

The Role of Criminal Law in Regulating Physician Liability for Medical Malpractice

دور القانون الجزائي في تنظيم مسؤولية الطبيب عن الأخطاء الطبية

Dr. Bouker Rachida¹, Dr. Bouzid Khaled²

¹ University of Mostaganem (Algeria), rachida.bouker@univ-mosta.dz

² University of Mostaganem (Algeria), khaled.bouzid@univ-mosta.dz

Received:21/07/2024

Accepted:21/09/2024

Published: 16/11/2024

Abstract:

This research delves into the issue of medical malpractice and its criminal repercussions, highlighting the lack of a universally accepted definition. Typically, medical errors are identified as departures from standard medical practices that may harm patients. These errors are categorized into professional and non-professional types, each bearing different legal consequences. The study points out that such errors often stem from ignorance, negligence, or inadequate care, and must result in actual damage for legal liability to be established. It emphasizes the critical need for strict compliance with both legal and ethical standards, especially in diagnosis and treatment processes, to mitigate negligence. The research concludes by proposing several measures to improve healthcare quality, including ongoing professional training, tighter regulatory measures, a focus on patient-centric care, and legal adjustments to protect patient rights and ensure justice within the healthcare framework.

Keywords: Healthcare Regulation, Medical Ethics, Medical Negligence, Medical Harm,

ملخص:

تهدف هذه الدراسة الى استقصاء الأخطاء الطبية والمسؤوليات الجنائية المترتبة عليها، مع التأكيد على غياب تعريف موحد عالمياً، غير أنه يُلاحظ عموماً أن هذه الأخطاء تمثل انحرافات عن المعايير الطبية المقررة التي قد تلحق الضرر بالمرضى. تُقسم الدراسة الأخطاء إلى نوعين: مهنية وغير مهنية، ولكل منها تبعات قانونية محددة. تُبرز التحليل أن هذه الأخطاء تنبع من الجهل أو الإهمال أو عدم العناية الكافية، ويجب أن تتسبب بأضرار فعلية حتى يُعزى إليها المسؤولية القانونية. تشدد الدراسة على ضرورة الالتزام الصارم بالمعايير القانونية والأخلاقية، لا سيما في عمليات التشخيص والعلاج، للوقاية من الإهمال. تختتم

الدراسة بتقديم مجموعة من التوصيات لتحسين جودة الرعاية الصحية من خلال التنمية المهنية المستمرة، وتشديد الإطار التنظيمي، وتبني منهج مركز حول المريض، وإجراء تعديلات قانونية لضمان حقوق المرضى وتحقيق العدالة ضمن نظام الرعاية الصحية.

كلمات مفتاحية: تنظيم الرعاية الصحية، أخلاقيات الطب، الإهمال الطبي، الضرر الطبي

Dr. Bouker Rachida¹, rachida.bouker@univ-mosta.dz.

1. INTRODUCTION

As we review the scientific advancements and technological progress of the modern era and observe the increasing number of inventions in all areas of human life, we can easily discern the risks that emerge in these various fields. In large industrial projects that utilize the latest machinery and are managed using electrical power, and sometimes even nuclear or atomic power in developed countries, the occasions for accidents due to errors in managing these machines or in complying with the regulations governing work within these projects increase. Accidents may also occur due to the use of workers who are incapable of performing a specific type of work due to a lack of the required experience or due to fatigue imposed by their employers. Similarly, unintentional crimes increase as a result of scientific progress in various specialized professional fields.

