

Medical Moral Liability between Islamic Republic of Iran and Italy

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Abstract

Nowadays, medical malpractice is considered to be a current topic in law; however, there's no unanimity as to its definition among different countries. Therefore in this article a comparative study of moral responsibility and medical malpractice laws in Iran and Italy is presented. The goal of this article is comparing medical malpractice laws in Iran and Italy. It will study moral and civil and criminal liabilities of the practitioner, the foundations of liability, the basics of practitioner's liability, patient's consent, practitioner's duty in disclosing information regarding the illness and the side effects of treatments. The study shows that in both countries, the Theory of Commitment is considered as the criterion for causing liability, and the practitioner's commitment in monetary matters is an obligation of means.

Keywords: Practitioner's liability, civil liability, moral responsibility, foundations of liability, basics of liability, patient's consent.

Introduction

In the modern world, there is a legal relationship between the practitioner and the patient. Based on this relationship, the practitioner has the obligation to utilize all his skill and abilities in treating the patients and he should not neglect the legal frameworks. Sometimes, the practitioner does not act as he has to in fulfilling his obligations and, quite accidentally and unusually, a result different from what is expected is achieved. In such cases, the issue of the practitioner's error, misdeed, negligence or failure arises whose judicial consequences for the practitioner and the patient are different.

Patients expect the practitioner to have proper precision and skill. Unfortunately, the absence of the above said factors sometimes result in incidents or deterioration of the disease and might amount to the patient's death. Such cases are usually referred to as medical negligence and errors of the practitioner as they are usually unintentional.

Medical negligence takes place when the practitioner has not taken the necessary steps to check and diagnose and treat the patient based on what are deemed to be the practitioner's duty according to medical laws. If the practitioner has conducted treatments or surgeries in accordance with governmental rules and medical principles and a sense of responsibility and good will, the patient may not resort to a court of law, even if he does sue the doctor, the practitioner will be acquitted. However, if negligence, lack of skill and carelessness and the practitioner's failure in complying with the governmental rules and medical principles result in the loss and detriment to the patient, he must compensate the damages and in addition to disciplinary charges, he might be sentenced to financial punishment or criminal punishment. Thus, practitioners are judicially liable for their mistakes.

A practitioner is liable of compensating the damages caused by him. Now, we must see what the criterion to make him compensate for the losses is.

Why has a practitioner the obligation to compensate for the losses caused by him? Does making practitioners compensate for the losses caused by them result in their refraining from conducting highly risky surgeries? For example, in emergency conditions where the possibility of the patient's survival is low or the patient is about to die and it is highly dangerous to operate him and, on the other hand, refraining from conducting surgery on the patient will cause serious danger or damage to the patient, what is the practitioner's duty? Is it sufficient to hold the practitioner liable merely because he causes damage to another person as a result of his decision? Or the practitioner is liable only where he has made negligence? These are supposed questions which rise in every one's mind.

The question is whether a practitioner's liability is based upon her failure in treatment and providing medical care or lack of skills in treatment issues also bears liability on him? May a practitioner be held liable for not treating the patients or refraining from conducting the surgery? Is a practitioner who does not provide his patient with complete information about treatment and its side effects liable? Does gaining consent and

acquittance lift the responsibility of the practitioner in the Iranian and Italian codes of law?

The studies conducted in this field indicate commitment to results for practitioner's liability. In other words, his failure in fulfilling the treatment tasks will result in his liability. Gaining the patient's consent before the operation will lift the responsibility only if he has made no negligence. The basis of a practitioner's liability is his failure in fulfilling medical treatments. Thus based upon contract or law, the practitioner has the obligation to treat the patient by obeying medical principles and makes every effort to treat him. Consequently, the practitioner may only be held liable when his failure is proved.

In the Iranian judicial system, refraining from helping the patients is a crime. Patient's awareness of his disease, treatment side effects and even type of treatment are among her first rights and the practitioner has the obligation to provide the patient with full information regarding her disease, type of treatment and side effects of treatment, unless where providing the patient with the information will cause damage and further problems for him and his family. Iranian lawmakers regard gaining acceptance and consent a cause to discharge the practitioner of his rights. Of course, article 59 of the Islamic Penal Code considers the practitioner liable in the case of his negligence, even if he has gained consent and acquittance. In the Italian law, gaining consent lifts liability and based on article 1325 of Italian Civil Code, this consent is one of the components of the contract between practitioner and patient.

