

# Justice



Public Health and Law in Jordan Series

No. 1

## The Quality of Health Services and Medical Liability:

A Comparative Study between the Jordanian and Palestinian Legal System

## **A Note on the Public Health and Law Series**

Law and policy are essential tools for protecting and promoting the health of the public. The Public Health and Law Series aims at bridging a knowledge gap in Jordan between health and legal experts. The series provides expert analysis on critical issues facing the public health and medical systems. This series is produced by Al Nahda Thought Center for Studies in collaboration with The Forum for Supporting the Justice sector.



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### **The Quality of Health Services and Medical Liability:**

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**March 2022**

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## Summary

This is the first study part of a series analyzing the issue of legal liability in the context of the health sector. This study is an analytical desk review of laws regulating medical liability in both Jordan and Palestine. The study describes and analyzes how the medical responsibility of health service providers exists within three basic forms: criminal responsibility according to the Jordanian Penal Code No. 16 of 1960 and the Egyptian Penal Code No. 73 of 1936, civil responsibility according to the Jordanian Civil Law and the Code of Judicial Provisions, and administrative responsibility in accordance with the laws of the Medical Syndicate. In addition, the study analyzes the special laws regulating medical liability, namely, the Jordanian Medical and Health Liability Law No. 25 of 2018, and the Palestinian Decree No. 31 of 2018 regarding medical protection and safety.

The study concludes that the issue of medical responsibility still faces many difficulties and obstacles in Jordan and Palestine, highlighting two aspects:

- a. Although there are special laws regulating medical liability cases, they did not address the issue of medical liability directly, which prompts the parties to return to the general civil, criminal, and administrative laws.
- b. Evidence and the burden of proof issues are one of the obstacles facing the parties, especially patients, in proving the occurrence of a medical error and the damage resulting from it.

Based on the legal analysis, the study also offers a set of recommendations, the most prominent of which can be mentioned as follows:

- 1- A reformulation of the legal aspects of medical liability within a private law instead of keeping it under the general laws.
- 2- With regard to criminal responsibility in particular, the legislator must create a legal template for a new crime in the special section of the Penal Code and not be satisfied with leaving the matter to the general rules.
- 3- Reconsidering the judicial readiness of the courts to consider cases of medical errors.
- 4- Reconsider the procedures followed before the courts and the competent authorities.
- 5- Pushing for more activation of the role of special committees in the health liability laws of 2018 in both Palestine and Jordan.

## 1. Background and Rationale

Holding healthcare professionals and entities accountable for inadequate care is critical to promote quality in health care. A doctor's decision to treat a patient establishes a physician–patient relationship, under which the physician (and the medical institution in which it occurs) owes the patient a reasonable duty of care. Failure to meet or a breach of this duty of care can result in legal liability for reasonably foreseeable injuries (Wilensky and Teitelbaum, 2020,).



In the United States, medical errors in hospitals and other healthcare facilities may now be the *third-leading* cause of death in the United States, behind only heart disease and cancer (Wilensky and Teitelbaum, 2020). According to WHO, European data, mostly from European Union Member States, consistently show that medical errors and healthcare related adverse events occur in 8% to 12% of hospitalizations (WHO, 2022).

In Jordan and Palestine, there are no systematic statistics regarding the prevalence of medical errors. However, anecdotal evidence suggests that medical errors abound in the two political geographies, and, more important, are on the rise.

As of 2021, The National Centre for Human Rights (NCHR) has expressed concern about the increasing number of medical errors reportedly occurring in healthcare facilities in Jordan, arguing that shortage of medical staff may be among the leading reasons behind this rise in cases (NCHR, 2022).

In Palestine, the Palestinian Independent Commission For Human Rights indicated in its 2012 report that the number of medical errors cases has been raising since 1996, the report shows that the commission received 8 complaints about medical errors in 1996 compared to 31 in 2009 and 26 in 2011. While the Ministry of Health in Palestine indicated that in 2009 alone, 13 cases of maternal death in the Palestinian hospitals could have been avoided (Idais, 2012). In Jordan, a 2022 report highlights that while some maternal deaths could be regarded as avoidable, not all them are due to malpractice. (forthcoming)

Medical errors affect both individual patients and society as a whole. Medical errors not only impact the wellbeing of individuals and their families, but also contribute to erode public confidence in medical institutions and professionals alike. For this reason, medical errors are considered a public health problem requiring a strong response from policymakers and the legal system (Wilensky and Teitelbaum, 2020). As a result, legislators worldwide have strived to formulate legislative frameworks that aim at responding to these errors. Recently, however, policymakers have begun shifting their attention to medical error reforms that are less reactive and more centered on error prevention and patient safety improvements, that either aim to redesign healthcare delivery methods and structures to limit human error or aim to prepare in advance for the inevitable errors that will occur (Wilensky and Teitelbaum, 2020). As we shall see, both Jordanian and Palestinian legal frameworks are very recent in time (dating back to 2018), which may help explain the ‘reactive’ approach still dominates both legal frameworks, among other issues.

