

The doctor commitment in the scope of the medical probability

التزام الطبيب في ظل الطب الاحتمالي

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الملخص:

يتضمن العمل الطبي نسبة كبيرة من الاحتمال فلا يمكن محاسبة الطبيب عن عدم شفاء مريضه، كون هذا الشفاء يتوقف على عوامل واعتبارات لا تخضع للإرادة الطبيب، لذلك تم اقتصار محل التزامه على بذل العناية دون تحقيق النتيجة .

لكن مع ظهور الطب الحديث ظهر دور جديد للطبيب يتمثل في إعطاء المريض حياة أفضل وأكثر راحة مما أخرج مهام الطبيب من المفهوم الكلاسيكي وأصبح من الضروري تجاوز القواعد التقليدية والاعتراف بوجود التزامات حديثة تحقق التوازن بين علاقة الطبيب بالمريض استجابة لمقتضيات العلاج الحديث . ومن هنا يظهر الهدف من دراستنا للالتزامات الحديثة للطبيب في ظل الطب الاحتمالي مع تبيان ضرورة إعادة تكييف العناية الملقاة على عاتق الطبيب مع الطب الحديث .

الكلمات المفتاحية: الطبيب، المريض، المسؤولية الطبية، التزامات الحديثة، الاحتمال الطبي .

Abstract:

Medical work involves a large percentage of probability, so a doctor can't be held accountable for not healing his patient, as this healing depends on factors and considerations that are not subject to the doctor's will, so the place of his obligation was limited to exerting care without achieving the result. But with the emergence of modern medicine, a new role for the doctor emerged, which is to give the patient a better and more comfortable life, which took the doctor's tasks out of the classical concept, and it became necessary to go beyond the traditional rules and recognize the existence of modern obligations that balance the doctor-patient relationship in response to the requirements of modern treatment.

Hence, the aim of our study of the modern obligations of the doctor in the context of probabilistic medicine and the need to re-adapt the care of the doctor to modern medicine.

Key words: doctor; patient; medical liability; modern obligations; medical probability.

Introduction:

Medical work includes a huge rate of probability, intuition, and deduction. It is not considered as a harm liability if the doctor is unable to treat his patient, because while achieving the treatment convention, the doctor is not required to heal, but rather is committed to apply due care for his patient in order to achieve recovery.

This healing depends on many factors and considerations that are not always subject to the doctor's will, such as genetics and the patient's physical and psychological readiness.

Restricting the doctor's commitment to exercising care is based on the concept of probability that dominates the result of his mission, in which many factors that are not subject to his control intervene.

But with the advent of modern medicine, a new mission emerged for the doctor, which consists on giving the patient a better and more comfortable life, for example by improving his physical appearance or alleviating his pains.

The modern role of the doctor emerges from the classical definition of the doctor's duties.

Therefore, it has become necessary to go beyond the conventional rules and develop them by recognizing the existence of modern commitments that achieve the balance between the doctor and patient relationship in reaction to the requirements of modern treatment.

In light of the above, we can pose the following problem:

What are the doctor's commitments as a part of probabilistic medical care?

How much is necessary to readapt the medical care to the doctor's charge in modern medical science?

Accordingly, the topic to discuss will be the following articles:

1- The definition of the medical probability

1.1 - The probability of lack in medical knowledge.

1.2 - The probability of a medical intervention by a human being (doctor) on another human being (patient)

2- The principle of the commitment to act with care as a result of the emergence of a medical probability

1.1- The required diligence of the doctor

1.2- The necessity of re-adapting the care of the doctor on modern medical science

1-The definition of the medical probability

The Medical health probability is the risk of medical intervention failure further factor issues that could not be predicted, apart from any error. This failure could be caused by a lack of medical knowledge, or the performing of a medical intervention by a human being on another human being.¹

To analyse that, the probability of a medical knowledge lack should be studied as a first section, then the probability of the medical intervention by a human being on another human being as a second one.

1.1-The probability of lack in medical knowledge

Since his early existence, the human being has wondered about the extraordinary phenomenon, diseases, injuries and death. The doctor remains the person who has that exceptional power which allows him to be in contact with the nature's extraordinary powers.

