

The Doctor's Civil Liability in the Organs' Removal and Transplantation Field

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Abstract: Organs' removal and transplantation requires the presence of a person who donates one of his body organs, another person who receives the donated organ, and a doctor who transfers the organ from the donor's body then transplants it into the recipient's body. This operation carried out by the doctor may cause harm to others, which creates a certain responsibility born by the doctor. What is, then, the doctor's civil liability in the human organ removal and transplantation field? And what are the conditions that must be met for both responsibilities?

key words:

Human organs' removal and transplantation - The donated organ - The donor's body – The recipient's body - The doctor's responsibility.

introduction:

The world witnessed a great development in the medical field, which resulted in the development of medical civil liability, especially in the field of human organs' removal and transplantation; as this liability concerns dealing with the human body, which is the most valuable thing for the human and which represents his life.

Furthermore, civil liability of the doctor is divided into contractual and tortious. If the commitment is broken by the source of the contract, the responsibility is, then, contractual, while if the commitment source is illegal work or harmful act, or a material incident that results in a commitment under the law, the responsibility is, then, tortious.

Organ removal and transplantation may be from the body of a living person to another living person, or from a dead body to a living person. This therapeutic industry has seen significant development and widespread use due to the prevalence of certain organic diseases such as kidney failure, diseases affecting the cornea of the eye, blood platelet disorders, and other diseases. Since such procedures require a person to donate one of their organs, another person to receive the donated organ, and a doctor to remove the organ from the donor's body and then transplant it into the recipient's body, this procedure performed by the doctor may cause harm to others, which entails the doctor's responsibility. For this responsibility to arise, whether contractual or tortious, certain conditions must be met.

The objectives of studying the subject of the doctor's civil liability in the field of organ removal and transplantation include

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examining Law 18-11 related to health, dated 18 Shawwal 1439, corresponding to July 2, 2018, in the official gazette number 46, issued on July 19, 2018, and the updates it contains regarding organ transfer and transplantation.

Therefore, we will explore these conditions, all of which raise questions such as:

- Is it a contractual or tortious liability?
- To what extent does the surgeon respect the regulations governing medical practice?
- Is it a requirement to perform organ transfer and transplantation operations in public hospitals?
- Are human organ transfer and transplantation operations limited to the living, or do they extend to the deceased ?
- Is the donor's consent required before death, or is the family's consent sufficient in the absence of consent before death?

All these questions lead us to pose the following issue problematic:

- What is the nature of the doctor's civil liability in the field of human organ removal and transplantation?
- What are the conditions that must be met in both types of liability?

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In order to study the topic, both descriptive and analytical methods were used, as follows:

Section I: Legal nature of the doctor's civil liability in the field of human organs' removal and transplantation (amongst the living, from dead bodies)

There is no text in positional legislations that clarifies the legal nature of the doctor's civil liability in the field of organs' removal and transplantation (amongst the living, from dead bodies). Therefore, several debates rose about this topic, and the question was posed about either his liability were contractual or tortious.

In addition to that, the Algerian legislator addressed the contractual civil liability in the third chapter entitled: "Impacts of commitments", from the second section, contracts and contractual commitments, in general. While he addressed civil liability in the second chapter of the fourth section entitled "commitments arising without agreement". The advocates of dual civil liability drawn on the difference that exists between the provisions of both those types of responsibility in various matters, including: eligibility, notice, proof, solidarity, compensation, prescription and release from liability.

However, another team of jurisprudence sees that civil liability is one type, as contractual liability, just like tortious liability, is the penalty for breach of prior obligation. Therefore, both liabilities have the same nature, especially since they share the same cause and result. The advocates of this opinion see that the original commitment arising from the contract expires with the destruction of its subject or with the impossibility of its subject because of the debtor's error, and that the

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commitment to compensation is not the original commitment resulting from the contract, but it is the commitment in the law rank, where the 124 article of the Algerian Civil Law is the source of law, and where law is the source of this secondary commitment, which means that commitment to compensation is a penalty for breach of arising first commitments, either on the contract or on the law.

After addressing contractual and tortious civil liability in general rules, we will attempt to search, based on general rules, in the legal nature of the doctor's civil liability in the organs' removal and transplantation field. In addition to that, we will attempt to reach a determination of the legal nature of this responsibility, either it is contractual (first claim) or tortious (second claim).

