات تنفيذ القانون المتعلق بالضرر من الإهمال الطبي من خلال تحليل مسؤولية الطبيب في الشريعة الإسلامية والقانون المدني، مع الإشارة بوجه خاص إلى النظم القانونية الأردنية والمصرية. علما بأن القوانين الأردنية لم تعالج موضوع المسؤولية الطبية في قانون مستقل، مما أنتج غياب الية واضحة لحماية الطرف الاضعف وهو المريض (الضحية). تشهد الدراسة التشابه بين قواعد الشريعة الإسلامية وتلك التي في معظم النظم القانونية الحديثة. مع التأكيد على أن الشريعة الإسلامية صالحة لكل زمان ومكان. و يتضمن البحث عرضا مفصلا للطبيعة القانونية للمسؤولية المدنية التي تؤثر على الأطباء ، فضلا عن آراء متباينة بشأن تكييفها. وقد وردت الإشارة إلى المبادئ التي وضعها النظام القضائي في مصر وفرنسا والأردن. و يحلل البحث عناصر المسؤولية الطبية. كما يسلط الضوء على موقف التشريعات الأردنية التي تعتبر المسؤولية على أساس الضرر، وليس خطأ. لقد قدمت مقترحات ومبررات للقول كيف أن القانون المدني الأردني يمكنه توفير حماية أفضل مصلحة للمريض. كل ما يجب على الطبيب القيام به هو بذل جهود المهنية كما هو مطلوب وفقا للقواعد العلمية المعمول بها. ومع ذلك، هناك بعض الحالات الطبية بموجبه أن يطلب من الطبيب لتحقيق النتيجة. في النهاية، في ضوء حساسية ودقة المسألة، ولتعلقها في جسم الإنسان على المرء أن يعترف بأنه من الصعب التوصل إلى استنتاج نهائي في موضوع المسؤولية المدنية للطبيب. وتنعكس أهمية البحث في المقترحات والتوصيات التي سوف توفر أساسا متينا لمعالجة المشاكل والتحديات التي تواجه المحامين والقضاة بسبب العيوب المتأصلة في التشريعات القانونية. ومن المتوقع لهذا البحث المتواضع أن يثري المكتبة القانونية الأردنية في موضوع الإهمال الطبي.

APPROVAL PAGE

This dissertation of Wadah Y.A Hajjat has been approved by the following:

Mohsin Hingun
Main Supervisor

Majdah Binti Zawawi
Co-Supervisor

Puteri Nemie Jahn Kassim
Internal Examiner

Anisah BT Che Ngah
External Examiner

Abdul Majeed Salaheen
External Examiner

Md.Yousuf Ali
Chairman

DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degree at IIUM or other institutions.

Wadah Y.A Hajjat

Signature.....

Date

COPYRIGHT

INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA

**DECLARATION OF COPYRIGHT AND AFFIRMATION OF
FAIR USE OF UNPUBLISHED RESEARCH**

**A CRITICAL COMPARATIVE LEGAL ANALYSIS OF
JORDANIAN MEDICAL NEGLIGENCE WITH REFERENCE TO
CIVIL LAW SYSTEM**

I declare that the copyright holder of this dissertation are jointly owned by the student and IIUM.

Copyright © 2016 Wadah Y.A Hajjat and International Islamic University Malaysia. All rights reserved.

No part of this unpublished research may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without prior written permission of the copyright holder except as provided below

1. Any material contained in or derived from this unpublished research may be used by others in their writing with due acknowledgement.
2. IIUM or its library will have the right to make and transmit copies (print or electronic) for institutional and academic purposes.
3. The IIUM library will have the right to make, store in a retrieved system and supply copies of this unpublished research if requested by other universities and research libraries.

By signing this form, I acknowledged that I have read and understand the IIUM Intellectual Property Right and Commercialization policy.

Affirmed by Wadah Y.A Hajjat

.....
Signature

.....
Date

DEDICATION

This study is dedicated to every oppressed Muslim on this earth.

