Study of civil liability for doctors and midwives at the entrance losses to the patient and parturient women

Neda Afrasiabi[1], Dr. Faysal Saeidi[2]

[1.] Department of Law, Persian Gulf International Branch, Islamic Azad University, Khorramshahr, Iran
[2.] Department of Law, Ahvaz Branch, Islamic Azad University, Ahvaz, Iran

Abstract: medical is one of the major branches of science and has a lot of audience that is as old as human history and With the passage of time and advancement of technology and public health of people not only reduced the need for medical science, but the dependence of human beings to the medical community entered a new phase and is growing. So existence of detailed rules and regulations is indispensable. On the one hand, parturient must be have psychological security in referring the medical community in the treatment period and ensure of safe and proper treatment and on the other hand it is necessary that work and social security of doctors also to be regarded in the rules and regulations governing and So that the result of these two issues causes personal and social health of public. In October 1378 a conference was held in Tehran and as medicine and the judiciary. The last discussions of experts to propose and amend laws and in line with the best perform of these two goals were performed. And the concerns of the medical community, as well as jurisprudence and legal from new issues were discussed. Which can presented a great help for the promotion and development of medical and legal aspects of the issues. The aim is to clarify that the responsibility of the doctor and the midwife is subject to his proof fault or also goes beyond that?
[Neda Afrasiabi, Faysal Saeidi. **Study of civil liability for doctors and midwives at the entrance losses to the patient and parturient women.** *N Y Sci J* 2015;8(8):30-35]. (ISSN: 1554-0200). http://www.sciencepub.net/newyork. 5

Keywords: civil liability, liability, medical liability, responsibility of midwife, laws.

Introduction

After the legal nature of the treatment and the relationship governing on the doctor and the patient was found, then This question arises whether only referring the parturient to a doctor and accepting the treatment by a doctor ؛ did contract of treatment is complete or there is need of arrangements and other measures?

As mentioned in the previous section every legal relationship has its legal special requirements and it was clear that the treatment and the relationship between doctor and patient is a private contract and is subject to the general rules of contracts. So for performing the other contracts, parties should have a series of features and conditions and in the contract of treatment, physician and parturient of these general terms aren't not exception. The first necessary condition to establish a contract for the treatment is satisfaction of parturient with treatment by a physician who considered him. The doctor will dominate the physical and psychological integrity of the parturient. And if these measures are not order to treatment and with parturient satisfaction will be constitutes the acting against persons and will be criminalized and With reference to the opposite concept of paragraph 2 of Article 95 of the Penal Code, this issue is well known. The question that arises at this point is whether with referring the parturient to a certain doctor is constitutes full satisfaction and physician has license for any action to treat will be? The question answer is no. Parturient satisfaction, whether orally or in writing must be consciously, Means first doctor must remind patient status, treatment necessary for recovery and possible complications or definitive treatment to the parturient. Satisfaction caused by mistake or ignorance of the consequences of treatment decision, not in the treatment contract but is not legally in any contractual origin of the work, and not only caused destroy contract but if this act is a wrong intention, the opposite person may be detected as a fraud or scam and be prosecuted. For example, when a physician is faced with a lesion surgical, must parturient satisfaction to treatment with sutures or without sutures to be taken treated if possible and is not taken the right to choose of the parturient and by describing the results of each of these methods attempts to continue the treatment. Similarly about oral or intravenous the prescription drug if in view of doctor the benefits and losses for the parturient be equal. The second question that arises after the patient's consent is that consent must be expressed by whom and if the parturient due to mental and physical condition doesn't have ability to provide satisfaction, in this condition expressing of satisfaction what form will be. In terms of legal who has the capacity necessary for conclusion of the treatment contract and Satisfaction of who will have legal effect? Generally, parturient are divided into several groups ؛ a group of people who have reached the age of majority (legal age of 15 lunar years for boys and nine lunar years for girls is known)and In