A) Contractual liability of the doctor in the organs' removal and transplantation field (amongst the living, from dead bodies)

Contractual civil liability of the doctor in the field of transferring and transplanting organs is the one arising when one party of the contract violates the commitments given to him by virtue of the contract, as there must be a contract that links the one who violated his commitment, which means the debtor, and the other party, which is the creditor, because even in this responsibility there must be a valid contract between both parties.

Based on the previously mentioned points, if there were between the doctor and the patient (the one benefiting from the organs' removal and transplantation operation) on one hand, and between the doctor and the donor of one of his body organs for the benefit of the beneficiary on the other hand, or between both of them

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together on one hand, or between the doctor on the other hand – if there were – a valid contract by which the doctor commits to perform the removal operation starting from the donor's body, then to transfer and transplant it in the patient's body (the beneficiary), and to offer the necessary medical care for one of them, or for both of them, and in return, the patient commits to pay the doctor's fee, in such case, the doctor's liability is contractual.

Therefore, the valid contract is the source of contractual liability. Furthermore, and since the organs' removal and transplantation operations are subject to complex and precise conditions imposed by their specific law, and since they need long procedures as well as complex tests and examinations for both the donor and the patient in order to ensure there is no danger to either of them as a result of the operation, and to also ensure the suitability of the transferred organ for the patient's body, then, it is not visualized that all these things can exist without the presence of a valid contract between the doctor on one hand and both the donor and the patient (the beneficiary) on the other hand.

We note that the prevailing opinion about the doctor's responsibility for medical errors that he commits while performing his medical work in general, either that matter was related to the organs' removal and transplantation operation or not, is a contractual liability, as the medical contract is a logical matter if the patient chooses his doctor. However, there are cases where it is difficult to know whether there is a contract or not, such as the case of performing a surgery in a private hospital, so if the doctor appointed by a private hospital or a

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private project is about to deal with this case if doctors contract with clinics or hospitals or companies' administration or factories, where the doctor commits, in virtue of the contract, to treat patients entering the hospital or the clinic, in this case, the doctor is committed to offer services to persons with whom he has no agreement and who did not choose him, and they cannot reject his services. We wonder, then, how can the patient prompt the doctor to execute his commitment while he is not party of the contract?

In order to answer this question, we must return to research in the legal nature of contract, then adapt this contract as being a stipulation for the benefit of others. The article 116 of the Algerian Civil Law states that the doctor (the contractor) commits to treat patients in front of the stipulating party, and as the patients are the ones benefiting from the stipulation, this grants them the right to file a direct lawsuit against the doctor (the contractor) in order to prompt him to execute his commitment although they are not parties of the contract. Based on that, the doctor's liability is contractual.

If the doctor chooses the private hospital where he will perform the operation for the patient, in this case, the doctor is not affiliated with the hospital's administration. Based on that, the hospital's role is limited and does not exceed offering a bed to the patient as well as placing surgical instruments and assistants in the doctor's hands and under his authority for a certain fee paid by the hospital. Therefore, the doctor is considered responsible for any error committed to the patient, based on the contractual liability considering that the patient had contracted with the doctor.

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We conclude from the previously mentioned points that the contract must be valid and productive of its impacts, and that all its pillars determined by law, including consent, location and cause, must be available in order to establish the doctor's contractual liability. The failure of one of this contract's pillars results in absolute nullity. Moreover, the contract's validity terms must be available, which means that the contract is not valid due to defect in the will. These defects include mistake, fraud, coercion and exploitation. So if consent was associated with one of these defects, the contract is revocable.

The doctor's contractual liability is established if the harm caused to the patient is a result of the non-execution of a contractual commitment. Amongst the commitments resulting from the medical contract, we state mastery of the contracted work, following the fundamentals of medicine, according to the scientifically constant scientific data.

B) The doctor's tortious liability in the organs' removal and transplantation field (amongst the living, from dead bodies)

The doctor's tortious liability is established in case of breaching general legal duty, which states that the human must not harm others by mistake or negligence on his part according to the article 124 of the Algerian Civil Law. Therefore, the doctor is responsible for his personal mistakes like the normal person who commits an error that results in harm to others.