ACKNOWLEDGEMENTS

وَقَضَيْنَا إِلَى بَنِي إِسْرَائِيلَ فِي الْكِتَابِ لَتُفْسِدُنَّ فِي الْأَرْضِ مَرَّتَيْنِ وَلَتَعْلُنَّ عُلُوًّا كَبِيرًا. فَإِذَا جَاءَ وَعْدُ أُولَاهُمَا بَعَثْنَا عَلَيْكُمْ عِبَادًا لَنَا أُولِي بَأْسٍ شَدِيدٍ فَجَاسُوا خِلَالَ الدِّيَارِ وَكَانَ وَعْدًا مَفْعُولًا (سورة الإسراء: 4،5)

Words are not enough to express my indebtedness to my supervisors, Assoc.Prof.Dr. Mohsin Hingun and Assoc.Prof.Dr. Majdah Zawawi, whose encouragement, guidance and support from the initial to the final stage of my research have enabled me to develop a deeper understanding of the subject matter. I highly benefited from them as an academic researcher.

I wish to express my thanks and heartfelt gratitude to my father, Yassin Hajjat who has sacrificed so much for my family members and has helped me become who I am now and placed me on the path where I am today. I am grateful to my mother, who has been praying for me and has sacrificed every single thing she had for all her eight children.

Lastly, my deepest gratitude to my wife and friend Mervut for her emotional support and patience with me, also my children, Besan, Ghaith, Rahmeh and Muhammad. To the above-mentioned people and to those who have not been mentioned, your sacrifice and encouragement are greatly appreciated and will always be in my memory.

TABLE OF CONTENTS

Abstract	ii
Abstract in Arabic	iii
Approval Page.....	iv
Declaration	v
Copyright	vi
Acknowledgements	viii
Table of contents	ix
List of Tables	xii
List of Figures	xiii
List of Acts.....	xiv
List of Cases.....	xv
List of transliteration	xvi
CHAPTER ONE: INTRODUCTION	1
1.0 Introduction.....	1
1.1 Statement of the Problem.....	8
1.2 Research Hypothesis.....	9
1.3 Objectives	9
1.4 Literature Review	10
1.5 Scope and Limitations of the Study.....	24
1.6 Methodology of Research.....	25
CHAPTER TWO: AN OVERVIEW ON THE FEATURES OF JORDANIAN LEGAL SYSTEM	27
2.0 Introduction.....	27
2.1 Sections and Branches of Law in Jordan’s Legal System	29
2.1.1 The division of legal principles relating to people's legal causes and legal relationships:.....	29
2.1.1.1 Branches of public law according to Jordanian legislation	30
2.1.1.2 Branches of Private Law in accordance with the Jordanian legislation.....	33
2.2 Sources of Legal Principles in Jordanian Law.	38
2.2.1 Official sources	39
2.2.2 Unofficial sources of the Jordanian law	42
2.3 The Judicial System in Jordan	43
2.3.1 Types of courts in Jordan:.....	44
2.3.1.1 Judicial courts are reconciliation, for instance, appeal, Cassation and the Supreme Court of justice (administrative court).	45
2.3.1.2 Religious courts:	49
2.4 Conclusion	50
CHAPTER THREE: MEDICAL LIABILITY IN ISLAMIC LAW	52
3.0 Introduction.....	52
3.1 Al Dhaman as a General Concept.....	53