terms of mental and emotional are in health and balance obviously satisfied and deciding of these people would be enough to start and continue treatment. A group of people is child and to legal term are minors that here is necessary in accordance with the general rules contracts the consent of father or grandfather of the child and in the absence of other guardians and caregivers of children. However, in general and outpatient treatments is usually not necessary the identity authentication of the parturient and doctors usually do not take this issue seriously. But in treatments that are vitally and important, particularly in surgeries requiring anesthesia, the child's legal guardian (father or grandfather in case of death of the child guardian) than the treatment it is necessary to give their consent. Another part is people with lack mental capacity; lunatics and generally people are incapable and lacking maturity that for treatment here it is necessary obtaining consent of the parturient guardian or legal guardian. To achieve this goal it is necessary to separate the two parts and legislative them. The first part is the rules governing private relations in society. The second part is the support requirements of individual rights of individuals with regard to the performance of the government authorities and approved by government. And legal policy and principle governing in the first part is people free in choosing how to communicate economic, social and legal with others. In this part law seeks to regulate solutions and frameworks necessary legal relationships to people perform by resorting to these law and freedom to choose the legal action. In such matters as long as the claim is not presented to the competent authorities and the rule of law doesn't have interest to enter into the private legal relations of society. And in accordance with the contracts Accuracy Rule in case of disputes, the relevant legislative of obligations and agreements of the parties will be provided bound to enforce. For example, in a medical contract may be agreed between doctor and parturient a series of conditions and services that in other similar treatments such agreements will not be raised but in the creation of consensus and conflict, Judicial authority in the framework of existing legal rules and on the basis of contract and agreements of the parties will resolve the dispute. In the second type of legislation, law is presented from the perspective of maintaining order and norms of society because a result of the unconditional freedom of people with different professions and skills will lead to chaos and spreading irresponsibility in the community. For example, each individual can choose one engineer and construction supervisor with their own plan. Obviously, if the law and rule of society gives all affairs and authority of these contracts to the owner and the factors involved in making, there is no representations in terms of the standard of strength and other rights and in macro scale, order and the urban fabric. Therefore it is necessary in the construction contract, the legislators employ competent people to supervise the construction of building and define the minimum standards and deal with offenders. Due to the importance of medical affairs, direct relationship to health and psychological security of society, medical not exclude d of regulatory oversight. Thus, the medical and health community because having the rights and powers inevitably must obliged by some rule s binding in their career. One of the assignments is about accepting emergency patients with medical emergencies. According to the general rules of contract, any medical has a right to refrain of accepting treatment a parturient but this restraint is not absolute and unconditional and for maintain order and public health this authority by the legislative become to obligation. Among these, the requirement for physicians to treat and cure patients is emergency as in paragraph 2 of Article 59 of the Penal Code in cases of emergency is not necessary to obtain consent from the parturient, means will of legislature in save lives will replace the parturient satisfaction to treatment because every disease is interested to his/her health and healing. Legislator with this default, while ignore the obligation to obtain consent from a physician, forces him to the treatment of patients, opposite for the need to protect the job security practitioners in the case of damage to the parturient, doctor isn't responsible if the failure of the regulation isn't done.(Article 60 of the Penal Code) about what condition is an emergency condition and what parturient it is possible to refer to other physicians seem has not a lot of debate because doctor is an expert and could act by the initial examination to the assessment and notification. In the case of claims and complaints, experienced specialist doctors' opinion in order to check the validity of diagnosis or medical malpractice shall prevail. There is other exception in patient satisfaction, situations where the rule of law replaces the parturient consent. And it is special conditions, such as the need for treatment troops and the need for compliance Of Military District or treatment of accused and convicted under the legal care. In Iranian law is discussed a total of 4 article the legal system of medical liability. This 4 of Article include paragraph 2 of Article 59, of the Penal Code 60-319-322 are the following:

- Article 59 GH. M. A: following actions is not a crime.
- Any type of surgery or medical legitimately performs with the consent of the person or authority

or supervisors or their legal representatives and with technical and scientific norms and government regulations.

- Article 60GH. M. A:"If a physician before starting treatment with surgery of the parturientor the patient's parents taken allowed, Doctor is not guarantor of physical harm or financial or defects and In urgent cases, which taking allow of sick is not possible the physician is not guarantor ".
- Article 60GH. M. A: "However, if the physician is qualified and expert in the treatments and personally performed though with the permission of the parturientor guardian, is causing loss of life or injury or damage, he/she is the guarantor."
- Article 322GH. M. A:""If a physician or veterinarian and like them before start treating obtain permission the parturient or guardian or owner; they will not be responsible for damage caused."
- Of course other materials in relation to medical affairs in the Penal Code exists that but because of the public examples of crimes and apart from the issue of the current discussion does not refer to them, including abortion.