## Definitions of Medical Liability

According to both Wilensky and Teitelbaum, medical liability should be understood as a “legal tool to promote quality in health care” (Wilensky and Teitelbaum, 2020, p. 272). It is considered that liability forms from the moment the doctors take their decision to treat patients. In this case, a legal relationship is formed between the two parties, hence this relationship will result in the doctors’ responsibility to provide medical care based on the duty of care. Likewise, there is a duty by the patient to reveal relevant medical information and comply with medical directions.

In the Jordanian and the Palestinian legal systems, the essence of liability stems from the idea of obligation; thus, liability arises from the obligation of individuals to bear the consequences of their actions. From a legal view, liability means that individuals take responsibility for their actions if they violate the rules and laws (Al-Otaibi, 2019; Al-Qurashi, 2007), whether this responsibility results from violating criminal laws, civil laws, or administrative laws.

In this context, criminal responsibility can be defined as an obligation to bear the legal consequences for the availability of the elements of the crime. At the same time, its subject is the punishment imposed by criminal laws on the offender (Al-Saeed,2002). As for civil liability, it can be defined as the obligation to compensate for the damages resulting from the actions of individuals, whether these damages were material or moral, and whether they were a result of a breach of contract or as a result of tort liability (Mukhtar,2010). Finally, disciplinary responsibility is the responsibility imposed by the legislature or union institutions on its members for committing acts that affect the dignity or duties of their profession (Al-Wathiri,2021).

## About this Study

This study undertakes a comparative analysis of the existing legislation that governs medical and health liability within criminal, civil and administrative fields, along with a comparison of judicial perspectives in Jordan and Palestine.

Specifically, the study analyzes how the Jordanian and Palestinian legislators regulate the issue of medical and health liability, by considering the following questions:

- 1- What are the types of medical liability in the Palestinian and Jordanian legal systems?
- 2- How does the law in both Jordan and Palestine regulate the issue of medical liability? What are the most important laws regulating them?
- 3- How does the judiciary deal with medical and health malpractice in the Jordanian and Palestinian systems?
- 4- What are the most prominent problems and obstacles that still face medical liability issues in Jordan and Palestine?

## A Comparative Study

Jordanian and Palestinian legal systems are characterized by many similarities due to the deep relations that bind the two countries, especially in light of the Jordanian rule of the West Bank, which left many fingerprints in the adoption of Jordanian laws, many of which are still in force today in Palestine. More important, both Jordan and Palestine are among the first countries in the Arab world to have adopted special liability laws in the recent past (see table in section X). In addition, Palestinians benefit from medical services offered in Jordan either as citizens, medical tourists, residents, or refugees.

## General Plan of the Study

This study has four main sections. The first section looks at the legal frameworks governing medical liability in Jordan and Palestine, with an emphasis on the general types of liability: criminal, civil, and disciplinary. The second section analyzes the specific laws that regulate the medical liability in both the Jordanian and the Palestinian system and their relationship to the three types of liability. Section three of the study provides a comparative analysis of procedural challenges in Jordan and Palestine. Finally, the study offers some general recommendations to improve current legal frameworks and their implementation.

## 2. General Legal Frameworks Governing Medical Liability in Jordan and Palestine

### Key Takeaways

- 1- **Criminal liability in the medical field is based on unintentional errors that take three forms; negligence, lack of caution, or non-observance of laws and regulations.**
- 2- **Civil liability in the medical field is based on tort relation between the medical service provider and the patient.**
- 3- **Disciplinary liability is based on the laws that regulate the medical profession. Hence it is primarily imposed by medical unions and associations.**

Within public life, the medical sector is one of the most vital and sensitive sectors due to its direct dealing with individuals' lives and mental and physical safety, which makes the issue of responsibility within this sector an essential issue that must be addressed to protect both patients and medical service providers.

Given its importance, there is a large and diverse set of ethics, general rules and obligations that govern work within the health sector, including the relationships of health service providers with their organization, with each other and with patients. In Jordan, a variety of obligations and ethics that govern the medical profession were contained in the 1989 Jordanian Medical Constitution and the duties of the doctor, and the ethics of the profession. Article 1 of the Medical Constitution indicated that “the medical profession is a humanitarian, ethical and scientific profession as old as man, endowed by long periods with traditions and specifications that necessitate the one who practices it must respect the human personality in all circumstances and conditions, and set a good example in his behavior and his treatment of righteousness in his work, preserving people’s souls and their honor, merciful to them and exerting his best in their service. The medical constitution also referred to a set of duties, the most prominent of which is that the doctor does not abuse his position in any way and that he exerts all his effort and energy to provide care, kindness, and sincerity to his patients.

In the same context, the Ministry of Health in Palestine, indicated a number of similar duties and ethics that doctors and workers in the medical field need to follow. For instance, it indicates that the ethics of the medical profession is built upon three pillars; the patient, the community, and the profession itself. It also indicates that “Doctors are interdependent with each other to take care of the health of the community and the health of its members. The physician and his or her colleagues collaborate for the benefit of the patient and society. This requires the doctor to realize that there are etiquette and duties that should be observed during his interaction with colleagues in the profession.” (MoH Palestine, 2022).

Despite ethical guidance and obligations, medical errors are the most prominent risk facing patients and medical service providers. Medical errors, in general, can be defined as medical service providers' breach of their duties in taking the necessary care regulated by the ethics, assets, laws, and requirements of the profession based on negligence, lack of due care, or failure to take the required precautions and caution, which result in causing harm to others (Al-Shura,2015; Shehab & Haniyeh,2021).