3.1.1	Defining Al Dhaman.....	55
3.1.2	The basis of Al Dhaman in the Quran.....	55
3.1.3	Al Dhaman in the Hadith	57
3.2	Types of Al Dhaman.....	57
3.2.1	Dhaman of the Contract	57
3.2.2	Dhaman in cases of aggression.	58
3.2.3	Differences and similarities between Dhaman arising out of a Contract and Dhaman due to Aggression.....	58
3.3	Elements of Al Dhaman.....	60
3.3.1	The Fault or aggression.....	61
3.3.2	The Damage	61
3.3.3	Casual Relationship.....	62
3.4	Nature of Medical Liability in Islamic Law	62
3.5	The Extent of the Doctor's Commitment in Islamic Jurisprudence.....	64
3.6	Types of Medical Liability in Islamic Law	67
3.6.1	Cases of medical liability as an ethical liability.....	69
3.6.2	Cases of Doctor's liability based on professional medical liability:.....	70
3.7	Consequenses of Medical Negligence.	78
3.7.1	Al Diyah.....	78
3.7.2	Al Daman	83
3.7.3	Al Ta'azir.....	84
3.7.4	No Compensation.....	85
3.8	Conclusion	85

CHAPTER FOUR: THE NATURE OF MEDICAL CIVIL LIABILITY 88

4.0	Introduction.....	88
4.1	Basis of Contractual Theory of Medical Liability.....	92
4.1.1	Conditions of the contractual medical liability.	94
4.1.1.1	The Presence of a Medical Contract:.....	95
4.1.1.2	The contract must be valid.....	98
4.1.2	Treatment of legal jurists towards the nature of the medical treatment contract.	104
4.1.3	The researcher's view:	112
4.1.4	Exceptions where it is considered tort.	115
4.1.5	Criticism of the contractual theory.....	116
4.2	Basis of Tort Theory in Medical Negligence.	119
4.2.1	Tort under Jordanian civil law	123
4.2.2	Criticism of the tort theory.....	126
4.3	The Jordanian Judiciary's View on the Nature of Medical Liability:	127
4.3.1	Analysis of the researcher on the decision of case number 233/1989.....	130
4.4	The Choice between the Two Liabilities.	140
4.5	Conclusion	142

CHAPTER FIVE: THE PILLARS OF MEDICAL LIABILITY 144

5.0	Introduction.....	144
5.1	First Pillar: The Error.....	145

5.1.1 Standard measurement of medical error.	147
5.1.2 Position of the judiciary in France, Egypt and Jordan.	149
5.1.3 Forms of medical error.....	151
5.2 Second Pillar: Damage	170
5.2.1 Definition of the Damage and its types.....	170
5.2.1.1 Damage based on its nature.	171
5.2.1.2 Damage based on the wrong or harmful act.	172
5.2.1.3 Damage Based on the affected party's knowledge.....	173
5.2.1.4 Damage based on time of occurrence.	173
5.2.2 Terms of the medical damage.	177
5.3 Third Pillar: The Casual Relationship	179
5.3.1 Theories on the casual relationship.	181
5.3.2 The termination of casual relation:	184
5.4 Conclusion	187

CHAPTER SIX: NATURE OF THE DOCTOR'S COMMITMENT TOWARD THE PATIENT 189

6.0 Introduction.....	189
6.1 The Importance of the Difference between the Obligation of Taking Care (Diligence) and the Obligation to Achieve a Result	190
6.2 The Nature of the Doctor's Commitment in Giving Care Contract	193
6.2.1 Factors that determine the commitment of the doctor.	195
6.3 Cases of Doctor's Commitment to Achieve the Result.....	198
6.3.1 Use proper medical devices and means of protection.....	199
6.3.2 Formulas and artificial organs.....	201
6.3.3 Blood transfusions, fluids and vaccination.	203
6.3.4 Drugs and medical treatments.....	205
6.3.5 Plastic Surgery.	207
6.4 The Amended Agreements of the Provisions of the Civil Liability:	213
6.5 Conclusion	217

CHAPTER SEVEN: CONCLUSION AND SUGGESTIONS..... 220

7.0 Introduction.....	220
7.1 Research Findings.....	221
7.2 Conclusions	230
7.3 Suggestions	233
7.4 Direction for Future Research	237

