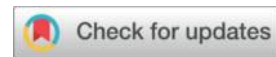




Civil Liability of a Physician for Medical Fault



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Abstract:

A physician's liability is primarily professional in nature. It is based on medical fault, understood as conduct that departs from the established and accepted standards of medical practice. This remains the case regardless of the traditional distinction between contractual and tort liability. The patient must prove the fault, the damage, and the causal link between them. Liability is based on the harm caused to the patient's body. The patient must seek judicial reparation through compensation. The amount of compensation is assessed by the judge, who has broad discretionary power subject to review by the Supreme Court and to a set of applicable criteria. The judge may also rely on medical expert evidence to determine whether the physician's conduct complied with the technical standards recognized in the profession. Health insurance also has a role in compensation and reparation. This role arises when two conditions are met: the fault occurs during medical work or intervention, and it is committed by a specialist physician. The system also protects physicians from the consequences of such liability.

Keywords: physician liability; contractual liability; tort liability; fault; damage; causation; medical expert evidence; health insurance; compensation; medical intervention.

Introduction

Medicine is a scientific profession founded on human and ethical principles. Its practitioners are governed by professional standards that require care and caution in order to protect patients' lives. Scientific and technological advances in the medical field have also been accompanied by a growing number of medical errors. These developments have occurred in medical theory, treatment methods, and technical medical equipment.

Medical fault consists of a departure from established medical standards recognized by professionals in the field. The injured patient must therefore prove the fault in order to establish the physician's liability. This can be difficult in practice. The patient must also prove the damage and the causal link between fault and harm. Reparation is achieved through compensation. Compensation is a legal

consequence of civil liability for medical error, and its amount remains subject to the trial judge's assessment under the applicable criteria

Medical errors of a technical nature are assessed in light of established scientific and professional standards. Medical practice is highly technical, and a judge may not possess the knowledge needed to evaluate such matters independently. For that reason, the judge may seek assistance from experts who also practise medicine. The medical expert determines whether the physician was negligent and whether the medical fault is linked to the resulting damage.

Liability for compensation therefore requires an examination of medical liability arising from professional error. It also requires consideration of the purpose of health insurance in compensating injury, repairing harm, and protecting physicians during the performance of their professional duties. The central research question is therefore: How has the Algerian legislature regulated the civil liability of a physician who commits a medical fault?

The importance of this study lies in examining the legal rules and dimensions of civil liability in the medical field. It identifies the legal nature of this liability and explains its constituent elements. These elements begin with fault as the basis of liability, followed by damage and the causal relationship between them. The study also considers the legal consequences that arise from such liability.

Given the nature of the subject and the objectives of the research, the study adopts a descriptive and analytical method. It analyses selected legal provisions relevant to the subject and refers to supporting judicial decisions and doctrinal opinions.

The study has the following objectives:

- To clarify the concept and legal nature of medical liability and the elements on which it is based: medical fault, damage, and causation.
- To highlight the importance of medical expert evidence in proving medical errors.
- To examine compensation for medical harm and the role of insurance in protecting physicians and compensating persons injured during medical intervention.

To answer the research question and achieve these objectives, the study is organized as follows:

- Section One: The Conceptual Framework of Medical Liability
- Section Two: Elements of Civil Liability for Medical Errors
- Section Three: Legal Consequences of Medical Civil Liability

Section One: The Conceptual Framework of Medical Civil Liability

Medical liability is closely connected with harm affecting the human body, particularly within the general framework of civil liability¹ This section therefore defines medical liability and examines its legal nature

First: The Concept of Medical Civil Liability

From a linguistic perspective, the Arabic term for liability is derived from the word meaning “responsible,” which in turn derives from the verb “to ask” In Arabic usage, asking denotes inquiry and request²

Medicine, or medical practice, has been defined as “the work performed by a specialized person for the purpose of healing another person, provided that such work is based on the principles and rules established by medical science”³

In legal doctrine, liability has also been used to express accountability It may be described as “a person's capacity for acts and statements to be attributed to him in a manner recognized by law and Sharia”⁴

Civil liability may be understood as the legal consequence of harmful conduct committed by a person More specifically, it is the legal situation in which a person is required to pay compensation for damage caused to another through a wrongful act attributable to that person⁵

Compensation is therefore a consequence of breaching either a pre-existing legal duty or a contractual obligation Civil liability may arise because a person fails to perform a contractual undertaking It may also arise from breach of the general legal duty not to cause harm to others⁶

¹ Nouredine Soudani, “The Legal Nature of a Physician's Civil Liability for Acts Affecting the Human Body,” *Journal of Legal and Political Research*, Vol. 8, No. 1, 2023, p. 107

² Nesrine Awadallah Mohamed Al-Imam, “The Concept and Elements of Criminal Liability,” PhD thesis, Faculty of Law, Mansoura University, Arab Republic of Egypt, 2020, p. 4

³ Savatier et al., *Traité de droit médical*, Paris, 1965, p. 11.