With the occurrence of a medical error and the consequent harm, several types of liability arise in the face of medical service providers or medical institutions, which are criminal liability, civil liability, and disciplinary liability.



## Criminal Liability

Criminal responsibility means holding medical service providers responsible for committing a legally criminal act that causes a criminal outcome, which results in harm either to patients or society, by the provisions of the Penal Code (Darwish,2018; Al-Qurashi,2007).

Criminal liability may result from:

- 1- The commission of an intentional crime based on the perpetrator's intention to commit the criminal act, with a causal relationship between the action and the criminal outcome, such as crimes of disclosing professional secrets or abortion (Sabrina,2015).
- 2- The commission of an unintentional crime based on unintentional error, with a causal relationship linking the mistake and the criminal outcome; consequently, the unintended mistake is based on the commission of the criminal act as a result of negligence, lack of caution, or non-observance of laws and regulations (Obaid,2016).

The Jordanian Penal Code No. 16 of 1960 is the criminal law valid in Jordan. In Palestine there is two criminal laws, the Jordanian Penal Code No. 16 of 1960 is valid in West Bank, and the Egyptian Penal Code No. 74 of 1936 in Gaza Strip.

These laws refer to a set of legal articles that regulate crimes based on unintended error, and given the generality of the provisions of the Penal Code, the criminal responsibility of the doctor falls under these articles (Al-Shalash, 2007).

Article (343) of the Jordanian Penal Code No. 16 of 1960 states, "Whoever causes the death of a person due to negligence or lack of due care or regard for laws or regulations, he/she shall be punished by imprisonment from six months to three years."

Article (344) of the Jordanian Penal Code No. 16 of 1960 states, "1. If the perpetrator's fault only caused injury as the one stipulated in articles 333 and 334, the punishment shall be imprisonment from one month to one year or a fine from five to fifty dinars (JD5-50). 2. Any other involuntary harm shall be punished by imprisonment for a period not to exceed six months or a fine not to exceed ten dinars (JD10). 3. The pursuance of other cases shall be based upon the victim's complaint if no illness or work prevention which exceeds ten days resulted from the harm. The complainant dismissal of the case shall have the same effects stipulated in Article (334)."

While Article (243) of the Egyptian Penal Code No. 74 of 1936 states "Whoever commits any of the following acts recklessly or negligently that endangers a person's life or in a way that is likely to cause harm to another person, such as: treat a person who has taken medical or surgical treatment upon himself, or dispensing, giving, selling or administering to any person a medicine or a toxic or dangerous substance. He is considered to have committed a misdemeanor."

Therefore, for a medical service provider's criminal responsibility to occur, the unintended error must have occurred in three forms according to the law:

- 1- Neglect: It is the negative behavior of the doctor, which leads to the occurrence of a criminal outcome. In other words, it means the doctor's refusal to do what he/she should have done. Ergo, if the doctor takes all the necessary and required precautionary measures, he/she would be able to avoid the occurrence of the criminal outcome, such as neglecting the doctor's supervision of the patient after the end of the operation, which leads to complications that lead to death or harm (Sabriniya,2015; Shadeed,2021).

- 2- Lack of precaution: It is the positive behavior that the perpetrator performs in circumstances in which he should have refrained from doing this act without taking any protection and caution, which led to the criminal result, such as blood transfusion without taking precautions to ensure its approval of the patient's body or guarantee it is not polluted (Sabriniya,2015; Shadeed,2021).
- 3- Non-observance of laws and regulations: It is achieved through the offender's action in violation of what is stipulated in the laws and regulations in force, which leads to the occurrence of the criminal outcome, such as non-observance of the rules and laws that govern the work of the doctor in his relationship with the patient, performing operations and providing medication (Sabriniya,2015; Shadeed,2021).

## Civil Liability

Civil liability is based primarily on the idea of compensation for the resulting damage. In Palestine, The Code of Judicial Provisions stipulates in article 19 that "no harm shall be done," while article 20 refers to "the harm shall be removed." Article 92 states that "the direct one is guarantor even if he is not intentional.". These same principles were also stated by Article 62 from the Jordanian Civil Code of 1967, moreover, Article 256, indicated that "every harm to others obliges the perpetrator, even if he is not distinguished, to guarantee the damage".

Since the general laws in both Jordan and Palestine did not distinguish between ordinary or professional wrongdoers, it is interpreted that the medical liability resulting from harm due to a medical error can be seen under these laws.

The Jordanian Court of Cassation indicated that "technical errors incurred by the doctor, like other professionals, are not limited to errors that are made out of bad faith only, but extend to every behavior that is considered a departure from the norm among the people of craftsmanship in exercising the care required by the principles of the profession" (Al-Shura,2015, pg.20).

To understand the nature and type of civil liability in the medical framework, it must be noted that civil liability is based on two premises. The first is to achieve a result; the seller's responsibility is to deliver the sold item to the buyer according to the agreed terms, which thus makes the liability exist once the result is not achieved. The second is to take care of and perform all required measures to commit doing the work; therefore, the responsibility is not based on not reaching the final result but rather on proving that not all possible efforts to commit to completing the purpose behind the care were taking (Quzmar,2019).