BIBLIOGRAPHY 239

LIST OF TABLES

Table 2.1	Types of courts in Jordan	50
Table 3.1	The Current Value of gold Dinar	80
Table 3.2	Quantum of Diyah	82
Table 5.1	Forms of common medical errors.	169
Table 5.2	Types of the damage	176

LIST OF FIGURES

Figure 2.1	Branches of law in Jordan's legal system	38
Figure 2.2	Sources of legal principles in Jordanian law	43
Figure 4.1	Types of the doctor's civil liability	92
Figure 4.2	The conditions of contractual liability	104
Figure 4.3	The elements of tort liability based on Jordanian civil code and Egyptian and French code	137

LIST OF ACTS

Legislative act and constitution

Al- Qanūn Al-Madani Al-Ūrdūnī, 1976 (Act No 43, 1976).

Al-Dustur Al-Tibbi Al-Ūrdūnī, 1987(Act No 1, 1987).

Al- Qanūn Al madani Al Mīsrī, 1948 (Act No 131, 1948).

Qanūn Niqabt Al Atiba' Al Ūrdūniyah, 1972 (Act No 13, 1972).

Qanūn Al- A'mal Al-Ūrdūnī,1996 (Act No 8, 1996).

Al- Qanūn Al madani Al Sūrī,1949 (Act No 84, 1949).

Qanūn Mahkamat Al'adl Al Ūlia Al-Ūrdūnī, 1992 (Act No 12, 1992).

Qanūn Ūsūl Al Mūhakamat Al Madanīyah Al Ūrdūnī,1988 (Act No 24, 1988).

Qanun Majalīs Al Tawa'if Al Denīyah Al Ghair Muslm Al Ūrdunī, 1932 (Act No 2/1932).

Qanūn Al 'Ūqūbat Al Ūrdūnī, 1960 (Act No 16, 1960).

LIST OF CASES

- Qarar Mahkamat Al Tamīz Al Urdūnīah raqm1246/1995, Majallat Niqabat Al Muḥamīn Al Urūnīn li sanah 1992,1709*
- Qarar Mahkamat Al Naqd Al Masrīah tarīkh (26/6/1969) Quoting, 'Ajjāj,, Al Masūliyah Al Madanīyah lil Tabīb, 115.*
- Qarar mahkamat Besanoon Al Faransīah –(26/10/1932) Quoting, 'Ajjāj,, Al Masūliyah Al Madanīyah lil Tabīb, 111.*
- Qarar mahkamat Al Tamīez Al Kūwatīah, tarikh (4/6/1980), Quoiting, Mansūr, Muhammad Husaīn, Al- Mas'uliyah Al-tibbiyah, 156-158.*
- Qarar Mahkamat Al Naqdh Al Faransīah, Tarīkh, (12/4/1995) Quoting 'Ajjāj, ṬAlāl, Al Masūliyah Al Madanīyah lil Tabīb,161.*
- Qarar mahkamat Līyon Al Faransīah Tarīkh (17/11/1904) Quoiting, Al Abrashi, Hasan Zaki, Mas'uliyah atibba',144.*
- Qara Mahkamat Marsīlya Al Faransīah, tarīkh (3/3/1959). Zaki,' Mushkilat Al Masūliyah Al Madanīah,387.*
- Qarar Mahkamat Al sīn Al Faransīah, raqm 115/47 tarīkh (3/3/1965) Quoting Mansūr, Al Masūlyīah Al Madanīah lil Tabīb'215.*
- Qarar Mahkamah Lyon Al Faransīah ramq(536, 17/3/1937). Quoting, Al Tūtanjī, abd Al SAlam, Al- Masūlyīah Al- Madanīah lil tabīb,409.*
- Qarar Mahkamah Al Naqdh Al Masrīah (1914), Quoting Al Abrashi, Hasan Zaki, Mas'uliyah atibba',303-304.*
- Qarar Mahkamah Al Tamīz Al Urdūnīah, (424/1995), Majallat Nīqabat Al Mūhamīn Al Urdūnīn, 1995.*
- Qarar Mahkamah Al Tamīz Al Urdūnīah raqm 273/75, Majallat Nīqbat Al Mūhamīn Al Urdūnīn1976, 820.*
- Qarar Mahkamah Al Tamīz Al Urdūnīah raqm 233/89, Majallat Nīqbat Al Mūhamīn Al Urdūnīn1990,740.*

LIST OF TRANSLITERATION

Before using this Table, you must first install the AHT Times New Arabic fonts.