⁴ Tayeb Bermadan, “Criminal Liability in Islamic Jurisprudence and Algerian Law,” *Al-Mi'yar Journal*, University of Algiers, Vol. 12, No. 1, 2021, p. 89

⁵ Chawki Berkani, “Disciplinary Fault in Public Service Law: A Comparative Study,” PhD thesis, Faculty of Law and Political Science, Hadj Lakhdar University, Batna, 2017-2018, p. 142

⁶ Ahmed Abdel Fattah Al-Nsour, “Administrative Discretion in Imposing Disciplinary Sanctions under the Jordanian Civil Service System,” Master's dissertation, Al-Ahliyya Amman University, Jordan, 2012, p. 49

The Algerian legislature has not provided a specific definition of medical liability. Legal doctrine has therefore undertaken that task. Medical civil liability may be defined as the obligation to compensate a patient for material or moral damage caused by a medical fault¹

Second: The Legal Nature of Medical Liability

Medical liability arises when medical professionals fail to exercise the care required by their profession in treating and attending to patients. The need for such liability follows from the nature of medical practice itself. A physician must act carefully while performing professional duties²

Medical liability may be civil or criminal. Medical civil liability arises when a physician breaches an obligation owed to the patient and causes bodily, personal, or financial harm that requires compensation³

Medical civil liability therefore takes two principal forms:

- Tort liability: This is the legal consequence of the physician's breach of a statutory duty not to harm others. Wrongfulness is assessed by reference to a departure from the caution and care expected of an ordinarily prudent person⁴
- Contractual liability: This arises when the patient's damage results from the physician's breach of an obligation based on the medical contract⁵. The relationship is formed when the patient chooses the physician who will provide treatment. The physician must then exercise the care required by the contractual relationship created by the physician's offer and the patient's acceptance⁶

According to the approach stated above, the physician is required to exercise due care in tort liability. In contractual liability, the source also describes the physician as being subject both to a duty of care and, in some situations, to an obligation to achieve a result⁷

Criminal liability may also arise when a physician commits an act constituting an offence, such as causing death, injury, or permanent disability. The offence may be intentional or unintentional

¹ Fatima Zahra Kadwari, "Rules of Civil Liability Arising from Medical Errors," *Journal of Rights and Freedoms*, Vol. 11, No. 1, 2023, p. 941

² Madiha Al-Fahla, "Insurance against Medical Errors," *Al-Mizan Journal*, Ahmed Salhi University Centre, Naama, Vol. 2, No. 2, December 2017, p. 61

³ *Ibid.*

⁴ Nouredine Soudani, previously cited work, p. 113.

⁵ Madiha Al-Fahla, previously cited work, p. 62.

⁶ Nouredine Soudani, previously cited work, p. 108.

⁷ *Ibid.*, p. 113.

Criminal fault may take forms such as negligence, recklessness, or failure to take necessary precautions. In such cases, the physician may face prosecution before the criminal courts¹

Section Two: Elements of Civil Liability for Medical Errors

Medical professionals, like members of other professions, may incur legal liability. The professional nature of medical practice has an important effect on the assessment of that liability. It also affects the determination and proof of the elements required to establish a physician's liability²

This section examines the three elements of medical civil liability: medical fault, damage, and causation.

First: Medical Fault

Medical fault occupies a central place in medical civil liability. It is the basis on which liability is established. In the absence of fault, fault-based liability does not arise.

Medical fault is governed by the general principles applicable to fault in civil liability. At the same time, it has characteristics that reflect the particular nature of medical practice. Medical civil liability is generally contractual in origin, while tort liability applies in exceptional situations.

Medical fault is therefore a condition for establishing liability toward patients. To clarify its legal position, this section addresses its definition and forms. It also examines its conditions, the applicable standard, its particular characteristics, and the role of medical expertise in proving it.

1 Definition of Medical Fault

It is difficult to formulate a single precise definition of fault arising from human conduct. Legal scholars have therefore differed in their formulations. In general, fault has been defined as “a breach of a legal or contractual obligation, where the contractual obligation may require either the achievement of a result or the exercise of due care”³

Planiol defined fault as “a breach of a pre-existing obligation”⁴

The Algerian legislature has likewise not defined medical fault, or fault in general, either in the Civil Code or in legislation governing health and the medical profession.

¹ Madiha Al-Fahla, previously cited work, p. 62.

² Mohamed Rais, *Scope and Rules of Physicians' Civil Liability and Its Proof*, Dar Houma, Algiers, 2012, p. 29.

³ Ali Bougara, “Medical Civil Liability: A Study in Algerian Law,” *Journal of Human Sciences*, Vol. 22, No. 1, 2022, p. 1139.

⁴ Patrice Jourdain, *Les principes de la responsabilité civile*, 5th ed., Dalloz, Paris, 2000, p. 48.