In the field of pharmacy, a pharmacist might err in preparing a specific medication, placing a toxic substance in the wrong spot, or increasing the proportion of a particular substance beyond the amount prescribed by the doctor, which could lead to the patient's death or harm their health. In the field of engineering, an engineer might neglect the preparation of a building design, and a contractor might err in supervising the construction, causing the building to collapse and result in death or injury (Fawziyya Abdul Sattar, 1977,, p. P4)

Perhaps the most dangerous field of error is medicine. Although medicine is a noble profession that must be protected from wrongful criminalization due to their duty to save human lives, this does not mean that physicians have absolute legal immunity and cannot be prosecuted if

they are found to have violated patient rights. Hence, the issue that needs to be addressed in this study is: **Can a mistake made by a physician in the practice of medicine be considered a cause for criminal liability?**

To answer this question, we adopted a descriptive and analytical approach, as it aligns with the nature of the topic. The study is divided into two sections: the first section deals with the concept of medical error that entails criminal liability, while the second section is dedicated to applications of medical error that entail criminal liability.

2. The first topic The Conceptual Framework for Medical Errors Incurring Criminal Liability

Medical error, a critical concern in the healthcare sector, encapsulates any deviation from the established norms and protocols of medical practice that results in harm to a patient. This concept is pivotal not only from a medical standpoint but also from a legal perspective, as it often triggers questions of accountability and criminal liability.

The relationship between medical error and criminal liability hinges on the notion of negligence or breach of duty. For a medical professional to be held criminally liable, it must be proven that the error was due to negligence—failing to act with the prudence and attention that a competent professional would reasonably exercise under similar circumstances. This includes errors in diagnosis, treatment, or management of a patient's condition

2.1 First requirement :The Concept of Medical Error

We will address in this section the definition of medical error followed by the types of medical errors.

Subchapter One :Definition of Medical Error

Generally, error represents the psychological relationship between the actor and the outcome. However, modern jurisprudence has noted that since the outcome is only one element of a crime, the error may also reside in a psychological relationship between the actor and other elements of the crime besides the outcome. An error might occur due to a lack of correct knowledge about the circumstances under which the action was performed; it is this deficiency in knowledge that leads to unintended consequences, despite the actor's intent to achieve them, because the perpetrator could

have avoided this outcome with more care and caution. Examples include mistakes in facts due to the perpetrator's error, and mistaken beliefs about the existence of a justification for the act, with one of the clearest applications of this being the case of "imaginary danger" in legitimate defense. If a person believes that someone approaching them in the dark, appearing to carry something shiny, intends to kill them, and thus kills that person only to find out it was a friend, they would be liable for involuntary manslaughter if it was proven that they could have avoided the mistake with a reasonable degree of care and attention. Another scenario is the erroneous overstepping of justifiable reasons (Fawziyya Abdul Sattar, 1977,, p. P15)

As for the concept of medical error, there is no universally accepted precise definition, but it is generally understood as a deficiency in the obligations imposed by the physician's profession and its nature. These obligations are derived from the legal duty not to harm others, based on the professional rules that detail their scope and particulars. (Nasreddine Dinosaurs, , 2002, p. P44)

Medical error is also defined as any action by a physician that deviates from the accepted medical norms and standards theoretically and scientifically at the time the medical action is performed, or a breach of the duties of caution, care, and vigilance imposed by law, especially if such actions lead to severe consequences while the physician could and should have taken necessary measures to preserve patient safety (Abdullah, 1999, p. 224)

Furthermore, medical error can be defined as an error resulting from the physician's ignorance of the basic technical knowledge expected of all medical professionals, or from negligence or failure to exercise due care (Mohammed Hamdan, 2008, p. 19)

Thus, medical error can be defined as a shortfall in the physician's conduct that would not occur with a diligent physician, any violation of the medical norms and standards in force at the time of performing the medical act, or a breach of the legal duties of care and vigilance, especially if such breaches could cause significant harm to the patient (Wafaa Helmy Abu Jameel, 1990,, p. 38) (Dr. Osama Abdullah Fayyad, 1990,, p. 1)

At the legislative level, some legislations, like the Algerian legislator, define it under Article 413 as, except in cases of medically justified necessity, punishable according to Articles 288, 289, and 442 of the Penal Code. It covers any negligence or professional error proven to have been committed by a health professional during or on the occasion of their duties, which causes damage to a person's physical safety or health, causes permanent disability, endangers their life, or results in their death.