Thus, medical liability stems primarily from the standard of care, it was originally founded in the 18th-century English common law (Wilensky and Teitelbaum, 2020). In another words, doctors are obligated to take care and not achieve a result. This means that the doctors' responsibility is built on following all the general rules that regulate their work and taking all possible and expected measures from a person in their position to reach the final purpose, without any obligation to achieve the final result (Al-Najada, 2020). As doctors are not obligated to cure the patient, they are compelled to take all measures to help or contribute to the patient's recovery (Kazmar,2019).

On the issue of the personal obligation of doctors and health services provider to provide care, both Jordanian and Palestinian Courts of Cassation have further clarified the extent of this obligation. The Jordanian Court of Cassation indicated that "the legal obligation where a breach of duty is considered an error in the tort is the obligation to exercise care. The person needs to follow vigilance and caution in his behavior not to harm others. Suppose he deviates from this obligatory behavior with his awareness of this. In that case, this deviation is a mistake that requires his tortuous responsibility, whether this deviation is the result of a person's pledge not to harm others or his negligence" (Al Shura, 2015, p.58). On this issue, The Palestinian Court of Cassation Resolution No. 501/2019 indicated that "the obligation

that falls on the doctor is an obligation to take care. The content of the commitment is carefully summarized as making sincere and vigilant efforts consistent with the existing conditions and established scientific principles intending to follow up the patient's health condition and recovery and improve his health condition, and violate this obligation constitutes a medical error that raises the liability of the physician.” (The Palestinian Court of Cassation, 2019).

With regards to medical service providers' liability, it is primarily based on compensation for damage resulting from their actions (Al-Najada,2020). However, to understand the nature of civil medical liability, it is necessary to refer to two legal grounds upon which civil liability is built:

- 1- Contractual liability is based on a contractual relationship between the doctor, the medical institution, and the patient. Therefore, the doctor's responsibility arises if he/she breaches the contract terms, which leads to harm to the patient as the second direct party in the relationship (Murad,2017; Sabrina,2015). In the case the contractual relationship between the medical institution and the patient is direct, the hospital itself bears the consequences of the error of the doctor who brought him in, as the party directly responsible for the doctor and as the second party in the contractual relationship (Al-Shura,2015).

Within this framework, the relationship between the patient and the doctor is based on the existence of a valid and enforceable contract that governs the obligations and rights of both parties, therefore the medical error resulting from violating the terms of this contract between the two parties, according to the opinion of the French Court of Cassation, falls under the contractual responsibility (Al-Najada,2020). In its decision issued on May 20, 1936, it indicated that “a real contract arises between the doctor and his patient, in which the doctor has an obligation -even if it is not to cure the patient- but rather to provide emotional and vigilant care -except in cases of exceptional circumstances- conforming to the facts that science has found. It is established, and the doctor's breach of what the contract dictates, even if it is not intentional, necessitates a liability of the same kind, i.e., contractual liability” (Murad, 2017, p.147).

- 1- Tort liability occurs when doctors violate their legal duty, which is to take all precautionary measures when performing their work, which leads to committing a harmful act that causes material or moral harm to the patient, it is based on the physician's failure to follow the procedures imposed by law, therefore unlike contractual liability, the basis of tort liability is the general legal rules (Sabriniya, 2015; Murad, 2017; Shura, 2015).

The importance of tort liability in medical errors appears in cases where there is no clear and explicit contract between the patient and the doctor, especially if the patient attends a governmental medical institution. In this case, the patient has no freedom to choose the doctor he wants. He becomes obligated to deal with the doctor the hospital provides for him, making the relationship between the two parties based on the laws and regulations that determine the hospital's work. At the same time, the doctor is considered an administrative subordinate to this hospital, which makes the hospital the responsible party for the actions of its subordinates. In this situation, the medical institution becomes accountable for the actions and errors committed by the doctors working in it (Al-Shura, 2015; Darwesh, 2018). The Jordanian Court of Cassation indicated in its decision No 196\2006 that “if Prince Faisal bin Al Hussein Hospital, which is a government hospital in which employees work for the state, the state is civilly responsible for any mistakes committed by its employees during the exercise of their job duties, by the rules of tort responsibility in Article 256 of the Civil Code. The doctor's operation was in a non-medical and impractical environment and in which there was a lot of chaos, and no one from the nursing helped him. Still, the doctor himself performed the process of cleaning the wound and closing the abdomen alone and did not take into account the correct procedures of the operating room in terms of counting the number of pieces of gauze and that the gauze was forgotten in the patient's stomach, the error occurred from a doctor working for the government. Therefore, the state is civilly responsible” (Al-Najada, 2020, p. 8).