Medical fault is one form of fault in general and falls within the field of professional liability. It may therefore be understood through the concept of professional fault.¹ Professional fault has been defined as “fault connected with the practice of a person's profession and consisting in a departure from, or violation of, the general rules and established principles of that profession”²

Because medical fault derives from the broader concept of professional fault, it may be defined as “an act committed by a person engaged in medical practice that is inconsistent with established or contemporary medical standards, data, or customs. The act may be positive or negative, is closely connected with the person who performs it, and cannot be attributed to another person”³

A physician's fault is not established by a mere breach of an obligation. The breach must also result from conduct accompanied by will, discernment, and awareness.⁴

2 Forms of Medical Fault

Some of the principal forms of medical fault are discussed below

a Diagnostic Error

Diagnosis is the process through which a physician seeks to identify the patient's disease, its nature, severity, progression, and possible complications. The physician must also consider the patient's surrounding circumstances, general state of health, hereditary factors, and medical history. Diagnosis is therefore both important and potentially serious. It allows the physician to determine the nature of the illness and select the appropriate treatment. In some cases, the patient's condition requires an immediate decision that cannot be postponed.⁵

Legal doctrine has accordingly defined diagnosis as the search for the nature of the disease from which the patient suffers. Diagnosis may be performed by either a specialist or a general practitioner.⁶

A diagnostic error may give rise to medical liability when a physician of the same specialty, placed in the same circumstances, would not have committed that error.⁷

¹ Meriem Boucharbi, “The Physician's Civil Liability,” *Journal of Law and Political Science*, Abbes Laghrour University, Khenchela, No. 4, June 2005, p. 155

² Mourad Ben Sghir, “Medical Fault under the Rules of Civil Liability,” PhD thesis, Abou Bekr Belkaid University, Tlemcen, Algeria, 2010-2011, p. 24

³ Rahab Arjilous and Cherif Bahmaoui, “The Burden of Proving Fault in the Medical Field,” *Dafatir Al-Siyasa wa Al-Qanun*, No. 19, June 2018, p. 818

⁴ *Ibid.*, p. 819.

⁵ Mohamed Rais, previously cited work, p. 69.

⁶ Meriem Boucharbi, previously cited work, p. 158.

⁷ Aicha Kassar Ellil, “The Legal Nature of Medical Liability,” *Tabna Journal of Academic Scientific Studies*, Si El-Hawas University Centre, Barika, Algeria, Vol. 4, No. 1, 2021, p. 372

Accordingly, liability may arise in the following situations:

- A physician may be liable where the error reflects ignorance of basic and generally recognized medical principles that represent the minimum standard accepted in medical practice¹
- Liability may also arise where the physician fails to seek assistance from another practitioner whose expertise is required, such as a radiologist or an anesthesiologist²
- A physician may be liable for failing to use modern scientific methods when the patient's condition urgently requires them³ Article 14 of the Code of Medical Ethics requires physicians and dental surgeons to have the equipment and technical means necessary and sufficient for professional practice. It also prohibits them from practising under conditions that compromise the safety and security of treatment or medical acts⁴
- Liability may arise where a diagnostic error results from the use of obsolete equipment or methods that are not scientifically recognized in medicine⁵ Article 17 of the Code of Medical Ethics requires physicians and dental surgeons not to expose patients to unjustified risks during medical examinations⁶
- Liability may also arise where a diagnostic error results from manifest ignorance, gross negligence, or a clear violation of established scientific principles⁷ A physician may also commit an error while issuing a medical prescription⁸

b Error in Treatment

Treatment follows diagnosis. A physician is generally free to choose the method considered appropriate, but that freedom is subject to professional constraints that must be respected.

- When selecting treatment, the physician must balance the risks of treatment against the risks created by the disease. This assessment may be difficult, particularly when the physician must act under pressure and within limited time⁹

¹ Meriem Boucharbi, previously cited work, p. 158.

² Aicha Kassar Ellil, previously cited work, p. 372.

³ Meriem Boucharbi, previously cited work, p. 159.

⁴ Article 14 of Executive Decree No. 92-276 of 6 July 1992 containing the Code of Medical Ethics, Official Gazette, No. 52, 1992.

⁵ Meriem Boucharbi, previously cited work, p. 159.

⁶ Article 17 of the Code of Medical Ethics, previously cited.

⁷ Aicha Kassar Ellil, previously cited work, p. 373.

⁸ Ibid.

⁹ Mohamed Rais, previously cited work, p. 79.