As previously clarified, the doctor's liability in the organs' removal and transplantation field is contractual, as it is not visualized

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that these operations can be performed without a valid contract between the doctor on one hand as well as the donor and the patient (the beneficiary), or one of them, on the other hand, note that the prevailing opinion about the doctor's responsibility for medical errors that he commits while practicing his medical work in general is that it is a contractual liability, either that matter concerns the organs' removal and transplantation operations or not. However, there are cases where the doctor's liability for his medical errors in general is tortious. These cases can also be available in the organs' removal and transplantation operations as follows: the case where the doctor proceeds directly to the operation of the organs' removal and transplantation without the presence of a contractual relationship between himself and the donor/patient (the recipient of the transplantation operation). This case shows, and this condition is fulfilled, in three cases, which are:

1. The case of the doctor' intervention willingly:

If the doctor intervenes willingly, or based on an invitation from the audience to save the infected person, his work, then, will be considered as a favor. While as for the nature of the doctor's responsibility in this case, it is a tortious liability because there is no medical contract between the parties.

2. The case of the doctor who works in a public hospital:

The relationship between the doctor and the hospital where he works is a legal organizational relationship that is subject to the

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employment's laws and regulations, and it is, then, not contractual. Based on that, the doctor's responsibility for the harm caused to the patient due to his error in a public hospital is a tortious liability, not a contractual one.

This is what the Algerian legislator adopted when he required the performance of the human organs' removal and transplantation operations in public hospitals legally licensed, according to the article 1/366 of the Health Law 11-18 stating that: "The operations of human organs or tissues or cells removal or transplantation can only be performed in public hospital institutions licensed by the Minister charged of health, after the opinion of the National Agency of Organs' Transplantation..."

Section II: Conditions of the establishment of the doctor's civil liability in the operations for human organs' removal and transplantation (amongst the living, from dead bodies).

The doctor's responsibility in the field of organs' transfer and transplantation is either contractual or tortious. In both liabilities, it is required that the doctor commits a medical error (**A**), which caused a harm (**B**), and there must be a causal relationship between both of them (**C**).

A) Medical error

The human organs' removal and transplantation operations are distinguished by an important characteristic. As a result, the concept of error in the field of human organs' removal and transplantation is

different from the general concept of medical error, as the organs' removal and transplantation operation is subject to a set of legitimate and legal regulations. Therefore, the doctor must affirm their availability before performing this operation.

Furthermore, jurisprudence derived the definition of medical error from error in general, which defines it as: "A failure in the human's path that does not happen by an awake person found in the same external conditions surrounding the responsible".

Images of medical error entitled to compensation are numerous in the human organs' removal and transplantation field. Medical errors requiring compensation in the human organs' transfer and transplantation field are the errors resulting from violating regulations related to persons (1) and medical errors related to violating regulations related to medical action (2).

1: Medical errors related to violating regulations related to persons

The Algerian legislator stated a set of regulations related to persons in order to perform the human organs' removal and transplantation operations. Every violation of these conditions is considered as a medical error that requires compensation. These violations are: violating the consent condition (a), violating the condition of notifying both the recipient and the donor (b) and violating the free of charge condition (c).

a – Violating the consent condition:

It appears in case of removing the organ by the surgeon without getting the donor's or the alive recipient's consent. Violating the consent is also incarnated in the case of removing the organ from

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the donor who retracted his consent, as the retraction omits the legal effect of the donor's consent.

While concerning prosecution related to expressing consent, the doctor's error is incarnated in performing both the removal and the transplantation operations without getting the legal representative's approval.

The Algerian legislator stated all the previously mentioned points in the article 4/360 and 5 of the Health Law 11-18: "The organs and cells' removal operations, from a living person in order to transplant them, cannot be performed without the notified approval of the donor. Therefore, the donor must express his/her approval to donate and, if applicable, to cross-donate before the regionally competent court. This latter shall ensure in advance that the approval is free and notifying, and that the donation meets the conditions stipulated in this law. The donor can withdraw his approval any time and without any sanction..."

The doctor's action is also considered an error when organs are removed from persons perforce, or from living persons without legal capacity, according to the article 361 of the Health Law 11-18.