Medical responsibility does not stop at the limits of the error committed by medical service providers, as there are complicated issues related to determining who is responsible for some mistakes, especially with the presence of more than one doctor, as a result, liabilities can arise in both Jordanian and Palestinian legal system in different forms:

- 1- In the case of private hospitals with a legal capacity, the relationship between the medical institution and the patient is a contractual relationship based on the contract concluded between the two parties. Therefore, the medical institution is the party that bears the responsibility resulting from a medical error by doctors who were hired to perform medical work (Wilensky and Teitelbaum, 2020; Al-Shura, 2015; Mukhtar, 2010). At the same time, the medical institution returns to the doctors later to bear the responsibility based on their contract with it, as the Jordanian Court of Cassation recognized “the responsibility of the hospital owner, even though the damage to the patient was caused by mistake in the diagnosis, which is a technical work signed by the treating doctor” (Al-Shura, 2015, p 53).
- 2- If the relationship between the doctor and the patient is direct, the doctor is the one who bears the responsibility for the medical error, even if he uses the machines and tools of an independent medical institution since the contract is between the patient and the doctor himself (Al Shura, 2015; Mukhtar, 2010). However, the relationship between the patient and the medical institution, in this case, appears in the treatment institution providing the necessary medical care before and after the treatment. Therefore, a contract between the patient and the treatment institution makes it a ground for establishing the institution’s responsibility for the error committed within its limits towards the patient (Wilensky and Teitelbaum, 2020; Al-Shura, 2015; Mukhtar, 2010).
- 3- In the case of the patient’s relationship with the alternative doctor, the contractual relationship between the patient and the actual doctor ends as soon as the alternative doctor replaces the original doctor. According to a new contractual relationship between the two parties, the alternative doctor becomes the responsible party facing the patient in a medical error situation (Shura, 2015; Mukhtar, 2010).
- 4- If there is more than one doctor who has participated in causing the medical error, such as the surgeon and the anesthesiologist, in this case, the responsibility is a joint responsibility in facing the injured (Al-Shura, 2015; Mukhtar, 2010), based on Article 265 of the Civil Code which states that “If there are several people responsible for a harmful act, each of them is responsible in proportion to his share in it, and the court may rule equally or jointly and severally among them.”
- 5- In case there was more than one person who works under the primary doctor’s supervision, the main doctor holds the tort liability. In this context the Jordanian Court of Cassation stated that if a follower committed a medical error in the medical team, the medical responsibility is borne by the primary doctor since the doctor is the one with the first obligation to take care of a patient, which entails choosing people he works with within the limits of taking the necessary care to do his work, such as selecting the anesthesiologist, the partner doctor, or other workers with him to carry out his work (Al-Shura, 2015; Mukhtar, 2010), based on the relationship of allegiance between the original doctor and his workers, as the court’s decision indicated that “No one is questioned about the action of another unless there is a relationship of subordination with this third party, which requires the existence of the actual authority to direct orders, control and supervise the subordinate on the subordinate, and that the subordinate has made a mistake that led to harm to others during the performance of his job or because of it” (Shura, 2015, p. 64).

## Disciplinary Liability

Disciplinary liability is imposed by the competent/relevant government administration when it comes to the public servant. As for professionals, the unions and federations organized by-laws are responsible for setting these penalties on their members.

In Palestine, Article 38 of the Jordanian Medical Association Law No. 14 of 1954 which is valid in West Bank No. 14 of 1954 states that “a disciplinary council shall be formed to prosecute the members’ doctors for breaching their duties, violating the provisions of this law or the bylaw issued under it, committing an act that degrades the dignity of the profession, committing an act of neglect of the duties of the profession, or behave in their private lives an act that was accompanied by a scandal.”

In Jordan, disciplinary liability was regulated in the Jordanian Medical Association Law No. 13 of 1972.

Article 45 of the law stipulates that a physician is liable to disciplinary responsibility in the event of a breach of his professional duties in violation of the provisions of this law and any regulation issued under it, or if he commits a professional error or defaults in his obligations imposed under the medical constitution, or if he performs any work that affects the honor of the profession.

Although the responsibility arising from medical errors are diverse, they can all be combined in one case or case in both the Jordanian and the Palestinian legal systems. For example, the patient is exposed to a permanent disability due to a medical error, that will push the responsible health care provider to bear criminal liability because of the harm he inflicted on the patient. At the same time, civil liability is represented in compensation for the material and psychological damage caused to the patient. Finally, a disciplinary liability may appear before the competent authorities because of the health care provider’s violation of the ethics and ethics of the profession.

## 3. Special Laws Regulating Medical Liability in Jordan and Palestine

### Key Takeaways

- 1- **Both The Palestinian Decree-Law No. 31 of 2018 regarding medical and health protection and safety and the Jordanian Medical and Health Liability Law No. 25 of 2018 regulate the issue of medical liability.**
- 2- **Even with the existence of the two laws, patients restore to the use of the general laws in front of civil and criminal courts.**
- 3- **Both the Palestinian Committee for Medical and Health Protection and Safety and the Jordanian Higher Technical Committee are responsible for looking into the medical errors cases and providing a technical report to the courts.**

Medical errors are still a sensitive issue that constitutes a controversial topic in Palestine and Jordan, in addition to the inability of the general laws discussed above to find a solution to this issue.

This has led to many formal and informal institutions calling for the enactment of special laws to address the issue of medical errors.

In 2014, the Palestinian Independent Commission for Human Rights indicated in its report that there is a need for specific legislation to enhance the accountability of health professionals and to establish a specific legal mechanism to govern the work undertaken by committees investigating medical errors that can guarantee the right to a fair trial. The commission stated that “the lack of clear disciplinary procedures for accountability for many health professionals, especially those working in the private sector, makes it necessary to consider the enactment of a law on procedures for administrative trials in cases involving medical error” (ICHR, 2014, p3). Moreover, the commission stated that “The Palestinian legal system lacks a single common legal mechanism to govern the work undertaken by committees investigating medical errors” (ICHR, 2014, p4).