The medical science development has led to several specialities as surgery, autopsy, anaesthesia and antisepsis. However, this does not allow saying that the medical science is nowadays a well mastered science because even all the development of the science knowledge, it is still unable to provide solutions to many diseases, some of them remain incurable, despite counting those which are still causing death of a part of the humanity without explain the resulting death.

Diseases increases and require an increasing continuous research as for the viruses. They generate muting viruses that change whenever a vaccine against them is elaborated. The best example is the new Corona virus (Covid-19).

In addition, there are recent diseases resulting from human behavior or unknown causes, such as the AIDS disease.

Therefore, the medical probability due to a lack of medical knowledge is a possibility that cannot be rejected, because medical sciences are not infallible or perfect, it is confirmed whenever new medical discoveries appear that reveal ignorance of their secrets, as is the case with genetics, whenever research on genetic diseases progresses, their complexity and prevailing ambiguity are confirmed, even though it is considered the vector of human life.

However, the lack of medical knowledge is not the only reason for the medical probability, the medical technology control, the medical intervention is carried out by a human being (the doctor) on a human being (the patient).

1.2- The probability associated with carrying out a human-on-human medical intervention.

The practice of medical science is an intellectual work that depends on personal experience and study. It is practiced by a human being. Therefore it involves inevitably

probability because human work itself is fallible, so choosing the appropriate treatment is also fallible.

The failure of medical intervention may be due to an error on the part of the doctor. Although doctors have received similar and equivalent training, each one in his specialty, every doctor has his own knowledge, personal qualities, and professional skills.

As long as medical care is not practiced using a machine or device, differences remain existing from one doctor to another when it comes to personal skills, and thus the success of medical intervention results from the professionalism of the doctor.

In addition to the professionalism of the doctor, his nature as a human being represents efficiently an important role in the success or the failure of the intervention. Indeed, the cost-effectiveness varies due to several factors such as fatigue and exhaustion of the doctor, especially after a full day of work after examining 50 patients. The cost-effectiveness is not the same as for the first patient with the last patient.

Conversely, increasing the doctor's experience has two aspects; his skill and professionalism increase as he grows older, but the doctor's age is a limit of his innovation².

When a person practices of medical science makes him different in terms of the provided service nature, as well as skill and professionalism, since the doctor is a human being who cannot constantly remain at the same level of skill and professionalism.

As a result of the above, the probability involved in medical work cannot be excluded as long as the latter it is a human achievement. That gives probability to medical work even in the absence of error on the part of the doctor.

This doctor, facing a specific disease that may afflict the patient, has to provide a therapeutic solution which is not a simple mathematical operation performed by the doctor, but rather the result of an intellectual effort obtained further personal experience fueled by years of his accumulated experience.

To heal from the disease, the doctor faces with many solutions from which he chooses the appropriate one. For all problems, there must be a good choice. The idea of error is not raised, but rather the probabilistic nature makes fortune controlling the success or failure of the therapeutic solution. In this context, we can wonder about the doctor's freedom to decide choosing the appropriate treatment.

In fact, the doctor is free to prescribe treatment³, but this recognition of freedom in choosing treatment is not absolute, but is subject to restrictions.

The patient has recently gained economic power on the doctor, and this financial aspect, represented by the fee that the doctor receives, has imposed a kind of competition between doctors, which has made the patient, as a consumer of the treatment, controlling it. If the patient does not get from one doctor the desired purpose, he goes to another doctor to get it.

The doctor's option to choose treatment may also be limited by economic and political factors, which is unfortunate⁴. A good and effective medicine has become very expensive.

This burdened the Government's budget structures. It had a political impact. In order to reduce medical expenses, the government began to make pressure, albeit indirectly, on doctors to limit the prescription of expensive medications, for example, as is the case in Algeria due to generic medicines that have invaded the pharmaceutical market in the country. In choosing medicine and treatment, doctors are now prescribing these generic medicines due to their availability on the market, instead of the original medications.

Accordingly, medical intervention is potential because it is performed by a human being, but it is also potential because it is performed on a human body that has physiological and psychological reactions independent of the doctor's work. The success of medical intervention is not limited to scientific knowledge only, but there are other factors that should be taken into account in its success, which are the specific reactions of each patient and the specificity of his physiological composition. It is not controlled by either a doctor or anyone else. For example, the occurrence of an unexpected heart attack during a surgery operation constitutes a real case for the probability involved in medical work.