1.1 Responsibility

Latin meaning is synonymous with the responsibility that derives from the sense of accountability (response).Within the legal and civil meaning of responsibility is legal obligation of person without entering the direct or indirect losses to another.In the legal and religious sense, responsibility is used interchangeably with guarantee and who responsibility and obligation placed on him is called responsible or guarantor. Depending on responsibility in what area and the range is defined, the responsibility is divided into categories. For example, in the area of legislation, Responsibility is divided into two main parts, legal or civil and criminal or criminal and or on the impact and role about responsibility will we can point to two types conventional and unconventional responsibility or enforcement and Also is a moral responsibility, administrative, disciplinary, partnership, political, social and.. Responsibility in the field of medical science has the conditions of its own and in the science of law is discussed under as Medical Responsibility. Of course some professors of medicine and law (including the criminal or forensic medicine professor doctor F. Goudarzi Iran) on the book Principles Forensic Medicine and the poisoning has raised this issue under the title malpractice. In legal terminology, although among the fault (fault) and failure (neglect) are different, But with a little tolerance can be said the malpractice to some extent reflects medical liability issues related which improper treatment, failure, negligence, practice unlike aspects of professional, irregular operation, malfunction and malpractice are interpreted. About midwife and the profession characteristics should be said: These jobs include posts that authorities are under the overall supervision, activities include extensive health education and midwifery and health services to Pregnant women in community with understanding the needs of cultural, social, economic and family health.

1- Kinds of legal responsibility

1-2-1- criminal responsibility

Liability of criminal is responsibility for crimes committed a crime stipulated in the law. is also responsibility that who committed a criminal act in addition to the unawareness should be have malicious intent or criminal intent, causality relation between action and result of the committed crime should exist, so that can an attempted function be attributed to commit. The person responsible will reach to one of the punishments prescribed by law, and also must deal with the private claims for damages.

2-2-1- civil liability

Civil responsibility Is commitments and obligations to the compensation which a person entered into the other Including the losses due action of the person responsible or action of persons related to the responsible persons or objects, or property owned or occupied by him. In any case that person will be obliged to compensate the other person, against him civil responsibility is the guarantor. (Oven Khalili, Hamid, the legal Responsibility of a doctor, 10.14.1389).

3.1 nature and principles of civil responsibility of the doctor

Civil responsibility means a commitment to compensation. Two conventional theories that form the foundations of civil liability are the risk theory and blame theory. Among the jurisprudents, fault can be expressed as aggression or negligence and articles 951 to 953 of the Civil Code are pointed to this sense. Based on the theory of fault, the injured party must prove the fault of Culprit. But in the theory of risk, in order to facilitate the plan civil, injured party does not need to prove the fault culprit, but should prove causality between loss and culprit. Supporters of the theory of risk, say that this theory is beneficial from an economic standpoint, Supporters of the theory of risk, say that this theory is beneficial from an economic standpoint, because if anyone knows who is responsible the results of their actions even to non-fault inevitably be treated cautiously. But mutually is said that responsibility without fault reduces flourishing of personal talents and initiatives. As a result, people stand back of work, preferring to work safely and economically this is harmful. In a proper conclusion must say that in responsibility of recognition must be considered people's social and

ethics needs. Civil liability, to two main branches (responsible contractor and responsible enforcement) is divided. In this chapter, the nature and principles of civil responsibility of the doctor is examined. Obviously, analysis of medical liability insurance, without survey the nature of the civil liability of physicians and specifying its elements will not be possible.

1-3-1- nature of the civil responsibility of the doctor

Views on the responsibility of Medicine

In the case of medical responsibility there are two views. The first view is based on the supervision of responsibility a physician. Alternative view is conventional that idea of commitment to results and commitment to devices derived from the same view.

A: Coercive of responsibility of doctor

1-work history

In French law for a long time considered coercive responsibility a physician. In 1833, the French Supreme Court, ruled that the civil responsible the doctor to Article 1382 of the Civil Code of 1382 in France is compatible, so responsible a doctor, is coercive. Until 1936, That Supreme Court expressed a different view about the responsible a doctor, In French courts, in cases of medical responsible, the rules governing the coercive responsible were imposed. This means that injured party must prove that the doctor's fault. Before the Supreme Court judgment of 1936, some French courts, including the Court of Byzansvn appeal in March 20, 1933 and the Court of Appeal Lyon on March 19, 1935, an agreement was made to the contract theory. Court of France in 1936, with the approval of the above opinion the physician's responsibility knows contractual. (Muhtasib Billah, Bassam, Medical Almsvvlyh Almdynh and Aljrayyh, p. 99 plug it 106).