In the same way, in The National Strategy for Health Sector in Jordan 2015- 2019, the Higher Health Council indicated the importance of having special laws to address medical liability. It stated that “The approval of the medical liability law is an additional factor in enhancing the quality of health services provided in the field of medical tourism by ensuring the safety of both providers and recipients of health services. It is one of the most important tools that will contribute to the increase of patients’ number who come for treatment” (The Higher Health Council, 2015, p 61).

As a result, due to the importance of finding a radical solution to the issue of medical errors, the legislature in Palestine and Jordan moved to enact special laws that deal primarily with the issue of medical errors.

## Palestine

Decree-Law No. 31 of 2018 regarding medical and health protection and safety regulates medical liability issues. The law defines a medical error in Article 19 as what a practitioner commits and causes harm to medical service recipients as a result of:

- 1- Ignorance of technical matters that are supposed to be familiar to everyone who practices the profession of the same degree and specialization.
- 2- Failure to follow the recognized medical and health professional rules and principles.
- 3- Not taking the necessary care.
- 4- Neglect, lack of precaution, and failure to follow caution.

The Palestinian Court of Cassation stipulated in its decision No. 501/2019 that the medical error is a “negligence in the conduct of the doctor and his medical staff.” Therefore, the criterion on which the physician’s responsibility is determined or not is the standard of the ordinary person. The decision also confirmed that the doctor’s error exists in three cases:

- 1- In the case of negligence by the doctor or the medical staff, whether his fault was grave or simple.
- 2- The doctor and the medical staff made a mistake in the case of abstaining or not following up on the patient when he visited him while he was in the clinic and intervening promptly to save the patient.
- 3- The responsibility of the doctor and the medical staff also arises in cases where the doctor stops treating a patient at an inappropriate time and without legal justification unless he establishes evidence of force majeure or a sudden accident.



The law stipulates in Article 20 that medical and health responsibility is based on taking care and not achieving a result. Therefore, this responsibility depends on the extent of the practitioner's commitment to the professional rules and standards prevailing in the medical environment, the factors and circumstances that precede, coincide, or follow the work of medical and medical service providers.

In the same context, the Palestinian legislator clarified in Article 6 that the medical service provider is obligated, when performing his work, to abide by the rules and procedures for practicing the professional restrictions, in addition to the need to take into account the following:

- 1- Equality between service recipients according to their health conditions.
- 2- Performing work duties to ensure the comfort of the service recipient and taking care of him according to the recognized professional rules and scientific principles.
- 3- Cooperating with others who have a first-degree relationship with the service recipient and providing information about his health condition and the method he followed in his care.

The Palestinian legislator has explicitly adopted, in the text of Article 23 of the Law by Decree, three forms of liability that a practitioner of the medical profession who causes a medical error can bear, and with no specific articles, these types of liabilities can be seen within the general legal framework that we discussed earlier. Hence, criminal responsibility is based on criminal law, and civil liability is based on civil laws. In addition to the disciplinary penalty imposed by the competent authority in the Medical Syndicate.

The Decree-Law No. 31 of 2018 stipulated in Article 14 the formation of a committee for "Medical and Health Protection and Safety." It includes doctors with no less than 15 years of experience from the Ministry of Health and the Palestinian Doctor Association, a member of the Palestinian Medical Council, a forensic doctor from the Ministry of Justice, two members of the specialized union, and a member from the experts.

The tasks of the committee are mainly to:

- 1- Examining complaints submitted to the ministry or the competent union by the service recipients, legal representatives, or heirs.
- 2- Providing technical expertise in the complaint at the request of the Public Prosecution before filing the case before the competent court.
- 3- Providing technical expertise at the request of the competent court during the consideration of the case.

Where the law specified that the main objective of the committee's submission of its report is to determine the extent of the occurrence of the medical error or not, the reason for the occurrence of the medical error, the extent of the seriousness of the medical mistake in each case, within 30 days with the right to extend the period for one time only after the approval of the party requesting the report experience.

## Jordan

The Medical and Health Liability Law No. 25 of 2018 is the law regulating medical liability and the related mechanisms. Prior to being passed by Parliament, the Medical and Health Liability Law No. 25 of 2018, regulating the issue of medical responsibility, went through many discussions and consultations. As part of the process, the Jordanian House of Representatives and Senate were presented with a number of studies in order to inform them of different international experiences in this field.

The law defines medical error as “any act, omission or negligence committed by the service provider that does not comply with the prevailing professional rules within the available work environment and results in harm.”

Despite the importance of this definition, many of the components referred to by the Jordanian legislator within it have not yet been activated. Two critical points are: the existence of “professional rules,” for which a special system needs to be developed; and the mention to the “available work environment” which requires providing an appropriate work environment capable of providing appropriate conditions for medical service providers, including education, equipping and qualifying the workplace, and the professional rules regulating the exercise of their tasks to the fullest extent as the first step before holding them legally accountable.