- The physician must do more than identify the patient's condition accurately Treatment must take account of the patient's physical constitution, tolerance, resistance, age, and the progression of the disease If a chosen method later appears unsuitable, the physician may need to inform the patient or the patient's family Article 47 of the Code of Medical Ethics requires the physician to make prescriptions clear, to ensure that the patient or those around the patient understand them, and to seek the best possible implementation of treatment¹

- Treatment must be based on established and reliable scientific knowledge² Article 43 of the same Code also requires treatment to conform to established scientific standards and requires referral to highly qualified specialists when necessary³

In principle, the physician has discretion to select the treatment considered appropriate and necessary for the patient's condition The physician may prescribe the medication considered suitable, provided that the choice serves the patient's interests and complies with recognized scientific rules and professional knowledge⁴

c Surgical Errors

Surgery, whether general or specialized, is an area in which medical errors may occur and may give rise to both civil and criminal claims A surgical intervention performed on the human body requires a high degree of care, caution, and vigilance⁵

Before surgery, the physician must obtain the patient's personal consent, the consent of a legal representative, or, where permitted, the consent of a close relative, except in exceptional situations The physician must also check essential pre-operative factors such as blood pressure, cardiac condition, and whether the patient has fasted Failure to observe such precautions may expose the patient to serious risks, including aspiration of gastric contents under anesthesia⁶ Continuous post-operative monitoring is also required to confirm that the patient regains consciousness and that the intervention has proceeded safely

¹ Article 47 of the Code of Medical Ethics, previously cited.

² Aicha Kassar Ellil, previously cited work, p. 373.

³ Article 43 of the Code of Medical Ethics, previously cited.

⁴ Mohamed Rais, previously cited work, p. 88.

⁵ Ali Bougara, previously cited work, p. 1144.

⁶ Mourad Ben Sghir, previously cited work, p. 302.

Where the physician has avoided fault, liability does not arise merely because surgery produced an unfavorable outcome. Under the general rules, the physician's obligation is to exercise the required degree of care. It does not amount to a guarantee of recovery or of a successful operation¹

d Medical Errors Related to Childbirth

Medical errors during childbirth may take different forms. They may include conduct that results in premature delivery, absence of the physician during a difficult delivery, or delay in deciding to perform a cesarean section when such intervention is required²

Obstetric interventions may also cause harm to the fetus or the mother. Examples mentioned in the source include rough handling of the pregnant woman, excessive pressure on the fetal head that may cause paralysis of the limbs, and injuries such as uterine tearing or damage caused by delivery instruments³

3 Conditions of Medical Fault

For medical civil liability to arise, the medical fault must satisfy a number of conditions

1 The person who commits the fault must be practising a health profession. In other words, the person must be qualified in a recognized branch of medicine, as indicated in Article 166 of the legislation on health protection⁴

2 The medical fault must be established and identifiable. The judge must be satisfied that the fault actually occurred and that it is sufficiently proven in light of recognized scientific standards⁵

3 The fault must be committed in the course of medical practice, whether during diagnosis, anesthesia, surgery, or another field of medicine (Article 353 of the legislation on health protection)

4 The external circumstances surrounding the physician's conduct must be taken into account, including the medical equipment and instruments available at the time⁶

¹ Ibid., p. 306.

² Kenza Ziani and Kamel Drid, "The Burden of Proving Institutional Fault According to the Nature of the Medical Obligation in Public Health Institutions," paper presented at the National Conference on the Burden of Proving Institutional Fault in Public Health Institutions and Its Judicial Applications in Algeria, 3 June 2021, Faculty of Law, University of Oum El Bouaghi, p. 11

³ Ali Bougara, previously cited work, p. 1145.

⁴ Aicha Kassar Ellil, previously cited work, p. 371.

⁵ Souad Belmokhtar, "The Legal Nature of Civil Liability for Medical Errors," *Journal of Law and Political Science*, Vol. 15, No. 1, p. 777

⁶ Ibid.

5 The physician must have departed from established scientific and medical standards These are the principles recognized in theory and practice and acknowledged by experts in the field¹

6 The physician must have failed to observe duties of caution and vigilance or to exercise the required degree of care, including through failure to use appropriate diagnostic or treatment methods²

4 The Standard and Particular Nature of Medical Fault

a The Standard of Medical Fault

a1 The Subjective Standard

The subjective standard focuses on the degree of care that the particular physician was required to exercise A physician is considered at fault when that level of care is not met The assessment therefore examines the circumstances of the physician who committed the act, including the physician's personal awareness and degree of attentiveness³

a2 The Objective Standard

The objective standard compares the physician's conduct with that of a careful and diligent physician who would exercise the necessary care toward the patient, observe caution, and comply with established professional rules The comparison should be made with a physician of a similar professional level A specialist, for example, is compared with another specialist rather than with a general practitioner, and the specialist may therefore be held to a more demanding standard⁴

a3 The Prevailing View

The prevailing approach favors the objective standard It rests on three considerations The first is comparison with a physician who has a similar level of scientific and professional training The second concerns the external circumstances surrounding the medical act, including the urgency of intervention The third concerns whether the medical act complied with the established principles and standards of the medical profession as recognized by qualified experts⁵

This approach may also be inferred from the position of the Algerian legislature in the first paragraph of Article 172 of the Algerian Civil Code⁶

¹ Ibid.

² Souad Belmokhtar, previously cited work, p. 777.

³ Kenza Ziani and Kamel Drid, previously cited work, p. 60.