While concerning the dead donor, removing the dead person's organs without his/her consent is not considered as a doctor's error, but it is an error if the dead person expressed his/her disapproval to remove his/her organs during his/her life. Expressing this disapproval can be by any means, especially through registration in the disapproval register held by the National Agency of Organs'

Transplantation. Registration methods in the disapproval register are determined through organization.

Therefore, according to the article 362/1.2 of the Health Law 11-18, it is considered that the doctor has committed an error and liability arises when he is aware of the deceased's disapproval to remove his/her organs after death, and even though, the doctor proceeds to the removal operation, contrary to what is stated in the law 05-85, which requires the consent of the living or dead donor, and that this approval must be written according to the article 164.

However, things changed after the issuance of the Health Law 11-18. For the deceased donor, the article 362 of this law states that: "... the organ can be removed if the deceased did not express his/her disapproval to remove his/her organs during his/her life. Expressing this disapproval can be by any means, especially through the registration in the disapproval register held by the National Agency of Organs' Transplantation. Registration methods in the disapproval register are determined through organization. The medical team in charge of removing organs must review the disapproval register in order to search the deceased's position on organs' donation. The family adult members of the deceased donor shall be notified of the performed removal operations..."

Therefore, we conclude from the article 362 of the Health Law 11-18 that every person that did not express his/her disapproval in writing and did not register that disapproval at the specialized services is considered to have agreed to donate his/her organs after death. Subsequently, if the deceased donor expressed his/her disapproval to donate his/her organs during his/her lifetime, and even though the

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doctor proceeds to the removal operation, here the doctor is considered mistaken and his liability arises. As for the case of expressing disapproval, in this case the doctor proceeds to the removal operation and his behavior is not considered an error.

Moreover, the doctor can do that without the approval of the family of the deceased who did not express his/her disapproval, but the doctor notifies the adult members of the family of the deceased donor only of the performed removal operations according to the article 162/last paragraph.

b - Violating the condition of informing both the receiver and the donor:

The doctor must execute his commitment of getting the insightful consent before starting any medical or therapeutic action whatever its type, especially if it is a dangerous action whose results are hard to predict, such as the organs' removal and transplantation operations, without showing the risks and effects of the operation to the concerned parties, which is stated in the article 360/ paragraphs 7 and 8 of the Health Law 11-18.

This condition is also violated if the doctor breaches the notification commitment, for example, in case of hiding dangerous and expected results of the surgical action, while the doctor does not wonder about hiding unexpected risks because knowing them by the recipient can negatively affect the patient's psychology and moral spirit, which requires hiding these facts.

c - Violating the free of charge condition:

The article 358 of the Health Law 11-18 states that: “Removing human organs, tissues and cells and transplanting them cannot be the subject of a financial transaction”.

We conclude from this text that the free of charge condition is one of the most important conditions on which the human organs’ removal and transplantation operations are established. This condition is considered as an incarnation of the principle of the human body’s sanctity and inviolability. For that reason, any breach of that condition is considered as a medical error that requires compensation.

The article 367 of the Health Law 11-18 states that: “Practitioners who perform the removal operations, and the ones who perform the transplantation operations of human organs, tissues and cells, do not receive any fees for the operations”.

2 - Regulations related to medical action:

Medical action in general surgery and especially in the human organs’ removal and transplantation surgery is characterized by a kind of sensibility and danger. That is due to the spot of this action, which is the human body. These medical actions are represented in the use of unsterilized surgical instruments and tools (a), error in the organ to be removed (b), error during and after surgical intervention (c).

a - The use of unsterilized surgical instruments and tools:

The doctor commits to use sterilized and clean surgical instruments and tools as they are capable of harming the two parties of the operation. In case of breaching this condition, the doctor’s civil liability arises.

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b - Error in the organ to be removed:

The surgeon in the field of human organs' removal and transplantation commits to remove a healthy organ from the donor's body, and he/she also commits to remove the sick organ from the patient's body. If the surgeon damaged the removed organ, or removed a healthy organ from the recipient's body, in this case his/her civil liability arises.

c - Error during and after surgical intervention:

The doctor is responsible for not following common principles in the profession. In return, the doctor is not asked about not following scientific opinions that are still controversial in medical circles.