The Jordanian legislator states in Article 5 that medical responsibility is also a responsibility based on taking care and not achieving a result. Therefore, the performance of this responsibility is based primarily on adherence to what is required by “the ethics, accuracy, and integrity of the profession and per recognized scientific principles, and in a manner that achieves the necessary care for the patient and not exploiting his need for the purpose of achieving an unlawful benefit for himself or others, without discrimination between patients and abiding by applicable legislation.”

In Article 4, the law states that the basis for determining medical liability is the extent to which the service provider and the place of provision are committed to the relevant professional rules. To determine these rules, two essential elements must be considered:

- 1- The location and criteria for providing the service
- 2- The factors and circumstances that precede, coincide, or follow the service provider’s work and the medical or health procedures offered to the service recipient.

The Jordanian law considered that the Medical and Health Standards Committee regulated by Article 6 is responsible for setting the minimum professional rules to be followed by workers in the health sector, however, it is necessary to point out that until this date the committee has not carried out its task in developing these standards

Moreover, the Jordanian Court of Cassation indicated in its Decision No. 1145/2006 that “it is not sufficient for the doctor to be considered in breach of his obligation or to worsen the patient’s condition. Rather, the evidence must be based on the physician’s failure to care for him. This does not come unless he commits an error that could entail liability and determine the physician’s obligation. The doctor adheres to the professional rules and takes into account the determination of the extent of the doctor’s commitment to the external conditions in which he is present and in which he treats the patient” (Al-Najada, 2020, p. 14).

Although the law deals with the issue of medical errors and the statement of the doctor’s responsibility as being based on taking care, what should be noted is that the Jordanian legislator did not explicitly address the type of responsibility incurred by the doctor, which leaves the opportunity open again to return to the general legal texts that regulate the issue of duty in the criminal, civil and administrative laws that we discussed in the previous section, which puts more burden on the patient and his family.

The law stipulates in Article 9 the formation of a special committee under the name “Higher Technical Committee,” where the functions of this committee are:

- 1- Examining the complaints submitted by the service recipient, his heirs, guardian, or custodian to the concerned minister or union against the service provider and offering the decision regarding them to the concerned minister or association, to look into cases of medical errors and determine the responsibility of the doctor or not.
- 2- Providing technical expertise in the case or complaint at the request of the competent judicial authority.

Given the great importance that the technical expertise report occupies when it comes to cases of medical errors, especially before criminal and civil courts, the legislator stipulated that the technical expertise report prepared by the committee must be submitted within a period not exceeding three months from the date of its request by the court or from filing the complaint before the committee.

It must be noted, however, that in light of the sensitivity and possibility of losing evidence and data in cases of medical errors, the Jordanian legislator should have resorted to reducing the period granted to the committee to formulate its report, given the sensitivity and importance of this report, and to guarantee the rights of patients and to ensure that no evidence or data is lost.

The Technical Committee was recently re-established by the Jordanian Ministry of Health, after its mandate had expired. As part of the new mandate, the Ministry has appointed a group of doctors in sub-committees to assist the Supreme Technical Committee in its work. According to Dr. Abd al Hadi Brizat, head of the Committee, the outgoing Committee had received 128 complaints and had submitted technical reports for 47 cases.

## 4. Comparative Analysis of Procedural Challenges in Jordan and Palestine

### Key Takeaways

- 1- **In the case of medical error, the patient is the responsible party to prove the errors and the compensation.**
- 2- **Many difficulties face the patient in proving the medical mistake related to the technical data and the information availability.**
- 3- **The compensation process can be challenging because of the long process takes with the medical service providers, hospitals, and insurance companies.**
- 4- **There is a limitation to the compensation at the national level in Jordan, while it was left open under the general rules in Palestine.**

## Burden of Proof

An essential point must be mentioned about the litigation process in both countries, which is the issue of burden of proof, whether it is to prove the medical error that occurred or to verify the harm resulting from the medical error.

As within the judicial system in both countries, the criminal and civil courts are the competent authorities to hear cases resulting from medical errors.

In criminal cases, the burden of proof and proving the occurrence of a medical error falls on the shoulders of the Public Prosecution, as it represents the public right, therefore the role of the patient, in this case, is limited to moving the complaint and submitting his testimony.

But the situation is different in civil cases, in this case the burden of proof falls on the patient, according to the rule that the patient is the one who bears the responsibility to prove the occurrence of the medical error and the consequential damage.

In this context, the basic rule for requesting compensation for the harm is that the claimant is responsible for providing proof. Therefore, in the situation of medical errors, the patient, as the plaintiff, is the party that must prove the medical mistake and the harm resulting from the medical error (Wazna, 2011; Al-Sharif and Rehab, 2018). Article 75 of the Code of Judicial Provisions and Article 77 of the Jordanian Civil Code indicate that “evidence is for the plaintiff and an oath is for the one who denies.”

Therefore, within the medical errors that occur, the patient finds himself facing an additional burden represented in the necessity of proving the occurrence of a medical error based on negligence, lack of care, or non-observance of regulations and laws by the doctor, in addition to the burden of proving the occurrence of the damage caused as a result of the error made by the doctor.