Definition of liability

In lexicon, liability is defined as guarantee, being obliged to do a task and punishment and accountability, and it means everybody must answer for deeds and the consequences of his actions (Dehkhoda Lexicon, 1951: 448). In other words, "responsibility" is derived from the stem "response" and refers to duties, actions and deeds an individual is charged with. In legal terms, liability is defined as "legal obligation to compensate the damages caused to someone". The term "guarantee" is used with the same sense and refers to any type of liability (financial or criminal liability) (Moein Lexicon, 2006: 4124).

The lexical meaning of this term in the Italian Code of Law refers to "predicting one's consequences and correcting the same based upon the same prediction." Any intentional or unintentional act that causes unlawful damage to others is condemned and the perpetrator is obliged to compensate for the losses (Nicola Abbagnano, 1971:4).

Practitioner's liability

Similar to other liabilities, liability due to a practitioner's deeds is based upon a set of fundamental principles and concepts whose correct recognition and understanding paves the way for the more comprehensive analysis of this issue. Medical liability is usually divided into the criminal and civil liabilities, where civil liability includes moral, legal, contractual, separate and disciplinary responsibilities.

Criminal liability

A criminal liability is defined as follows: "Liable is referred to a perpetrator of the crimes represented in the law and the perpetrator will be penalized by one of the punishments expressed in the penal code. The injured party is the whole society, whereas in civil responsibility, the injured party are individuals. As in the case of criminal responsibility, right and justice can not be achieved through compromise and peace, and in criminal responsibility intention is basically the condition of the crime's fulfillment and liability. Whereas in civil responsibility, the presense of mistakes and carelessness and negligence is not the condition of it. In other words, criminal liability is opposite to civil responsibility" (Mousavi Bodjnowrdi, 2009: 14).

Civil liability

The term "Civil Liability" in the current literature of law represents a set of rules which oblige the perpetrator of damage to compensate for the losses of the damaged party. In other words, in any case where one must inevitably compensate the losses of another party, he is said to have civil responsibility for him. Responsibility is an essence of freewill. A free and wise individual is aware of and responsible for the consequences of his deeds (Katouzian, p. 34).

Although civil and criminal responsibility have emerged into 2 different systems today, it has never been like this. In Roman Law, civil and criminal responsibilities were not separate from one another. The only point of individual offenses as compared with public offenses was that beginning and continuing the prosecution was up to the plaintiff, whereas in the case of public offenses, public authority representatives had this power similar to the Right of God and the Right of People in Islamic Penal Code. As a matter of fact, the common goal of reducing inappropriate behaviors retribution sought by criminal and civil responsibility is what has associated these two fields of law to each other in such a way that despite all valuable efforts to separate these two branches, those old relations are still felt although they might not reach the threshold of unity and might deviate from one another in fact.

In Italian law, civil responsibility is defined as the legal consequences of any unlawful and technical behavior. Article 43 of Italian Penal Code stipulates “damages due to negligence and carelessness are considered a type of mistake, even if they are unintentional and caused by carelessness, negligence, lack of skill and errors of the practitioner”.

Based on the provisions of the Italian law, we see that their code of law also considers civil responsibility as a result of an incident and that responsibility is regarded to be a judicial fact not a judicial incident.

It is necessary to address the fact that in Iranian Code of Law, in addition to the civil code, civil responsibility law is imposed to complete the details regarding liability whose result is a more specialized and comprehensive analysis of this issue.

Scope of civil responsibility

In both judicial systems, the scope of civil responsibility has been separated into legal and moral responsibility, contractual responsibility, out of the contract responsibility, and disciplinary responsibility.

Legal and moral responsibility

Legal responsibility or out of the contract responsibility which is also known as warranty due to law is fulfilled where violation of a legal duty causes damage to someone. The cause of this responsibility is deviation from legal obligations.

Moral responsibility is a kind of responsibility not stipulated by the lawmaker, like human’s responsibility for themselves or our responsibility against god. The guarantee for performing such responsibility is just the internal and conscience influence, but it has no legal guarantee (Ja’fari Langrudi, 1967, p. 643).

Norberto Bobbio believes that people behave according to the moral principles the deem appropriate or believe. It is the same type of behavior originating from belief and Holy Book as taught by prophets and divine rulers to people (Norberto Bobbio, p. 116).