Subchapter Two : Types of Medical Error

There are two main types of errors: the first group includes professional errors, and the second group includes non-professional errors:

Firstly: Professional Error "A professional error occurs when a physician violates the rules and standards imposed by the medical profession. This type of error is associated with the technical aspects of medicine, specifically deviating from the medical rules and standards that are recognized theoretically and scientifically by the medical community at the time the medical task is performed. An example of this would be a physician experimenting with new treatment methods on patients without these methods having been scientifically validated and registered. This also includes errors related to disease diagnosis, prescribing treatment, anesthesia, and surgical procedures."

Secondly: Non-Professional Error

A medical error can occur from a physician during the practice of their profession, regardless of whether this error is related to the technical aspects of the profession. It is considered an error when a physician ignores basic obligations imposed on everyone, such as discharging a patient from the hospital before full recovery, or leaving a scalpel or gauze inside a patient's body during surgery. These material mistakes are known as ordinary errors and can occur from any person if they deviate from the behavior of an ordinary prudent person.

Therefore, all members of the medical team must remain focused and vigilant during surgical operations, including ensuring the count of bandages and tools used. It is essential to inventory bandages and tools before closing the surgical site to avoid any errors that could negatively impact the patient's health and life.

It is also worth noting that ordinary error may include more precise human errors, such as a physician's failure to save a patient, refusal to provide necessary care, abandonment, or even disclosing the patient's medical secrets." (Al-Shawarbi, 1988, p. 205; Al-Muayyadah., 2004)

2.2 Second requirement: The Relationship Between Error and Criminal Liability

While it is relatively easy to define criminal liability as the legal obligation on the perpetrator to bear the punishment prescribed for the crime, it is not as straightforward when trying to determine the elements upon which error is based, its place within liability, and its connection to it. This becomes more complicated when the discussion extends to criminal capacity and its place in the context. The understanding of error is debated between two theories: the psychological theory and the normative theory.

The psychological theory is based on the psychological relationship that connects the actor to the criminal event resulting from their activity. According to this theory, error is defined by the actor's intent to bring about the criminal event prohibited by law. This encompasses whether the error took the form of foreseeing the event and desiring it, representing it, or even if it was foreseen but not desired.

The normative theory, on the other hand, posits that culpability is an objective judgment on the actor's behavior, critiquing this behavior for violating the duty imposed by the criminal legal rule. According to this theory, the rule is the standard to which one must refer to judge the intent as culpable, and this intent is only considered culpable if it is free and conscious, formed under normal circumstances. Some add that criminal capacity must also be present in the actor for the behavior to be judged as erroneous. According to the normative theory, error lies in the direction of an intent considered legally deviant from the criminal legal rule.

Thus, according to proponents of this theory, error includes: the psychological connection between the actor and the criminal event, the natural voluntary act, and criminal capacity. It appears then that according to the normative theory, error is synonymous with criminal liability. This is likely due to considering criminal capacity as an element of error. Advocates of the normative theory argue that someone lacking capacity is

not addressed by the law's provisions, and thus it cannot be attributed to them that they violated a rule they are supposed to respect.

If this last observation is correct, it does not justify, in our view, considering criminal capacity as an element of error, as this would broaden the concept of error to make it synonymous with liability. Perhaps this is what prompted some supporters of the normative theory to point out that verifying the presence of criminal capacity does not solely concern culpability but also the establishment of liability in general.

It is also understood from the writings of some that the three elements said to constitute culpability according to the normative theory are not actually elements of culpability per se, but rather necessary components for determining its presence.

In any case, some rightly do not accept that criminal capacity should be considered an element in the formation of error, because its inclusion leads us to equate error with liability. Consequently, liability becomes an element of the crime, whereas error, as one of the components of a crime, should not be confused with the criminal liability arising from it. It is more appropriate to view criminal capacity as an independent element related to criminal liability, as it is based on elements related to the personality of the actor and not tied to the criminal event itself.

Thus, error and criminal capacity are the two pillars of liability. It is conceivable that error may exist without resulting liability due to the absence of the actor's capacity.