⁴ Mohamed Hachem Al-Qassem, "Medical Fault within the Scope of Civil Liability," paper presented at the International Conference on Medical Liability, 22-28 October 1978, Garyounis University, Benghazi, p. 12

⁵ Rahab Arjlous and Cherif Bahmaoui, previously cited work, p. 819.

⁶ Article 172(1) of Ordinance No. 75-58 of 26 September 1975 containing the Civil Code, Official Gazette, No. 78, 30 September 1975, as amended and supplemented.

b The Particular Nature of Medical Fault

Fault in medical civil liability has features that reflect the specific nature of the medical profession. Civil liability in this field may arise in contractual or tortious form. Medical fault may therefore consist of a breach of a contractual obligation created by the medical contract between physician and patient. It may also consist of a breach of a legal obligation derived from the statutory rules and scientific standards governing medical practice¹

5 The Role of Medical Expert Evidence in Proving Medical Fault

Medical expertise is often indispensable to the judge. It helps determine whether the physician's disputed conduct complied with the technical standards governing medicine and surgery². It also allows the court to overcome technical difficulties that arise from the facts of the dispute. This generally requires the appointment of an expert to conduct the necessary technical and scientific assessment³.

The expert performs the technical task independently and is guided by professional conscience⁴. This independence supports the credibility and objectivity of an opinion that must remain consistent with accepted technical and professional medical standards⁵.

The legislature permits the judge to appoint one or more experts for judicial expertise. The experts may belong to the same specialty or to different specialties, as provided by Article 126 of the Code of Civil and Administrative Procedure⁶.

The expert's task includes examining the reasons that led to the harmful act and whether the physician could have avoided it in light of the scientific knowledge available at the relevant time. The expert also considers the degree of negligence involved and compares the conduct with that of a vigilant physician in the same specialty and under similar external circumstances⁷.

¹ Meriem Boucharbi, previously cited work, p. 160.

² Belaid Boukhris, "Judicial Expertise in the Field of Medical Civil Liability," *Critical Journal of Law and Political Science*, No. 1, 2018, p. 140.

³ Mohamed Rais, previously cited work, p. 239.

⁴ Bernard Gachot, "Critères de qualité pour une expertise civile réussie," *Médecine & Droit*, issue 108, June 2011/Paris 2016, as cited in the source.

⁵ Mohamed Rais, previously cited work, p. 239.

⁶ Article 126 of Law No. 08-09 of 25 February 2008 containing the Code of Civil and Administrative Procedure, as amended and supplemented.

⁷ Belaid Boukhris, previously cited work, p. 139.

The expert's role is limited to technical matters of a material and professional nature. The expert must not decide legal questions or address matters outside the scope of the appointment. Although cases differ, the procedures followed in preparing a medical expert report are generally similar¹

The expert may also use numerical assessments when estimating the percentage of disability affecting an organ or when evaluating aesthetic or disfiguring harm resulting from medical or therapeutic intervention²

After completing the assessment, the medical expert submits the report to the court registry. The report may then constitute one item of evidence against a physician or surgeon alleged to have committed the fault³

The expert must preserve the confidentiality of information obtained from all sources while preparing the report. This obligation applies to information obtained from physicians treating the patient as well as from other physicians who were not directly responsible for the patient's care⁴

Second: Medical Damage

Damage is the second element of civil liability. If no damage exists, liability does not arise because the purpose of civil liability is to repair harm. A claim also requires a legally protected interest. Medical damage may be pecuniary, non-pecuniary, or bodily⁵

1 Definition of Damage

Neither the Algerian Civil Code, the health legislation, nor the Code of Medical Ethics provides a specific definition of medical damage⁶. Legal doctrine generally defines damage as an infringement of a person's legitimate interest⁷ or of a legally protected right. Medical damage may therefore be understood as harm caused to the patient by treatment or medical intervention. It may affect bodily integrity, financial rights, feelings, or emotional well-being. Harm resulting from medical acts may

¹ Fatiha Obeid, "The Role of Expert Evidence in Medical Civil Liability Claims," *Journal of Research in Law and Political Science*, Faculty of Law and Political Science, Ibn Khaldoun University, Tiaret, Vol. 4, No. 1, December 2018, pp. 190, 192

² Belaid Boukhris, previously cited work, p. 140.

³ Ibid., p. 139.

⁴ Fatiha Obeid, previously cited work, p. 193.

⁵ Mohamed Al-Mahdawi Bakrawi, "Tort Liability," study day on Modern Trends in the Theory of Civil Liability, 23 June 2023, Faculty of Law and Political Science, University of Adrar, Algeria, p. 28

⁶ Ali Bougara, previously cited work, p. 149.