Contractual responsibility and out of contract responsibility

Contractual responsibility is due to not performing an obligation stipulated in the contract. One who does not perform his obligations and causes damage to the other party must be held liable for the damages he has caused. Contractual responsibility arises where there is a contract among the parties for doing something and where not performing that contract has caused damage to one party (Michele Liguari, Giovanni Cannavo, Marco Orrico, 2011:1, p. 85).

Italian Jurists also believe that contractual responsibility arises where there is a contract among the parties and where not performing the provisions of the contract has caused damage to a party.

As stipulated, in contractual responsibility, the obligation to compensate for losses arises from the agreements made between the parties, thus the parties have a free hand in forming the liability and specifying the consequences of violating it. In contractual responsibility, there is no partnership responsibility among the causes of loss unless it is stipulated in the contract as according to the general principles of law, partnership is against the principle and it must be necessarily stipulated in the contract.

Responsibility will be deemed contractual if the following 2 conditions are met:

1. An incisive contract must govern the relationship between the injured party and the cause of it.
2. The damage must be caused by not performing the provisions stipulated in the contract.

The absence of either of these conditions will take the responsibility out of the scope of contractual responsibilities and the responsibility in question will be subject to coercive guarantee rules (Katouzian, 2011: 62).

As for out of the contract responsibility, the two parties have no contract with one another and one party, intentionally or unintentionally, causes a damage to the other. This responsibility is not rooted in the contract between them, but in violation of legal obligations which everybody has.

Disciplinary responsibility

Another type of responsibility is administrative, disciplinary of professional responsibility and it refers to the responsibility due to disciplinary offense (Abbasi, 1998:105). To put it more simply, violation of the jargon laws by someone belonging to that jargon such as practitioners, lawyers, and judges is deemed a disciplinary offense (Abbasi, 2000: 64).

Principles of civil responsibility

As mentioned summarily in the previous chapter, jurists have presented various solutions in order to establish a satisfactory system of civil responsibility to specify the principles of civil responsibility. The first ruling which is deducted from the “no damage rule” stipulates that the losses caused to the damaged party must be fully

compensated and its secondary ruling states that the performer of a damaging act may be sentenced to compensating it only when her fault is fully proved. A brief overview of the historical developments of civil responsibility indicates that 4 main theories have administered this social relationship so far:

1. Theory of failure: by virtue of this theory, the basis of civil responsibility is failure and people's behavior must be analyzed separately. Adherents to this theory do not have the same idea of the concept of failure and, as we will see, some of them have set aside the moral and personal meaning of failure and attributed a general and typical dimension to it. However, they stand on common grounds regarding the fact that the individual is liable only if he perpetrates an error.
2. Theory of causing danger. This theory has also developed into various branches, but all adherents to it stand on common grounds over this issue that failure is not among the elements of responsibility.
3. Theory of guaranteeing the right: it discusses the principles of civil responsibility through another approach and renders the theories of failure and causing danger as incorrect.
4. Complex and intermediate theories: these theories assume a more or less share for failure and causing danger or accept a more moderate basis (Katouzian, 1390:171).

Pillars of the practitioner's liability

Liability arises when a process is gone through and the relationship in this process causes responsibility. For example, the practitioner of a job is held liable only where he does something or refrains from doing something which is his legal obligation and this deed or refraining from doing it might cause damage to others. Individuals' rights are directly linked with the text of law, the incident which has taken place and her side effects (Michele Liguari, Giovanni Cannavo, Marco Orrico, 2011. 1: p. 61).

To fulfill the civil responsibility of a practitioner, whether it be contractual or natural, the presence of three factors is mandatory: 1. Medical error, 2. Presence of damage, and 3. Causal relationship between the medical error and the damage caused (Katouzia, 2011:239).

An important note that must be taken into consideration is the fact that medical error is usually used in contrast to mal practice known as "Practica Illicita" in Italian which is a broad and vague concept and is known as medical ignorance in the common medical or legal term. In other words, medical ignorance is the same as criminal offense which is generalizable to her component which is medical negligence and carelessness. Even, it includes its instances such as: carelessness, negligence, lack of skill, and failure to obey the governmental systems.

Conditions where a practitioner is not responsible

There are certain cases where if the damages caused by the practitioner to the patient are not intentional and willful, the practitioner will be exempted from compensating for the losses or acquitted from his responsibility. These cases include lawmaker's permission, intention to treat, liability insurance, observing the medical codes of honor, patients consent, and forgiving the damages by the party who has suffered the loss.