Regarding intent and the necessity for it to be free and unimpaired, one school of thought considers it as an element of error, while some associate it with criminal capacity, which relies on awareness, discernment, and freedom of choice. This group aligns with those who view criminal capacity and criminal liability as synonymous terms. Indeed, resolving this issue requires more details than can be elaborated here. Moreover, adopting one viewpoint over another will not significantly impact the conclusions reached (Wazeer, 1988, p. 7)

Consequently, it can be stated that medical error encompasses three main elements (Shadaifat, 2011, p. 221): (Khayya, 1996) (Ahmed Abdul Hakim Shahab, p. 32)

1. The Material Element: This is represented by the perpetrator's negligence in failing to take the necessary precautions and measures to prevent the occurrence of harmful outcomes. An example of this is a physician using a dialysis machine shared among several patients without sterilizing it or ensuring the safety of the blood given to them.
2. The Result: This is the actual physical or psychological harm inflicted on the patient as a result of the medical error. This damage is a fundamental element in determining the physician's criminal liability because, in the absence of harm, criminal liability does not exist, although civil liability may still be applicable.

Causal Relationship: There must be a direct relationship between the physician's error and the harm that befell the patient for the physician to be held accountable. The causal relationship serves as the link between the act and the outcome, allowing for the proof that the committed crime is the cause of the damage. If this relationship is absent, and if the crime was not intentional, there is no criminal liability, and responsibility is limited to an attempt in cases where the crime was intentional (Ahmed Abdul Hakim Shahab, p. 37)

3. The second topic Applications of Medical Error

In this section, we will discuss the errors committed by the physician during the examination and diagnosis phase, and those committed during the treatment and its implementation phase.

3.1 First requirement: Liability for Errors in Medical Examination and Diagnosis

Subchapter On: Error in Medical Examination Stage

Medical examination is the first step taken by a physician to assess a patient's condition, aimed at superficially observing the nature and severity of the disease, in addition to conducting a physical examination and determining the medical history. French jurisprudence has emphasized the importance of conducting preliminary medical examinations before proceeding with surgery or administering treatment. Consequently, the physician bears responsibility for any negligence that may occur during this stage, leading to medical errors.

Regarding supplementary examinations, French jurisprudence has not clearly defined the physician's liability. In some cases, the physician is held responsible in instances of negligence, while in other cases, responsibility is denied based on the individual circumstances of each case.

The French legal system focuses on the principle of providing good and appropriate medical care to the patient. Physicians are required to exercise extreme caution and attention during all stages of the medical examination to avoid medical errors and ensure patient safety (Ahmed Abdul Hakim Shahab, p. 37)

Subchapter Two : Errors in the Diagnostic Phase

According to researchers, this scenario presumes that initially, the physician conducted an examination of the patient but failed to correctly identify the disease. This misdiagnosis holds the physician accountable for the error. Accurate medical diagnosis enables physicians to determine the disease and its appropriate treatment. Any errors at this stage can lead to severe consequences. Moreover, any haste in the initial stages of diagnosing a condition could result in further diagnostic errors, either practically or theoretically.

On the other hand, when a physician exercises utmost caution, follows all necessary precautions as per the professional standards, and utilizes the resources available through scientific means, yet still makes a diagnostic error, they are absolved from the liability arising from this error. Even the most experienced and knowledgeable doctors can make unintentional mistakes and be misled.

Therefore, any diagnostic error, whether it violates established general principles, stems from blatant ignorance, or involves gross negligence, imposes liability on the physician as long as such an error would not likely come from a vigilant physician under the same circumstances. Additionally, a physician is not liable if the diagnostic error is due to the patient misleading the doctor with the information provided or omitting certain facts.