Moreover, the probability that controls the success of medical intervention is linked to the psychological reaction of the patient, which may have an impact even on the physiological side. The psychological state of the patient and his ability to resist the disease contribute greatly, along with the medical intervention, to the success or the failure of the treatment.

Likewise, the doctor cannot face the inevitable issues of fate and destiny that is a probability we forget in our attempts to estimate the doctor's responsibility. No matter how advanced scientific knowledge has reached, a person's life is limited by duration. For example, every time a patient undergoes surgical intervention, he is at risk of death due to the probability that this entails for the reasons mentioned above. All of these data make the medical probability an obligation to act with care⁵.

2-The principle of the commitment to act with care as a result of the emergence of a medical probability

To impose on the doctor merely a commitment to provide care with a logical and just result, because he cannot be questioned simply further the medical intervention failure, as he is not committed to achieve a result, but rather to be cautious and prudent when performing medical work.

During a ruling issued on 05/20/1936, considered the principle establishment of medical responsibility, the French Court of Cassation issued the nature and content of the doctor's obligation towards the patient. It decided that in the treatment convention, the doctor is not committed to heal the patient, but he is committed to provide acts of care to the patient, not of any kind. These efforts must be honest and vigilant. Consistent, in other than exceptional circumstances, with established scientific principles and in continuation of the French Court of Cassation's attempt to define a more disciplined scope of the care of the doctor. It decided in its ruling issued on 10/21/1970 that the doctor's commitment, subject of this study, should be in accordance with contemporary scientific data.

It is clear, in this new formulation that it includes a dynamic concept of the knowledge which the doctor must know, and as long as this is the case, the care that the doctor must have towards the patient must also take a dynamic concept, especially after the spread of modern medical devices and therapeutic methods.

In light of all this, will the doctor's commitment remain the same as his commitment to provide care, or do we have to change the consideration of his commitment in light of the precise and advanced devices that doctors have come to use?⁶

According to what was issued in the aforementioned decision of the French Court of Cassation, which remains constant with what was stated, the doctor is committed to provide the patient with care that corresponds to the human and professional conscience on one hand, and consistent with established scientific principles on the other hand. Further, we shall try to define the meaning of the necessary care of the doctor to match the data of modern medical science in the second section.

2.1- The required diligence of the doctor

In his commitment to provide care, the doctor undertakes to exercise care to achieve the purpose whether this purpose is achieved or not. Care is the effort that the committed practitioner makes in implementing his commitment, but the result is independent from the commitment itself. It is stipulated in Article 172 of the Civil Code. In committing to exercise diligence, the doctor has a global obligation to act with caution and prudence in implementing his commitment and this quantity of expended effort or diligence with the intention of achieving the purpose must be similar to the effort exerted by an average person⁷.

This is what is stated in the Article 43 of the Medical Code of Ethics which stipulates mainly that the doctor must be committed to providing treatment to the patient with sincerity and dedication, that this treatment must be in conformity with the setpoints of modern science and the necessity of seeking assistance when necessary from specialized and highly qualified colleagues.

This is what is stipulated in the Articles 69 and 71 of the Medical Profession Ethic Code in Algeria. The doctor must implement the treatment, suggested by specialists; otherwise his responsibility will be altered by an error.

Furthermore, the doctor who accepts to perform the specialist's opinion is responsible for this application. He cannot, if an error appears in the treatment, claim that he did not agree it but rather carried out it based on the opinion of the specialist⁸.

The Article 47 of the same code stipulates also that the doctor must prescribe his prescriptions clearly, insure that the patient or relatives understand his prescriptions clearly and must also strive to obtain best implementation of treatment.

The French Court of Appeal of Cannes convicted the doctor who prescribed medicine to a student without mentioning the dosage or the method of use, because, in this case, the

doctor did not make towards his patient an honest effort consistent with the established principles of medical science that do not tolerate negligence, inattention, or failure in application of regulations. This is what was stated in the decision of the High Court of Algeria dated May 30th, 1995⁹.