Lawmaker's permission: like all judicial systems of the world, the Iranian lawmakers has given permission to competent people in the field of medicine to take the steps necessary to treat patients within the legal framework without any fear of liability (Abbasi, 1998: p. 101).

Principle 32 of Italian Constitution stipulates "no one may be forced into a certain health and treatment method without judicial order. The law should never violate the limits set for protecting the personal territory of individuals." Article 13 of the Constitution stipulates "one's freedom is immune to encroachment. Medical treatment is necessary where, for example, one is suffering from severe mental disorders or where due to emergency conditions, the patient can not communicate her consent and her relatives are not available" (Article 833, Italian Civil Code).

Intention to treat

Another condition necessary to discharge a practitioner of his duties is that the doctor's intention for his action must only treatment of the patient, not anything else such as gaining experience, business or scientific experiments (Abbasi, 2008:108).

Legitimacy of medical actions

According to the provisions of paragraph 2 of article 59 of Islamic Penal Code, each type of surgery must be legitimate. Abortion is an example of illegitimate medical actions. Also, according to the provisions of article 6 of medical disciplinary bylaw, "engaging in jobs that are against the prestige of medicine is forbidden" (Medical Disciplinary bylaw enacted in 1969, Official Newspaper No. 7114 dated on July 13, 1969).

Obeying medical standards

According to Part 2 of paragraph 2 of article 59 of the Islamic Penal Code, "any type of legitimate surgery

conducted with the consent of the patient or the custodians or legal representatives of his where scientific, technical and disciplinary standards are observed will not necessarily require gaining the consent of the patient". As you have just seen, another condition to evade criminal liability is through observing technical and scientific standards.

Article 28 of the Italian Constitution stipulates:

"employees, officials and governmental organizations that violate the criminal, civil and administrative rights of the patients will be held directly liable as stipulated in the law".

This article shows that the practitioner must observe medical instructions and standards so that his actions do not amount to violation and the patient may have no claim.

Article 1218 of Italy: the practitioner who does not fulfill his duties very well and causes damage has the obligation to compensate for those losses, unless he can prove all the failures or hesitations were not due to his mistake.

Patient's consent

Another condition stipulated by the Islamic Penal Code to remove the liability of medical and surgical actions is to gain the consent of the patient, his parents, custodians or legal representatives. Without the consent of the patient or his legal representative, no practitioners may ever conduct medical actions, with the exception of emergency cases where gaining the consent is impossible (Abbasi, 1999: p. 111).

To fully protect the personal territory, voluntary consent is required before any surgery in all cases except for cases of emergency. Such a process entails exchanging information about the surgery and its possible side effects. This issue is also included in the theory of conscious consent in other countries which indicates the independence and absolute right of the patient to accept or reject any treatment after he is fully aware of it. A quotation from the Italian Court of Appeals is as follows:

"this consent is an element of contract between the patient and practitioner (article 1325 of Italian Civil Law) about the professional laws. Thus, information is needed to create trust and confidence to form agreements in the contract. (article 1337 of Italian Civil Code)". If all or part of the information is destroyed, the perpetrator will be guilty (Italian Court of Cassation, Third Civil Section. Judgement n. 7027, 23 May 2001).

Obtaining acquittance

Contrary to Sunnah clerics and jurists, Shia clerics have talked about obtaining the acquittance before operation in addition to consent. A Haddith quoted by Imam Sadeh (PBH) from Imam Ali says that " anyone who wants to practice medicine or veterinary medicine must gain acquittance from the patients parents first" (Abbasi, 1999: 117).

Conclusion

Based on the studies conducted and in attempt to answering the question whether the basis of the practitioner's liability is his failure in treatment or his lack of skill in the treatment or care taking issues, we must admit that the majority of damages sustained by medical issues refer to the personal weaknesses of the perpetrators. This weakness is the result of carelessness, ignorance, failure or lack of full knowledge of treatment liabilities such as after-surgery treatments. As stated, the practitioner in both cases is held to compensate for the losses in both cases and this is one point of similarity between the Italian and Iranian laws.

It can be inferred from article 459 of new Islamic Penal Code and note 9 of the same article and article 1218 of Italian civil code that practitioners are generally liable for the damages caused to the patient, unless his innocence is proved or he has gained acquittance. Even in this regard the practitioner will be acquitted if he has made no failures.