Table of the system of transliteration of Arabic words and names
used by the International Islamic University Malaysia.

b	=	ب	z	=	ز	f	=	ف
t	=	ت	s	=	س	q	=	ق
th	=	ث	sh	=	ش	k	=	ك
j	=	ج	ṣ	=	ص	l	=	ل
ḥ	=	ح	ḍ	=	ض	m	=	م
kh	=	خ	ṭ	=	ط	n	=	ن
d	=	د	ẓ	=	ظ	h	=	ه
dh	=	ذ	‘	=	ع	w	=	و
r	=	ر	gh	=	غ	y	=	ي

Short: a = اَ ; i = اِ ; u = اُ

Long: ā = آ ; ī = إ ; ū = و

Diphthong: ay = آي ; aw = وا

CHAPTER ONE

INTRODUCTION

1.0 INTRODUCTION

In modern times, medical negligence has attained a great deal of attention due to the fast development of modern science in its various fields. Due to the fact that medical practice is essentially a human profession and it is complex. Therefore, it is potentially dangerous and any error can cost a man's life. Thus a doctor is morally and legally obligated to exert his best efforts and afford full attention and care to the patient. A doctor, in treatment or surgery, can harm a patient due to certain errors in diagnosis, prescription, or surgery, which calls for medical liability to be examined.

The increase in medical treatment has also led to the increase in the percentage of medical errors as well, with some of them being settled in courts and attracting media coverage. This means that the issue of medical negligence has become a social problem that concerns all classes and sectors of society, and is no longer a limited professional problem related to medical staff and administrators. It is necessary to legally protect all parties involved in the issue of medical negligence, to protect the profession of medicine and its progress, and to protect patients as well. This is why rules and regulations are required to protect people from medical malpractice and its negative effect.

Undoubtedly, modern laws agree with Islamic law in considering medicine a lawful practice, as they agree on the conditions that ensures non-liability. These agreed upon conditions necessitate that the person involved is a medical doctor with

good intentions to cure his patient, and that he works according to professional standards after obtaining the consent of the patient.¹

Due to the importance of Islamic law as the second source for the Jordanian civil law, that Article (2/) civil code stipulates:²

"If the court has no provision on this law then the most improved provision of Islamic jurisprudence is taken, if that is not available then the principle of the Islamic law is used".

The researcher believes that one cannot study medical negligence in Jordanian civil law without studying the rules of Islamic law on the topic. In this regard, the head of committee entrusted with writing the Jordanian civil law stated that:³

“For the first time in modern Muslims history, the Hashemite Kingdom of Jordan prepares a civil law on transactions based on Islamic jurisprudence and its open-minded rulings, it is a leading project that is eagerly anticipated by Arabs and Muslims, and it achieves a goal wished for by countless jurists and men of law”.

The researcher believes that Islamic jurisprudence preceded Jordanian civil law in the field of medical negligence and malpractice as Muslim scholars address this topic in detail and set up many of the rules that regulate the relation between doctors and patients. On the other hand, Jordanian civil law left this topic to be dealt with under the general rules of the Jordanian civil law number 43 of 1976 in its third chapter under the title “Harmful acts or tort”.⁴

On the other hand, the Jordanian courts did not fill this legal gap and has not addressed the legal nature of medical liability. For instance, the Jordanian appellate court on 12 Ma 1991 in case no.223/89' ordered a hospital to pay 4000 Jordanian Dinar in damages for a baby which suffered permanent deformities due to errors in

¹ Al Jumaili As'ad, *Al-khata' fi Al-Mas'uliyah atibba' Al-madaniyah*, (Ürdun: Dar Al- Thaqafa, 2009), 14.