2. Reasons advocates for support of the coercive responsibility of doctor

Followers of responsible coercive a physician, argued that what a doctor makes a commitment to do it, is the treatment of sick and this is related to human life that can't be traded. They also argue that respect the principles and standards of medical and requires to the obligations of medical ethics is not in the field of contracts."Laloo," French lawyer, believes that any criminal offense which brings harm for others, due to overcome the criminal mode is caused the responsibility of coercive. Any error related to doctor with criminal law will be matched (That due to it the has deceased parturient, or the health of his body has been hurt. And if it is accepted that every crime has caused injurious to others, enforcement responsibility should be coercive. Matching problem with doctors will not be difficult, "We Zhu" a French lawyer, in response, said that the difference between the non-performance of the contract and the criminal offense is accurate. Here, there is a verb and it is the lack of performance of the contract. Lack of performance is punishment - able but this is not reason enough for non - implementation of the civil rules. Because between crime and compensation, there is a difference and otherwise claim is to deny the separation between criminal liability and civil liability.

B. contractual responsibility of the doctor and midwife

The concept of contractual responsibility

The existence of a valid contract and proof of causality is a condition for contractual responsibility so lack of performance of the obligation arising from each contract, Means committing to a contractual error. This is whether due to the intentional or arising from error. In any case, the fundamental pillar of responsibility contract is breach of commitment, that each party in a contractual relationship have accepted on some contracts, for caution and necessary care is adequate, and violation of it, creates a contractual responsibility. Issue is contract and failure to achieve the desired result will be responsibility. For example, a person who gives design a building project to the architect, or for its implementation, with a structural engineer, sets the contract. His expectations, in this is not limited that architect or engineer of the project implementer should only performs tasks related to compliance with precision and enough care, but employers have expectation optimal performance and away from any defect and technical difficulties and partners also with information about the expectations of the other party, pledge to carry out the subject of the contract. Proof of contractual responsibility, is not easily possible. For this reason, French lawyers, says that for ease of recognition the provisions of the contract necessarily lead to distinguish contractual obligations of the parties.

4.1 The legal relationship between patient and doctor

Until the problem in the treatment of parturient and physicians do not happen, does not talk of this relation about the law and its implications and in the conventional method, the patient visits to a doctor and physician, according to the common law start to medical treatment actions; While for selection and visiting certain doctor and treatment acceptance and treatment of illnesses by a physician, is Implemented legal effects and conditions, because a result of this interaction, a private contract called the treatment contract is concluded. (Daryabari time, M., Principles of Professional Responsibility of Physicians, 8/14/87).

1-4-1- treatment contract

Contract in general and conventional means is means of agreement between two or more persons (one or more agreements will). For one or several specific action and interaction, both financial and non-financial, such as buying and selling (sale) that the seller is committed to giving a certain gender With specified attributes and also the buyer is committed to pay (the price) the amount and the value of the commodity. In every contract there are at least two sides and for conclude contracts, consent and mutually agreed is necessary condition. Other conditions for the correct contract are necessary, including the legality of Issue of transaction as well as competence of the parties for concluding the transaction. There are two sides in the contract of care and treatment: the doctor and the patient. According to this contract under normal conditions of parturient with the right to choosing doctor, consults with a doctor and the doctor after obtaining patient consent for treatment and after she/he found out the type of disease in the area of his/her expertise, he starts to the treatment. However, in practice all phase of a clinical, visit and prescriptions ends; But from the perspective the law of action and reaction includes its legal consequences and legally a contract with its own standards is the governing on relationships between doctors and patients and this contract until the end of treatment or patient's withdrawal of treatment, have followed the consequences of their rights and after drug administration will end by your doctor.

5.1 Nature of the treatment contract

Investigate the nature the treatment contract is very important, in determining responsibility or lack of responsibility medical, in the cases that between doctor and parturient, there is no contractual relationship.

There are different views about the nature of the treatment contract include:

• Rental theory of the treatment contract

Proponents of this view argue that in all occupations, owners of professional that are committed to the provision of services, the general rules are governing on the lease contract and says that the treatment contract, such a contract is a special contract, which has a certain time commitment, for other people it works and is entitled to remuneration. It seems that this view is incorrect. Because in lease contract term must be found, otherwise, the contract will be void. While on treatment contract, the duration of treatment is unknown. Hence in treatment contract, there aren't rules governing public's Rental.