The Algerian judicial authorities¹⁰ decided that the hospital was responsible in accordance with a decision issued on February 3rd, 1988, further the doctor's wrong placement of a plaster on the patient's leg, which led to the rotting of that leg and its subsequent amputation.

Even if the Algerian legislation does not impose on the doctor to be perfect and infallible, it allows him to perform basing on senseless acts and recklessness without taking into account the necessary information and contemporary scientific settlements.

The availability of acquired, current and modern scientific information that is agreed upon and referred to is a standard updating the doctor's error that leads to responsibility, represents a benefit to the patient's interest in terms of diagnosing and treating the disease, and to the doctor by excluding his responsibility because he has respected modern scientific information¹¹.

The content of the doctor's commitment to care is not determined by the medical result, but rather by engaging in it while exerting effort and ensuring the success of the medical intervention.

According to the jurist Savatiez, when a doctor undertakes a medical intervention, he must provide all care and attention, with vigilance, accuracy, and conscience in order to achieve the patient's interest. The instructed conscience does not consist on the rules of the professional conscience, but rather what is governed by extreme care and continuity in serving the patient, as well as the skill, ingenuity and sincerity in work.

The doctor's error may appear clear if he does not show the required care in prescribing certain medicines without requesting that biological tests or x-rays should be performed, as required by correct medical work, applying standard of an ordinary doctor in the same circumstances, or if he does not properly ask the patient about his illness and its antecedent diseases.

For example, the patient suffers from a stomach ulcer and the doctor does not ask him about it and prescribes anti-inflammatory medicines that could have serious adverse side effects on the stomach. The circumstances of any medical, pharmaceutical or surgical intervention must be in accordance with scientific principles and must be carried out with the necessary security for the patient's safety.

However, the question that arises is how, based on the above, the judge can legally introduce the doctor's work and define the required commitment about the care?

Determining the doctor's commitment is linked to the real circumstances surrounding the medical intervention. We have to observe another doctor's behavior in the same

circumstances, independently from the specific side circumstances of the doctor's personal specificities (age, personality, intelligence), because the side circumstances are what would affect the course of the medical intervention. They consist on the difficulties that the doctor faces during the intervention, including those which are related to the patient himself, others that are related to the patient's physiology and psychology, and some that are related to the nature of the medical intervention, whether it is ordinary or urgent¹².

The doctor's intervention may be urgent, it is meant by that an intervention that involves a certain degree of danger and requires quick and urgent medical measures to be taken.

The time factor is often of utmost importance in these cases, it relates to the patient's condition regardless of other circumstances that may constitute another exceptional circumstance. So we are facing with two circumstances that would have a great impact on determining the wideness of the doctor's required care.

Therefore, a state of emergency can justify a lack of care on the one hand, as it can force the doctor to exercise greater care.

The doctor could neglect to carry out tasks and procedures that he would not have otherwise overlooked if there is no urgent situation, such as an x-ray examination because of time restrictions¹³.

On the other hand, scope of an emergency, the doctor is committed to provide better care to the patient than in other ordinary situation.

He must closely monitor the patient's condition, and if necessary, be present next to the patient or ensure the presence of a specialist next to him as long as the risk remains, otherwise, he will be responsible for any resulting damages.

Also, from the point of view of justice, it is unreasonable rule a situation of a doctor who treats a patient in a hospital equipped with all modern devices with others who work in health institutions that are not well equipped..

After defining the necessary of the doctor in this requirement, we shall study in the second requirement the necessity of re-adapting the care on the doctor dealing with modern medical science.

2.2-The necessity of re-adapting the care of the doctor on modern medical science

When resolving any medical responsibility dispute, an average bloke could think that the doctor's commitment is the commitment to provide care. This principle is neither a rule nor a regulation, but it has become more strengthful than any basic legal texts for judges.

Therefore it should be reconsidered in sight of medical care improvement and not approved in an absolute manner. Nowadays judges have become aware that the medical care improvement, in which the outcome depends on probabilities, required the applying of a suitable system for these specificities.

While they are facing a principle that makes the commitment to exercise care, consequently the judiciary institutions try to find an average solution and compromise to transform the content of legal concepts¹⁴.