⁷ Abdelrazak Derbal, *A Concise Treatise on the General Theory of Obligations*, Dar Al-Ulum, Annaba, Algeria, 2016, p. 87

include death, loss of bodily integrity, loss of an organ, permanent disability, treatment costs, and other medical expenses¹

2 Types of Damage

Medical damage may be pecuniary, bodily, or non-pecuniary

a Pecuniary Damage: This form of damage affects the injured person's financial interests and may reduce or eliminate part of the person's patrimony Bodily injury may itself create financial loss, including treatment expenses or loss of earning capacity² Financial loss may also affect dependants if it is established that a deceased patient had provided them with regular and continuing financial support during life³

b Non-Pecuniary Damage: Medical errors may cause pain, grief, and emotional suffering Such harm may result from disfigurement or disability caused by negligent or reckless conduct The source gives the example of a child born with a physical disability because of inadequate prenatal monitoring or because the pregnant mother was given medication harmful to the fetus⁴

c Bodily Damage: In addition to pecuniary and non-pecuniary harm, bodily damage directly affects the human body It may include death, wounds, fractures, or removal of an organ⁵

3 Conditions of Compensable Damage

Civil-law doctrine has identified several conditions that must be met before alleged damage can support a claim

a The Damage Must Be Certain

Whether pecuniary, bodily, or non-pecuniary, the damage must be certain It must either have already occurred or be certain to occur in the future Algerian law recognizes future damage in this sense Article 131 of the Civil Code allows the judge, where the full amount cannot be assessed at the time of judgment, to reserve the injured person's right to seek a later revision of the initial compensation award⁶

For example, a physician may cause an injury that results in complete or partial loss of sight Medical reports may show that corrective surgery cannot be performed for three years because of the risk of

¹ Ali Bougara, previously cited work, p. 1149.

² Mohamed Al-Mahdawi Bakrawi, previously cited work, p. 28.

³ Lina Aouine and Ahmed Hassan, "The Judge's Power to Assess Compensation for Medical Damage," *Tabna Journal of Academic Scientific Studies*, Vol. 7, No. 1, 2024, p. 367

⁴ Ali Bougara, previously cited work, p. 1149.

⁵ Abdelrazak Derbal, previously cited work, p. 91.

⁶ *Ibid.*, p. 88.

complications In that situation, compensation may include two elements The first is the present disability represented by the loss of sight The second is future loss, such as reduced ability to work or expenses connected with the later operation¹

Future damage may therefore be compensable when its occurrence is certain Merely hypothetical damage is not compensable² The Algerian Supreme Court has likewise required that damage be established as a condition of civil liability³

The French Court of Cassation has adopted the same general approach, describing certain damage as damage that has occurred or that will inevitably occur⁴

b The Damage Must Affect an Acquired Right or a Legitimate Interest

The relevant interest will often concern a person's life or bodily integrity Both are protected by law

Damage may also affect the interests of third parties For example, an employee may suffer an injury that prevents further work and stops the employee's earnings If the employer is required to continue paying a benefit or fixed salary, the medical fault may also affect the employer's financial interest An impairment of that financial interest may itself constitute damage⁵

c The Damage Must Be Direct

Damage is direct when it results from the harmful act attributable to the responsible person, whether the specific consequence was foreseeable or unforeseeable Under Article 182 of the Algerian Civil Code, damage is considered a natural consequence of the harmful act when the injured person could not have avoided it by exercising the care expected of an ordinary person

4 Loss of a Chance of Recovery and Its Role in the Development of Medical Liability

Legal scholarship defines loss of chance as a situation involving a future event whose realization is uncertain and which does not result from the victim's own conduct Algerian case law recognizes compensation for a lost chance where the chance is real and serious, even though the concept is not always expressly named or formulated in those terms⁶

¹ Mourad Ben Sghir, previously cited work, p. 139.

² Abdelrazak Derbal, previously cited work, p. 88.

³ Supreme Court Decision of 27 November 1985, Case No. 41783, Judicial Review, No. 1, 1990, p. 43; and Supreme Court Decision of 28 February 1989, Case No. 58012, Judicial Review, No. 2, 1992, p. 14.

⁴ Lina Aouine and Ahmed Hassan, previously cited work, p. 355.

⁵ Mourad Ben Sghir, previously cited work, p. 138.

⁶ Ibid., pp. 139-143.

Algerian law does not prevent the judge from taking into account a claimant's lost opportunity when an unlawful harmful act has deprived that person of a substantial prospect of obtaining a benefit. The assessment of damage resulting from loss of chance is generally left to the trial judge.

Compensation for loss of chance has become significant in several fields of civil liability, including professional liability such as that of lawyers. This development supports the need for clearer rules and conditions governing compensation for loss of chance in medical liability and in other applications of civil liability¹.

Third: Causation

Causation requires the damage to be attributable to the harmful act of the person held responsible. The link may concern responsibility for one's own act, the act of another person, or an act involving a thing under one's control. In principle, the injured person must prove the causal relationship. Courts may nevertheless infer causation where the established fault or harmful act is, by its nature, capable of producing the damage. In such cases, causation may operate as a rebuttable presumption. The defendant may avoid liability by proving that the damage resulted from an external cause, such as a fortuitous event, force majeure, the injured person's own fault, or the fault of a third party².