It is important to note that diagnosis is a technical method that the court cannot opine on without the assistance of experts. However, the physician's opinion in this regard is subject to judicial assessment (Ahmed

Abdul Hakim Shahab, p. 38) (Mahzah bin Aqoun, 2018-2017, p. 101) (Muhammed Hamad Yaqoub, 2020, p. 267) (Maryam Bouzrara Zekkar, 2020, p. 340) (Serbina Ben Amara, 2019, p. 15)

3.2 Second requirement: Liability for Errors During the Treatment and Execution Phase

Subchapter One: Errors During the Treatment Stage

Liability for errors during the treatment stage arises when the physician determines the appropriate treatment methods based on the type and nature of the disease. It is challenging to distinguish between the diagnostic and treatment phases since the purpose of diagnosis is to prepare for treatment. Once the disease is identified, the physician attempts to treat the patient by prescribing a treatment regimen tailored to the type of disease diagnosed. The physician must consider the patient's health status, age, resistance, and tolerance to the substances being administered, as well as the treatment methods and techniques applied.

From the perspective of the humble researcher, a physician's freedom to prescribe and choose treatments is constrained and not absolute. It is bound by the principles of the medical profession and the humanitarian and ethical standards that the physician must uphold, including the urgency to treat the patient and alleviate their pain.

The Primary Court of Egypt ruled that "a physician's choice of one treatment over another does not lead to liability for the treatment method followed, as long as this method is correct for treating the disease and is scientifically proven and actually followed. The physician's liability for treatment errors is not absolute and depends on the type of treatment chosen unless it is proven that in choosing the treatment, the physician displayed ignorance of the principles of medical science and art. (Ahmed Abdul Hakim Shahab, p. 38)

Subchapter Two :Errors During the Treatment Execution Phase

If the patient is in a critical condition, the physician's responsibility is significantly heightened. If the physician's liability arises from a failure to fulfill the duties imposed in prescribing treatment for the patient, this responsibility also extends to errors in the execution and supervision of the treatment. It is expected that the physician personally establishes methods

of supervision and control over the treatment execution. If the physician neglects or overlooks their duties of caution and care, or fails to monitor the treatment properly, they are considered at fault and are liable if this negligence results in harm to the patient (Ahmed Abdul Hakim Shahab, p. 40)

The Algerian legislator has specifically addressed the aspect of supervision in the Code of Medical Ethics, particularly in the fifth chapter concerning the practice of medicine or dental surgery, under the requirement of supervision. According to Article 90 of the Code, the physician is considered a supervisor for their patient and is obliged to inform the patient after examination that they are under the physician's supervision. The Algerian legislator has established a specific principle for supervision in the Code of Medical Ethics, under the title "Supervisory Measures during Hospitalization," setting forth a list of obligations for physicians and dentists while performing this task. Among these obligations, the physician in charge of notifying the individual under their supervision must conduct the examination as a supervising physician and must maintain complete objectivity in their conclusions and adhere to professional confidentiality regarding their intent (Hassani., 2016, p. 8) (Ladghish Rahima, 2022, p. 243)

4. CONCLUSION

Based on the comprehensive analysis presented in the article, it is evident that medical error not only implicates the individual practitioner but also underscores systemic issues within the healthcare framework that necessitate stringent regulatory scrutiny and proactive management. The delineation of medical error into professional and non-professional errors provides a clearer understanding of the intricacies involved in medical practice and the pivotal role of adhering to established medical standards and norms. The study has deduced numerous pivotal outcomes and recommendations.

Results :

1. Medical error, as elucidated, encompasses a broad spectrum of omissions and commissions which deviate from the accepted medical practices and standards. This deviation not only results in adverse patient outcomes but also raises significant legal liabilities for the practitioners involved.
2. The article effectively categorizes medical errors into professional and non-professional, each with distinct implications and associated legal responsibilities. This classification is crucial for legal frameworks as it helps in tailoring specific guidelines and protocols to mitigate such errors.
3. The interplay between medical error and criminal liability is complex and often contingent on the demonstration of negligence, intent, or breach of duty in adhering to the standard of care. This relationship is vital for the judicial system to effectively adjudicate cases of medical malpractice.