Article 495: "if a practitioner causes death or physical damage, he is liable for atonement, unless his action is in line with medical rules and technical standards or where he has gained acquittance before surgery and no failure on his part is reported. If immaturity and insanity render obtaining acquittance illegitimate or gaining acquittance is impossible due to the patient being anesthetized, acquittance will be acquired from the parents of the patient."

Note 1: no warranty will be required from the practitioner if he has made no negligence or failure in treating the patient, although he has not gained acquittance.

Article 1218 of Italy: "if the patient does not conduct his operation in a good way and causes damage to the patient, he has an obligation to pay for the losses unless he proves not all the failures or delays were caused by his mistake and certain unpredictable conditions have contributed to the accidents". Thus, in both cases, the practitioner's liability is based upon the theory of failure.

Concerning the second question whether the practitioner may be held reliable for treatment or refraining from conducting the surgery, principle 29 of Iranian Constitution has obliged the government to fulfill needs of health and treatment services and medical care in the form of insurance and other initiatives. On the other hand,

the most moral law approved during the Iranian history can be considered the executive bylaw of the penal code of refraining from helping the patients as approved by the board of the ministers in January 5, 1985. According to this bylaw, the practitioner has the responsibility to treat. Also, in the Italian law based on principle 32 of the constitution where public health and treatment are supported as basic rights of individual and principle 13 where individual freedom is protected from harassment, practitioners have the obligation to treat patients in any case.

Finally, it must be admitted that in Iranian law and also Italian constitution, practitioners have the obligation to undertake medical actions based upon the law and the oath they have taken.

Let's go now to the third question and see whether a practitioner who does not provide his patient with sufficient information regarding the treatment and its side effects is held liable or not. Based on article 190 of civil code which says the intention and agreement of the parties and even the object of the deal must be of a specified subject and as provided by article 183 of the same law which defines contract as the agreement between two intentions to create liability and since sufficient information is required about the subject of agreement in order to gain consent, it is inferred that practitioners have the obligation to provide their patient with information regarding the disease. Based upon articles 1325 and 1327 of Italian Civil Code which consider consent and important element of contract between the patient and practitioner and information is regarded as a means to gain trust in every contract, it can be inferred that a patient must be provided with full information regarding the type of disease and treatment and its side effects and his consent must be obtained with total awareness. Thus, the patient will be entitled to have sufficient information regarding the type of treatment and his disease from the practitioner.

Concerning the last question whether gaining consent and acquittance will amount discharging a practitioner of his liabilities, principle 32 and principle 13 of constitution and article 1325 of Italian civil code regard informed consent among the main conditions of every contract including the treatment contract made between the practitioner and patient and if the practitioner makes no mistakes in treatment issues, he will not be liable for anything. In Iranian law, acquittance has lost its sense as provided by the article 495 of new Islamic Penal Code approved in 1392 and note 1 of this law and if the practitioner fails to follow medical standards and rules, he will be punished by atonement. Although the majority of Shia clergies believe that gaining acquittance will discharge the practitioner of his liabilities, a small group of clergies disagree and believe gaining acquittance by no means can lift responsibilities because discharging the rights has taken place before its proof and it is not clear whether the perpetrator will be responsible or not.

In response to the above mentioned problems, it must be stated that a condition for acquittance is permission to undertake an action whose effect is to create a right, such as permission to consume or even waste someone's assets. Furthermore, the inevitable proof of a right is not necessary for abandoning it, but it can be abandoned when the context is appropriate. In the case of treating the patients, the context of proving the right is laid down, even if it is before treatment.

In the current state of Italian Law, it is witnessed that the victim's rights due to the doctor's ignorance are not clear. Although this is predicted in the constitution, but there is no real discussion of compensating for the losses caused to the injured party.

Finally, we may conclude that a doctor's responsibility is obligation to means. In other words, his failure in treatment issues will bear on him responsibility. Gaining the consent before operation relieves the practitioner if he has made no mistakes. Of course, supporting rules must pave the way for the practitioner to fulfill his duties for patients without any fear. It must also be possible that in cases of emergency where gaining the consent of the patient is not possible, the practitioner must be able to take the necessary actions without causing any liability to himself.

Drafting comprehensive laws which defend a doctor's rights is proposed as a strategy to improve medical issues so that the practitioner may conduct his duties as a practitioner with legal support. It must also stipulate that practitioners will not be sentenced to paying atonement if they have made every professional effort but with no favorable result. Drafting such laws requires more analysis of medical issues and their relationship with the patient's rights.

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