1 Proof of Causation

Proving causation is not always straightforward. The patient bears the burden of showing that the physician's fault caused the damage. Where liability does not depend on proof of fault, the patient must show that the damage resulted from the act performed by the physician³.

To reduce the evidentiary burden, courts may infer a causal link once fault by the physician is established, particularly where that fault caused the patient to lose a chance of recovery, survival, improvement, or avoidance of a specific harm⁴.

The civil judge has authority to determine whether causation is established. Technical expertise may be required for that purpose. The legal characterization of the facts remains subject to review by the Supreme Court⁵.

¹ Mourad Ben Sghir, previously cited work, pp. 143-144.

² Abdelrazak Derbal, previously cited work, p. 112.

³ Mohamed Rais, previously cited work, p. 298.

⁴ Ibid., p. 300.

⁵ Mourad Ben Sghir, previously cited work, p. 153.

2 Absence of Causation

If the causal link between medical fault and damage is absent, civil liability does not arise. Causation may be excluded by proof of an external cause, including force majeure, a fortuitous event, the injured person's fault, or the fault of a third party.

An external cause may consist of a fortuitous event, force majeure, the injured person's fault, or the fault of a third party where that cause makes the damage unavoidable.¹ Article 127 of the Algerian Civil Code reflects this principle by excluding the defendant's obligation to compensate when the legally relevant external cause is established.²

a Fortuitous Event or Force Majeure

Legal scholars generally treat force majeure and a fortuitous event in a similar manner for this purpose. The event must be one that the defendant could not reasonably foresee and could not resist or avoid, assessed by reference to the ordinary-person standard.³

An example is an unexpected power outage caused by severe rainfall that results in the death of a patient.

b Fault of the Injured Person

If the damage results exclusively from the injured person's own fault, the right to compensation may be excluded. If the defendant's fault and the injured person's fault both contribute to the damage, responsibility may be apportioned between them. Where several persons are responsible, liability may also be divided among the injured person and the responsible parties. Article 126 of the Civil Code addresses joint participation in causing harmful conduct and allows the court to determine each party's share where the relative seriousness of the faults can be assessed.⁴

Where the judge can determine the seriousness of each party's fault separately, compensation may be imposed on the defendant in proportion to that fault.

c Fault of a Third Party

A third party is a person other than the defendant. Third-party fault therefore means conduct by another person that contributes to the patient's damage.⁵ If the defendant physician's fault remains the decisive

¹ Mohamed Sabri Al-Saadi, *Commentary on the Algerian Civil Code, Part II*, Dar Al-Huda, Ain M'lila, Algeria, 2004, p. 109.

² Article 127 of Ordinance No. 75-58, previously cited.

³ Ibrahim Salih Atiyya Al-Jubouri, *Factors Affecting the Assessment of Compensation for Harmful Acts*, 1st ed., Al-Halabi Legal Publications, Beirut, Lebanon, 2013, pp. 58-72.

⁴ Article 126 of Ordinance No. 75-58, previously cited.

⁵ Mohamed Al-Mahdawi, previously cited work, p. 30.

cause of the harm, the physician may still be liable. If, by contrast, the third party's fault breaks the causal link between the physician's conduct and the damage, the physician's liability may be excluded. The causal connection may nevertheless remain legally relevant where the physician is responsible for the acts of another person, including in cases involving employees or assistants¹

Section Three: Legal Consequences of Medical Civil Liability

Compensation is the principal consequence of civil liability, whether contractual or tortious. Its purpose is to restore the balance disturbed by the harmful act. Compensation should correspond to the damage and should neither exceed nor fall short of it². Physicians are also required to obtain insurance in order to facilitate compensation of injured persons and to protect medical practitioners from the financial consequences of liability³.

First: Compensation for Medical Errors

Compensation for medical fault may be examined as follows

1 Definition of Compensation for Medical Errors

Compensation has been defined in general terms as reparation for the harm suffered by the injured person⁴.

Within civil liability, compensation may take the form of a monetary amount paid for damage caused by the physician's fault. Mohamed Sabri Al-Saadi describes compensation as the legal consequence that follows once liability is established through fault, damage, and causation. The judge assesses its amount according to the seriousness of the damage, while the Supreme Court reviews the legal basis on which that assessment was formed⁵.

2 Criteria Used to Assess Compensation

Articles 132, 182, and 183 of the Algerian Civil Code indicate several criteria that the judge should consider when assessing compensation in cases of medical liability⁶.

¹ Meriem Boucharbi, previously cited work, p. 165.

² Ibrahim Salih Atiyya Al-Jubouri, previously cited work, p. 19.

³ Fatima Zahra Kadwari, previously cited work, p. 955.

⁴ Ibrahim Salih Atiyya Al-Jubouri, previously cited work, p. 18.

⁵ Lina Aouine and Ahmed Hassan, previously cited work, p. 360.