Furthermore, and after performing the operation, the surgeon commits to follow its results and the healthy developments of the operation parties. If specific symptoms showed, indicating the condition deterioration, and if the surgeon did not intervene, it is considered, then, that he/she had committed an error arising liability.

B) Harm in the organs' removal and transplantation operations

Harm is the second pillar of civil liability. Jurisprudence has defined it as: "The harm that befalls a person as a result of infringing one of his rights or legitimate interests".

The harm may be physical, represented in infringing body safety, which means the injury and its results, such as physical disability like damaging one of the body organs, or detracting from it, or causing a permanent or a temporary disability, or any motor deficit, or taking souls.

Moreover, harm can be material, which is the one that infects material services of the hurt person due to a total or partial disability to work. Amongst the examples of that, we state loss of wages for the worker or the employee, and that also includes all the treatment expenses of all kinds (medicines, hospital and clinic costs...), in addition to loss of dispense for persons who were supported by the deceased.

As for moral harm, it is the one that infects the right or the legitimate interest of the person who caused moral or psychological pain to the hurt one for infringing his/her legal entity. This type of harms infects the person in his/her emotions and feelings as a result of a suffering that may arise from physical pains on one hand or from psychological pains on the other hand.

The Algerian legislator stated the possibility to recompense moral harm in the article 182 bis of the Cities' law in the modification 10-05: "Compensation of moral harm includes every infringement of freedom or honor or reputation".

C) Causal relationship

In causal relationship, the doctor's error must be the one that caused harm infecting the patient recipient or the donor.

It refers that the surgeon in the organs' removal and transplantation operations does not proceed to the operation alone, but there will be with him/her a medical team headed by the surgeon. So, in case of harm, we wonder who shall bear civil liability? Does the doctor bear it alone and shall it be his/her personal responsibility? Or is it a responsibility for the actions of others (the medical team)?

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A jurisprudential debate arose about this issue. On one hand, there is an approach that sees that it is the doctor's responsibility for the action of others, as being the medical team president, because he is in charge of committing to caution rules, which fall on each member of the medical team.

On the other hand, this opinion was criticized on the pretext that the relationship disappears in the frame of medical action proceeded inside hospitals, where tortious liability arises. This view was followed by the French Cassation Court, which adopted the principle of the surgeon independence from the anesthesiologist, and each of them is considered responsible alone.

However, the French Cassation Court backed down from its position, considering that the anesthesiologist's responsibility is collaborative with the surgeon, due to the impossibility of separating the two specialties. While if the error was committed by the radiologist or the nurses or even the medical students, the surgeon, then, who is the medical team president, is the one who bears tortious liability for this error, based on the dependent's responsibility for various actions, because of the control and orientations' authority that he/she enjoys. This point was adopted by the Algerian legislator through the article 136 of the Algerian Civil Law.

Conclusion

The nature of the doctor's civil liability is determined, either contractual or tortious, according to how available are the conditions of each of them. It is contractual as an origin if there is a contractual link between the doctor and the person subject to the operation. In

contrast of that, it is tortious if there is no contract. Furthermore, the doctor's civil liability does not arise in the human organs' removal and transplantation operations unless its conditions were met, which are error, harm and causal relationship.

From all the above, we concluded the following results:

- The necessity to allocate independent legal texts to organize medical liability in the human organs' removal and transplantation field.
- The necessity to determine a definition for the human organ by the Algerian legislator.
- The expansion of the hospitals' list where human organs' removal and transplantation operations are proceeded to include other hospitals.

- The necessity to review the article 362 of the Health Law 11-18, which requires that each person, before his death, must edit a written disapproval not to remove and transplant his/her organs, as it is possible that the deceased does not desire to donate his/her organs but did not express that before his/her death through a written disapproval, then his/her organs will be removed. For that reason, the donor must replace the Algerian legislator (written disapproval) and express his/her disapproval to donate before death.

-It was widely agreed that the process of organ transplantation is an critical need for the lives of patients, and donating organs is a form of altruism and cooperation in righteousness and piety, which Allah Almighty has commanded, and it has become safe from risks, with its benefits greatly outweighing its harms.

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-The text states that one should not resort to the removal of an organ from a living or deceased person if it is possible to use a prosthetic organ that serves the same purpose.

- Establishing a medical insurance system for doctors that covers damages that may occur as a result of unintentional medical error.

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