² Al-Qanūn Al-madani Al-Ürdünī, 1976 (Act no 43,1976) Art 2.

³ Al-Mudhakkirah Al-'Idahiyah li Al-Qanūn Al-madani Al-'Urduni, Al-juz' 1, 16.

⁴ Al-Qanūn Al-Madani Al-Ürduni, Art 256 - 292.

diagnosis. At the same time, the court backed the liability of the hospital owner for the errors committed by his staff, referring to article 288B in the Jordanian civil law, as the staff was working under the directions and supervision of the hospital owner.⁵

One notes that this ruling did not address the nature of the medical liability and whether to adapt it as contractual or negligence liability. Thus, Jordanian courts missed a historic opportunity to fully address the nature of medical liability, leaving the door open for scholars and researcher of Jordanian law to find their answers regarding the legal adaptation of this issue.

Regarding to Islamic jurisprudence, the most important foundation for jurists in relation to determining medical malpractice is the hadith:⁶

“He who practices medicine without knowledge of it is liable”.

Muslim jurists have placed the principles and criteria that regulate the medical profession. The four Imams have studied medical negligence and stated its legal effects that protect patients and preserve human life, and also protect doctors and their ability to do research and discover new ways of helping patients. They distinguished between a knowledgeable doctor and an ignorant doctor, defining the former as one who mastered the profession, exerting all efforts and not neglecting his duties to examine and study the case.

As for the latter, he is liable for any hurt caused to the patient, thus, the ignorant doctor is liable once there is hurt to the patient. This liability, however, is negated if the patient knows that this doctor is ignorant and still allows this doctor to treat him. If the ignorant doctor presents himself as knowledgeable to the patient and

⁵ *Majallat niqabt Al-Muhamen Al-'Urdunin*, 1992 (Magazine of the Jordanian lawyer bar) Al-a'dad 10 wa 12, 709 - 712.

⁶ Ibn Majah, Muhammad ibn Yazid, Abu 'Abdullah Al-Qazwini, *Sunan Ibn-Majah*, (Bayrūt: Dar Al-Kūtib Al- 'Ilmiyah, 2002) 3466.

treats him, leading to the patient's death or harm, then the doctor is fully liable based on the damage done.⁷

Nevertheless, a knowledgeable doctor is not liable for any damage, as long as he obtained the permission to treat the patient and did not commit an act of negligence. This is due to the fact that there is an Islamic rule stating that the treatment by the doctor after obtaining consent is obligatory⁸, Jurists agree that when death comes as a result of an obligatory action, despite precautions and lack of negligence, and then there is no liability⁹. Based on the above, that a doctor will not be found liable for medical negligence if the following conditions are met:

- 1- The doctor is truly knowledgeable and not an imposter.
- 2- The doctor has good intention to treat the patient.
- 3- To work according to the norms of professional medicine.
- 4- To obtain the consent from the patient or his guardian to allow the treatment.

The Journal of the Islamic Fiqh Academy supported these conditions and commented that it “gives doctors a considerable amount of freedom, if he does not go beyond the known principles of his profession. Undoubtedly, this freedom and right to use one's own judgment play an important role in accommodating medical scientific development. There is no harm if the doctor does not adhere to the opinion of his fellow doctors”.¹⁰

⁷ Nasimī, Mahmūd Naẓīm, *Al-Tibb Al-nabawi wa-Al-'ilm Al-hadith*, (Bayrūt: Mu'assasat Al-Risalah, 1987), 15.

⁸ Ghamidi, 'Abd Allah, *Mas'uliyah Al-Tabib Al- Mihanya fi Al-Shari'ah Al-'Islamiyah*, (Jeddah: Dar Al- Andalus, 1997), 63.