⁶ Ibid., pp. 362-364.

a The Surrounding-Circumstances Criterion

- Relevant circumstances include those affecting the injured person before, during, and after the fault They may include social position, health status, and family circumstances
- The judge assesses the injured person individually and considers the seriousness of the actual harm The focus remains on the direct damage caused by the wrongful conduct

b The Criterion of Changes in Damage

The Algerian legislature follows an approach also found in French doctrine and case law by assessing compensation at the date of judgment If the damage later changes and the amount could not be fully assessed at the time of judgment, the injured person may seek compensation within the legally relevant period and may request a reassessment Article 132 of the Algerian Civil Code reflects this principle

c The Direct-Damage Criterion

In medical liability, the physician may be responsible for direct damage whether it was foreseeable or unforeseeable Excluding such damage would unfairly prejudice the patient This approach applies whether the relationship between physician and patient is contractual or non-contractual

Second: Insurance for Medical Civil Liability

The purpose of insurance is to protect a person against losses arising when an insured risk occurs In the context of medical liability, the relevant rules may be examined as follows

1 Definition of Health Insurance

Insurance is generally defined as a legal relationship between an insurer and an insured person The relationship arises from an insurance contract and presupposes a risk or event whose occurrence is feared If that risk materializes, the insurer provides the agreed coverage in return for a premium paid periodically by the insured¹

In the medical field, insurance may cover all or part of healthcare costs and may protect insured persons from high treatment expenses in the event of illness Medical liability insurance also provides compensation for damage caused by a physician's fault² Before practising, the physician concludes an insurance contract with an authorized insurer That insurer covers liability arising from faults

¹ Ibrahim Salih Atiyya Al-Jubouri, previously cited work, p. 154.

² Madiha Al-Fahla, previously cited work, p. 66.

committed during medical intervention, as contemplated by Article 167 of Ordinance No 95-07 on Insurance¹

The principal purpose of this form of insurance is to provide physicians with protection and professional security Coverage of medical liability under the agreement between the insurer and the physician is subject, according to the source, to two conditions

- The fault must occur during medical intervention It may arise during diagnosis, treatment, surgery, anesthesia, or medical consultation Liability insurance is therefore intended to cover compensation for faults committed throughout the different stages of medical activity²

- The fault must be committed by a specialist physician acting within the limits of the relevant specialty In such cases, the insurer is responsible for compensation for damage caused by the physician, subject to the terms and limits of the insurance relationship described in the source³

Article 16 of the Code of Medical Ethics supports these conditions It permits physicians and dental surgeons to perform acts of diagnosis, prevention, and treatment, but prohibits them from exceeding the limits of their professional competence except in exceptional circumstances⁴

Conclusion

This study examined the central question of medical civil liability and reached a number of findings It also identified several proposals that may contribute to a clearer legal framework

- Medical liability occupies an important practical position within the legal system Its importance appears in its legal nature, its constituent elements, the role of medical fault and damage in assessing compensation, and the legal consequences that follow from liability Clear rules are therefore needed to govern medical civil liability

- A physician may be held accountable for wrongful conduct regardless of its form or degree of seriousness, subject to the legal requirements governing liability

- A physician's professional liability arises when conduct departs from the rules and standards of medical practice and from principles accepted by qualified experts in the same field

- Medical fault is often difficult to prove Judges therefore rely on scientific and medical expertise to overcome technical difficulties connected with the dispute The expert's role is limited to technical

¹ Article 167 of Ordinance No. 95-07 of 25 January 1995 on Insurance, Official Gazette, No. 13, 8 March 1995.

² Madiha Al-Fahla, previously cited work, p. 67.

³ Madiha Al-Fahla, previously cited work, p. 68.

⁴ Article 16 of the Code of Medical Ethics, previously cited.

and material questions and does not extend to legal issues or matters outside the scope of the appointment. The expert determines whether the physician's conduct was consistent with the scientific and technical standards of medicine or surgery.

- The legal provisions governing insurance against medical errors are dispersed among Health Law No 85-05, the Code of Medical Ethics, and Insurance Ordinance No 95-07.
- The legal provisions governing medical expertise are also dispersed between legislation regulating medical practice and the Code of Civil and Administrative Procedure.

In light of these findings, the following proposals may be advanced:

- Medical awareness should be promoted among the general public, particularly in view of scientific developments. This may help reduce medical errors that give rise to compensation claims and make it easier for injured persons to understand and assert their rights.
- The legislature should adopt specific provisions on medical liability within health legislation, in addition to the rule contained in Article 140 bis, paragraph 1.
- Medical expertise should be regulated in a separate chapter of health legislation. That chapter should define its legal framework and specify the consequences of violating the rules governing its practice.
- A specific legal regime should be established for insurance covering damage caused by medical errors. Consideration should also be given to creating a national compensation fund for cases in which a physician's fault is established or the patient's damage is aggravated, within limits to be defined by regulation.

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