•(Jualah) reward theory of (Jualah) reward contract

Some scholars, including Ibn Qudama, said that the contract between doctor and patient is reward which unknown type or duration of action, it is possible. Ibn Qudama rejects this argument which improvement condition of the treatment contract is due to unknown condition. With reliance on the reward treatment contract, it is correct. It seems which contract of treatment, also is not reward, because in reward contract, when the agent is entitled to reward which Jualah has done or surrendered (Article 567 of the Civil Code).But in contract treatment, physician before treatment, receives commissions and Unlike contract Jualah, achievement of results for receiving right of treatment is not condition.

• Advocacy theory

Pvtyh, French lawyer, argued that contract between doctor and patient is advocacy contract and each parturient must give a gift to the doctor as an honorarium. Trvlvnj also believed that describe the relationship between doctor and patient is not possible without a advocacy contract. Because the physician of side of parturient, is the lawyer for treat him. In response to them Lucas, denied advocacy theory for treatment contract, argued that legally, Advocacy for thinking is representation. How we might think that the doctor, on behalf of the patient, treats him? Doctor does his career in his own name and in doing it, his release is complete. In addition, the client must be able in doing what that Advocacy allows, while less there is who himself able to treat himself disease.

Discussion and conclusion

With study of judicial and medical opinions on medical liability these results obtained that Iran today in some aspects of the legislative, judicial, administrative, attracting public cooperation is a kind of ambiguity and serious disability and based on the available facts can't provide the objective realization to mission of preventive, corrective and administration of justice. Regarding medical responsibilities also seems that there are this ambiguity, conflict and confusion issue in the three areas of legal, judicial and executive. For this reason, in some cases, in different courts reviewed, according to the common law and sometimes by personal preferences about patients rights are decided. Also on the subject of Iran with regard the issue of the loss of opportunity, which is one of the most important issues raised in the context of the responsibilities of the doctor and midwife, there is no special text. And jurisprudence in this area is not available and although knows accepting it in most cases justly but accepting it in our law known problem. However, while accepting this issue in statute law will not be met a problem and would be more compatible with the principle of justice and fairness. Losses that

normally due to the practice of medicine are caused for individuals are not limited to the physical losses that be compensated by money, But may physical injury be caused financial and other intellectual losses on patient the cost of treatment, disability, tolerance of pain, deprivation of the enjoyment of many aspects of life and Pains and consequences of it, Including them that unfortunately, despite Law based on possibility to demand moral damages there isn't any sign of a decision based on compensation In addition to blood money and moral damages that the issue indicates a problem on the judicial system in order to judgment Problem that certainly will conflict With the philosophy of civic responsibility. So it seems that due to reasons such as medical science advances, the current laws are not appropriate. Although the existing legislation in this area has been scattered, thus it is essential that all mentioned rules under a unit title, be combined. In some cases, such as losses from defects medical devices that heavily used during treatment, losses arising from violations of pharmaceutical products and health products, losses caused by tainted blood transfusion to individuals, losses due to wrong in medical trials, losses resulting from infections of the treatment environment (hospital infections) and losses due to mandatory vaccination and biomedical experiments. Exceptionally, responsibility for medical interventions must be determined and lost opportunities intellectually, religiously in itself is valuable and since in medical issues, missed opportunity is associated directly or indirectly With human lives, it is too important. Accordingly, need for the compensation resulting from this, is the result logical. And considering that of the legal point of view there are no obstacles on the legitimacy of such damages, in this case, the criterion of fault is kind, however, that in some exceptional circumstances must be retracted to personal criteria. Finally, with regard to the development of medical science, so existing rules cannot be accountable for issues such as raised new treatments with titles such as medicine with sub-categories such as energy therapy and the possible responsibilities of these and other measures of health. In terms of development sensitivity and science, attention to the health and safety of parturient, we need to review the current rules, regulations, designing special rules, new, coherent and non-contradictory.

References

1. Snhvry, Abdul Razzagh, Al Bayt al-Qanun fi al-Madani described, sources Alalam, 1952 - Page 655.
2. Safai, SH, civil law (obligations and contracts) accounting Tehran Institute, 1351, pp. 540-538.
3. Katoozian, Nasser, legal events, printing, publishing Yalda 1371, p. 9.
4. Calculated in God, Bassam, responsibility and penal Medical City - between theory and Alnitak - First Edition - Beirut - Daralayman -- 1,404 H.q. P. 99 and p. 106.

8/12/2015