⁹ 'Isam Ahmad Muhammad, *Al-Nadharīyah Al-'ammah lil-haqq fi salamat Al-jism dirasah jina'iyah Muqaranah Mujallad 1, 2, atab'a 2*, (Al-Qe'hirah: Dar Al-tiba'a Al-haditha, 1988), 240.

¹⁰ *Majallat Al-Majma' Al-Fiqh Al-Islami*, Makkah Al-Mukarramah, Al-Majma' Al-Fiqhi Bi-Rabitat Al-'Alam Al-Islami, 1989.juz'7), 1548.

It is worth mentioning that despite this consensus on the non-liability of doctors based on these conditions, jurists have differed on the reasoning for their opinions.

- 1- Hanfi School opines that this is due to social necessity, and the consent of the patient or his guardian.¹¹
- 2- Shafie and Ahmad bin Hanbal schools opine that the reason is the consent of the patient, and the fact that the doctor has a good intention and is not intending harm.¹²
- 3- Maliki schools opine that the reason is based on the consent given by the ruler as well as the patient; the consent by the ruler is given to allow the doctor to practice medicine. With these two types of consent, a doctor is not liable unless he violates medical standards.¹³
- 4- Another view of the Hanbalī School states that they agreed with the views of most of the jurisprudence scholars. Ibn Qudamah said “that there is no liability on an expert practitioner performing cupping, circumcision, or other medical operation as long as they follow the medical standards without exceeding the usual area of treatment, and they know their profession well, in addition to obtaining permission from the patient”.¹⁴ It is Also worth mentioning that the Shari‘ah obligated learning medicine as a (*Fard Al-kifaya*),¹⁵ as medicine is indispensable and a society cannot

¹¹ Ramlī, Muhammad Ibn Ahmad, *Nihayat Al-muhtaj Ilā sharh Al-Minhaj*, (Mīsr: Sharikat Maktabat Wa-Matba‘at Mustafa Al-Babi Al-Halabi wa-Awladih, 1967), 20.

¹² Nasimī, 15.

¹³ ‘Abidīn, Isam Muneer, *Al-Mas’uliyah Al-Tibbiyah Al-jaza’iyah*, (Bayrūt: Al- Jami‘a Al- Islamiyah, 1999), 21.

¹⁴ *Ibid*, 23.

¹⁵ ‘Awdah, ‘Abd Al-Qadir, *Al-Tashri‘ Al-jina’i Al-Islami bmuqaranan bi-Al-Qanun Al-Wad‘i*, (Bayrūt: Dar Al-Kutub Al-‘Ilmiyah, 2005), 519. Fard Al – Kifayah: if one person fulfills an obligation it is sufficient for the whole Muslim in that whole society.

survive without it. It becomes an individual's duty if it was not undertaken by a sufficient number of Muslims.

In contrast the civil legislations, found in the Jordanian, Egyptian and French Civil Codes, the law does not comprehensively regulate the relation between doctors and patients. A doctor who neglects his duties faces various liabilities. If his action constitutes a crime, he will be criminally liable. If his action causes physical or psychological harm he to be compensated, he will be civilly liable and maybe as to compensate his patient for any harm caused by him.

Civil liability is violating one's lawful or contractual duties. This liability is divided into; a contractual liability due to the contract between the doctor and his patient, and negligence liability that is not based on contract but on the doctor's lack of medical care or attention.

Under the civil law there is no agreement among jurists of law regarding to the nature of civil medical liability, is it based on negligence or is it contractual in nature? Undoubtedly, liability from negligence takes places when there is no contract between the doctor and his patient. Whereas, Contractual liability only takes place when there is a breach of contract that caused an injury. Meanwhile, the French courts initially recognized medical liability cases based on negligence until the French Court of Cassation's civil division issued its (Mercier) ruling in June of 1936 stating that, "there is an actual contract between a doctor and a patient, with consequence borne by the doctor... breaching this contractual obligation results in contractual liability".¹⁶

This new adaptation of medical liability as contractual did not cover all legal aspects between doctors and patients. It was later agreed to consider medical liability a negligence liability in these cases:

¹⁶ Shawaribī, 'Abd Al-Hamīd, *Mas'uliyah atibba' Wa-Al sayadilah Wa Al-mostashfaiat*, (Al-Iskandariyah: Munsha'at Al-Ma'arif, 2000), 98.