It has become necessary to wide up and strengthen the doctor's responsibility. There are many attempts of the judiciary institutions in this context, however, to initiate the distorting general legal principles to achieve the doctors' responsibility it would be better and more effective to establish a clear and specific system to satisfy the desire of patients to obtain on adequate compensation for the damages they've had, on the one hand, and to preserve the doctor's options to practice his noble profession with utmost determination and perseverance on the other hand.

Adopting the well-known path in the field of medical responsibility and attesting that the doctor's commitment is an obligation to provide care, and on the other side trying the distortion of this principle and expanding the concept of error and causality leads to a dead end, which is neither the aim of the injured party seeking compensation nor the doctor's aim in performing his duties.

However, activating this responsibility vis-à-vis the doctor must be a penalty for wrongful behavior and not a way to obtain compensations. That was the judiciary institutions objective on the one hand and the litigating patients seeking compensation on the other hand during recent years.

Maintaining the strictness of the principle of the commitment to care on the responsibility of the doctor in accordance with the Marseillais Decree of 1936 constitutes a protection for the doctor from the probability of considering him accountable. This is because, even if it was possible to imagine it in 1936, time has passed it, as it is difficult nowadays to imagine this strict application of the principle based on which a lawsuit can be rejected. The victim was injured for the sole reason that it was unable to prove the fault of the doctor who caused the harm¹⁵.

It is not reasonable too to undertake the policy recently adopted by Governments, which is the possibility of obtaining compensation simply for contracting an infection in hospitals, as was the case for victims of AIDS through blood transfusions, without proving that the fault was the doctor's one.

In contemporary era, we have to take into account the necessities that complement the practice of the medical care by establishing a controlled and coherent compensation system that is not governed by inappropriate circumstances and not limited by time durations to consolidate medical responsibility in a specific way which reflects its privacy because its aims are specific. Also, the circumstances of the medical care practice vary from risky medical interventions to areas of modern medical care based on providing the personal comfort.

According to the opinion of Professor Bouvier, the doctor's obligations no longer are of a common nature. Depending on the aimed goal, we are facing an obligation to practice medical care at times, and a commitment to achieve a result at other times.

Since that, the idea of the obligation to provide extreme care emerged as a result of the merging and confusion in the modern concepts of medical sciences and linking them to the consumption concept.

The patient and the customer (the consumer) do not accept anymore failure or incapacity to achieve the expected result. Due to the awareness of judges who take decisions

in the field of medical responsibility, strict rulings have been issued to face medical professional practices. The damages resulting on the medical field are considered serious, given that medical actions and interventions, in this case, are not inevitable. When damage arises, it becomes logical and necessary to assume the doctor's error seeing that it is unfair to charge the patient with the necessity of proving the doctor's error.

This reality is confirmed by the justice rulings, the judicial instances tried to find ways to reduce this charges on the patient who is already harmed. So, the French judiciary has tried, as an illustration, to overcome the difficulties faced by the patient, in order to establish evidence of the error by inferring it from the occurrence despite what is required by general regulations, through what is supposed to be probabilistic or estimated error.

The basis of the concept is that the harm would not have occurred unless an error has been caused on the part of the doctor. In this context, the French Court of Cassation has summarized the specific hospital's error from the mere transmission of the infection to the patient, in a such case, can only be explained by an error committed by the hospital during the patient hospitalization, and the court confirmed this by ruling that the hospital is presumed responsible for the infection that befell the patient while performing the surgical procedure in the operating room unless the mentioned hospital is able to issue evidence that there was no error on its part¹⁶.

In the mean while, the Algerian judiciary institutions ruled that the hospital was responsible on the basis of mismanagement regarding a patient falling from a mobile bed that led to his death.

While the French administrative judiciary instance has adopted this concept and extended its use, the French Council of State has considered, through a decision issued on 11/21/1997, the occurring of a probable medical error on the part of the general hospital, of the injury resulting from defects in the tools and devices used in its services, as well as the damages attributed to the lack of caution of the employees in the hospital, in addition to cases of infection within it.

In fact, the idea of probabilistic error, although it appears to be intransigent towards doctors, nevertheless reveals the judiciary's awareness of the insufficiency of classical legal rules to provide protection for patients while facing progression and developments in the field of medical process, which make injured patients become unable to establish evidence of the doctor's or hospital's error.