Recommendations:

1. There is a dire need for continuous professional development programs for healthcare providers to stay abreast of the latest medical standards and procedures. This training should also emphasize ethical practices and the importance of patient safety.
2. Regulatory bodies must enforce more rigorous standards and regular audits to ensure compliance with medical protocols. This could include more detailed tracking and reporting of errors, which would help in understanding patterns and implementing preventive measures.
3. Encouraging a patient-centric approach in medical practice, where open communication and patient involvement in decision-making processes are prioritized, can significantly reduce errors related to miscommunication and misinformation.
4. The legal framework should be revisited to ensure that it is both protective of patient rights and fair to medical professionals. This includes clear definitions and guidelines on what constitutes a medical error and its repercussions.

5. Bibliography List :

- Abdullah, Q. O. (1999). *Criminal Liability of Physicians: A Comparative Study*. Cairo: Dar Al-Nahda Al-Arabiya.
- Ahmed Abdul Hakim Shahab, B. M. (s.d.). The Criminal Liability of the Physician for Medical Error. *The Future Journal of Legal and Political Studies*, 32.
- Al-Muayyadah., N. O. (2004). "Civil and Criminal Liability in Medical Errors," . Riyadh,: Center for Studies and Research, Naif Arab University for Security Sciences.
- Al-Shawarbi, A. (1988). *Liability of Physicians, Pharmacists, Civil and Criminal Hospitals, and Disciplinary*. Egypt: Manshurat Al-Ma'arif, Alexandria, .
- Dr. Osama Abdullah Fayyad. (1990,). *Criminal Liability of Physicians A Comparative Stud*. Dar Al-Nahda Al-Arabiya.
- Fawziyya Abdul Sattar. (1977,). "The General Theory of Non-Intentional Error, . Cairo: Dar Al-Nahda Al-Arabiya.
- Hassani., K. (2016). "The Legal System of Civil Liability for Physicians." *Master's Thesis*,. Faculty of Law and Political Science, University of Setif, .
- Khayya, W. M. (1996). I, "Criminal Responsibility of the Physician in the Saudi System," . , Saudi Arabia: Hozan Library, .I, .
- Ladghish Rahima. (2022). "Criminal Liability of the Emerging Physician for Errors,,. " *Journal of Law and Interdisciplinary Sciences*.
- Mahzah bin Aqoun, ". -I. (2018-2017). "Criminal Liability of the Surgeon Physician in Algerian Legislation, Doctoral Thesis in Criminology and Punishment Science. Faculty of Law and Political Science, University of Hajj Lahdar.
- Maryam Bouzrara Zekkar. (2020). "Physician's Criminal Liability for Medical Errors,, *Journal of Legal and Political Studies*,.
- Mohammed Hamdan. (2008). "Criminal Liability of Physicians in Moroccan Law: A Comparative Study,, Marrakech: Faculty of Law,.
- Muhammed Hamad Yaqoub. (2020). "An Overview of Cases of Civil Liability Existence and Absence of the Physician in Iraqi Civil

- Law. " *Journal of the Faculty of Law and Political Science*, Dar Al-Raid for Printing, Publishing, and Distribution,.
- Nasreddine Dinosari, A. S. (, 2002). , *Civil Liability in Light of Jurisprudence and Judiciary*. Alexandria: , Jalal Printing Company.
- Serbina Ben Amara. (2019). "Physician's Criminal Liability in Law and Judicial Jurisprudence,". *Reference published in "Message of Jurisprudence for Legal and Economic Studies,"* amanrasset University, Algeria.
- Shadaifat, S. M. (2011). "*Criminal Responsibility for Medical Acts*. Dar Al-Thaqafa.
- Wafaa Helmy Abu Jameel. (1990,). , "*Criminal Liability of Physicians: A Comparative Study*. CAIRO: Dar Al-Nahda Al-Arabiya.
- Wazeer, .: A. (1988). "*Presumption of Innocence as the Basis for Criminal Responsibility*. Cairo: " Dar Al-Nahda Al-Arabiya.