- 1- When the doctor interferes without a sound contract, i.e. without a contractual relation as when the doctor saves a drowning patient.
- 2- When a patient causes harm to others like spreading contagious diseases.
- 3- When a doctor refuses to treat a patient he is legally bound to help.

However, scholars have agreed upon is that whether liability is attributed contractually or by way of negligence, a doctor is required to compensate the victim.¹⁷

As the researcher mentioned above that in Jordan judicial rulings on civil medical liability are limited and do not address this issue directly. It is worth noting that Jordanian civil law considers injury and not error as the basis for civil liability.

Paragraph 256 of Jordanian civil law states that:¹⁸

“Each injury to others renders the transgressor liable even if he is not able to distinguish right from wrong”.

Jordanian law adopts the objective theory, being influenced by Islamic jurisprudence. However, the Jordanian appellate court has taken into consideration the elements of error, injury, and the casual relation between them.¹⁹

Medical responsibility will be examined in accordance with the Civil Code of Jordan, in contrast to the standard adopted by the Court of Cassation of Jordan which takes into account an element of error, whereby they ignored the article (256) which stresses on the need to show the occurrence of the damage in order to establish medical liability. Meanwhile in the researcher’s view that the Jordanian civil law takes into account the interest of the patient more than the position adopted by the Court of Cassation in Jordan as well as the position under Egyptian civil law and French civil law, as will be proven by the researcher in chapter four .

¹⁷ Hanna, Munir Riyad, *Al-Mas’uliyah Al-madaniyah lil-atibba’ wa-Al-jarahin fi daw’ Al-qada’ wa-Al-fiqh Al-Faransi wa-Al-Misri*, (Al-Iskandariyah: Dar Al-Fikr Al-Jami’i, 2007), 82-87.

¹⁸ Al-Qanūn Al-Madani Al-Ūrdūnī, Art No 256. This concept will be explained in detail in chapter 4.

¹⁹ This will be discussed in detail in chapter 5.

1.1 STATEMENT OF THE PROBLEM

This research shall address the following legal problems:-

Firstly, the Jordanian legislation does not specifically cater to issues relating to the medical liability. Instead, the laws based on general principles relating to civil liability. The problem with implementing general principles is that it gives rise to differences of legal opinions about medical profession and the duties owed to their patients. As a result this leads to different criteria set out in judicial opinions in deciding cases involving medical negligence. Because of this uncertainty, it is necessary to address this issue.

Secondly, the current position on the issue of civil liability of doctors in Jordan is not clear. Because of the absence of a clear method to secure the right of the patient-victim, whose responsibility is it to establish the occurrence of error, harm and casual relationship between the doctor and the victim. The problem is worsened when the medical errors of the doctors are accepted as fate from Allah Which is preretirement and they refuse to claim for compensation, because of these reasons the legal nature of civil liability of the doctor is not clear and as such there is a need to conduct a research into, his responsibility towards the patient, conditions that may necessitate implementing civil liability on him, the types of medical error and harm, and as well as casual relationship between them. In addition to that the mechanism of securing compensation for the patient needs also to be discussed.

Thirdly, legists experts and researchers have used the term *Al-khata' Al-tibbi* [medical error] in the study of medical liability. This expression is not appropriate when discussing the doctor civil liability in the medical field according to the Jordanian civil law. This is because under article no 256 of the Jordanian Civil law, what needs to be proven is medical harm (*Ḍarar Al-Tibbī*), not Medical error (Al