Accordingly, the only thing that the judiciary institutions had to do was to develop these rules in order to reduce the difficulty of technical evidence that requires the patient to bear it.

Thus, the judiciary's adoption of the concept of probable errors means its persuasion of responsibility based on the error, caring for the injured patient and aiming to establish the adequate balance in the relationship between the doctor and the patient¹⁷.

However, the concept of probabilistic error was not the only way that the French judiciary institutions resorted to in order to limit the burden of evidence on the patient's responsibility, as they resorted to other legal ways, which maybe had a greater impact in

tightening and strengthening the doctor's responsibility, including expanding the field of medical obligations to achieve a result that includes medical fields that do not involve a high rate of probability, such as medical fields aimed at achieving personal comfort, like plastic surgery.

A such expansion leads to reducing the burden of evidence which is in charge of the injured patient, to practically being exempted from it.

Finally, due to the judiciary institutions adoption of the trend of supposed risks, the concept of insurance emerged. As the development of medical profession and the use of modern methods increase with risk, the protection of patients from doctor errors requires insurance.

Insurance is one of the means of achieving the development of medical responsibility to lead to scientific and technical development in the medical field.

The impact of the doctor's responsibility is transferred to the group of doctors registered in the Medical Union as members of the same profession, and in implementation and activating of the principle of risk spread, instead of charging the concerned doctor of his mistake consequences or misconducting while doing his work. In other words, the insurance company is responsible of covering risks of practicing medical work as a part of the insurance contract, whether group insurance agreed between the parties and the Doctors Union, or individual insurance on behalf of the doctor who agrees with the insurance company to cover and guarantee the effects resulting from all or some of his errors on the patient while practicing his profession. It is provided that the doctor is committed to pay the installments determined by the company for the insurance.

By establishing an insurance system in the field of medical responsibility, the injured patient obtains an important privilege in being exempted from bringing the evidence of responsible doctor's error.

Therefore, there are some legislation institutions that have resorted to mandatory medical responsibility insurance, whether with regard to the doctor's responsibility for his individual professional behavior or for equipment and medications.

Conclusion:

The lacks and rigidity of the legal norms ruling the doctor's commitments and the tremendous development occurring in the medical field require reconsidering and readapting them to reality. The patient's relationship with the doctor no longer has the same concept.

In order to follow modern developments, we have to distinct between two medical fields; a medical field that aims to eliminate a disease with all the risks and probabilities it carries. It is the traditional concept of medical care, and a medical field that aims to provide the doctor with a better and more comfortable living for the patient, in conformity with his wishes. It is the modern medical intervention that has resulted in a modern category of commitments.

Through the above, we have reached the following results:

1/ Through our study, subject of this research, it became clear that the Algerian legislative institution remained parallel with classical medical responsibility in accordance with global rules, with some special texts, whether in the medical ethics law or in the health law. These laws emphasized the necessity of the doctor's respect for a set of commitments without any reference to the development that has occurred in the field of medical responsibility and the definition of treatment in modern medical care and what have resulted from the modern commitments.

2/ The Algerian legislator has to expedite in establishing an integrated legal institution, excluded from general rules, specifically for the medical profession that guarantees the achievement of a balance between ensuring a protection of the affected patient and providing a scope of freedom and creativity for the doctor in carrying out his noble duties.

3/ Although the Algerian legislator did not hesitate to impose insurance in the field of civil responsibility for all professionals of the medical field, this institution is still does having small impact comparing to the victims of medical work, that's why it would be necessary to create an independent compensation system which proportionate with the seriousness of medical operation accidents as long as it is a matter of physical harm that represents a real social risk.

4/ The necessity of entrusting the expertise in the medical field on which the Algerian judiciary institutions relies to a specialized commission. It is uncoherent to be limited to one expert and rely on his work proving whether or not a doctor has failed while executing his commitments. This specialized commission would be composed of specialized doctors and jurists close to the field of medical liability responsibility.

5/ The importance to establish oversight bodies that monitor the functioning of medical facilities, especially private ones, as well as monitor the operation and safety of medical devices and the quality of medical services.

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