This is considered one of the most challenging things that the patient can face as the weakest party in this equation, especially since medical errors need evidence based on technical and medical expertise, which is a complex experience that the patient may not be able to provide or access due to its complex technical nature. Also, medical fellowship sometimes may cover for a doctor by another colleague, which leads to the loss of evidence. Moreover, many papers and documents related to treatment and medical errors that occur are either in possession of the doctor himself or the treatment institution, which makes the possibility for the patient to obtain them very difficult or almost impossible sometimes (Wazna, 2011; Al-Sharif and Rehab, 2018).

As a result, the most significant problems and obstacles facing the patients are placing them with an additional burden represented in proving that the error occurred due to negligence or lack of care, the occurrence of damage, and the causal relationship between them.

Hence, applying this general rule will only increase the burden on the patient, which makes it necessary to have a different legislative approach towards lifting this burden.

Although the Jordanian and Palestinian legislators have granted the special committees “the Palestinian Committee for Medical and Health Protection and Safety and the Jordanian Higher Technical Committee” the power to submit technical reports to the judicial authorities, this alone does not constitute a sufficient tool to protect patients and guarantee their rights, which makes it necessary to reconsider the evidence system followed before the courts in cases of medical errors.

In this context, we note that the French Court of Cassation, in its 1997 decision, transferred the burden of proof from the patient to the doctor, stressing that if the doctor has a duty under the law or the contract, he must provide evidence that he has implemented this obligation (Al-Sharif and Rehab, 2018; Wazna, 2011). consequently, this example shows that there is a possibility to reduce the burden of proof from the patient as the weakest party, and to transfer this burden to the doctor as the strongest party to protect the rights of patients.

## Compensation Fund

In addition to the obstacles and difficulties facing the patient and his family in proving the occurrence of error and damage, one of the obstacles they also face is the process of compensation.

The Palestinian legislator indicated in Article 27 of the 2018 Medical Protection and Safety Law that insurance companies are the party obligated to compensate if a competent court decision proves the medical error and damage according to the general laws that regulate the right to compensation, which are civil laws. This means that the patient, in addition to his suffering to prove the error and the damage in the judiciary, has to go through another suffering to obtain the amount of insurance from the companies, especially in light of a complex and long-term system that doubles the suffering of the patient and his family.

Although the law referred in Article 28 to establishing the Palestinian Fund for Compensation for Medical Errors, [this fund has not yet seen the light and still needs a complete study to find out how and the mechanism of its establishment in cooperation with the competent and relevant authorities.](#)

Article 17 of the Medical and Health Liability Law of 2018 in Jordan refers to establishing an insurance fund against medical and health liability errors for compensation under the management of the Higher Medical Council. The internal system for the fund that was issued on 2/6/2019 divides the medical service providers into three categories. The highest compensation value is the first category, with a value not exceeding fifty thousand dinars for one contractual year, while the lowest is for the third category, with a value not exceeding ten thousand dinars.

This raises an important question about the background on which the law builds these amounts, especially if the damages resulting from medical errors for medical service providers according to the categories mentioned in the law are higher than the ceiling set by the law?

In this case, will the patient resort to the usual method of compensation, which is to refer to the doctor or the treatment institution and the insurance companies that deal with them? Or will the compensation be divided into two parts, one adopted by the fund and one by the doctor?

As a result, the compensation within the Palestinian legal system is still regulated by civil law, which means that patients need to use the general rules for compensation in the civil courts in order to repair and restore the damage, which is a long process that required the patients themselves to prove the error and the damage.

In the same context with no specific and clear process in Jordan within the 2018 Health Liability law and the internal system for the fund that was issued on 2/6/2019, the process of compensation is still also regulated by the general rules, however, while in Palestine compensation demands are not specified with a limit, in Jordan, there is a need to review the limitation for compensation in the 2019 internal system for the fund, in order to guarantee the rights of the patients.

## 5. Recommendations

The role of law as a monitor of the quality of health care relates to both judicial involvement scrutinizing the standards of care in the courtroom, and through explicit legislation provides a framework that facilitates quality in health care through guide practice and set boundaries, while keeping expectations realistic (McHale, 2002).

The issue of medical errors is still one of the sensitive issues around the world including Palestine and Jordan, as the two countries have witnessed many cases that left many victims during the past years, and despite all attempts to deal with this issue, it still faces many obstacles.

Although the Jordanian and Palestinian laws have recognized the existence of medical responsibility on medical service providers who causes medical errors, this responsibility is still subject to the general rules, whether in the field of criminal, civil or administrative responsibility, therefore even with the existence of special laws for medical liability, these laws have not achieved their main purpose of establishing a clear legal system to regulate medical liability, but rather referred it entirely to the general laws.

On the other hand, the complications surrounding medical error cases are many. One of them is a long time in courts, these cases may stay before the courts for a relatively long period, especially in the absence of a specialized judiciary in the medical field.

In addition, the technical complications surrounding evidence in medical errors cases place more burden on the patient as the party required to prove the harm caused by the medical error for the purposes of compensation, therefore the patient may find himself either unable to access this evidence or unable to claim information and the required data itself.

The issue of compensation itself also constitutes an additional burden in view of the length of time it may take to claim compensation cases from the medical service providers even after their liability is established, which makes the consequences of the occurrence of a medical error not only at the limits of the harm done to the patient but extends to the traditional mechanisms of compensation that may increase the patient's suffering instead of alleviating it.

There are still many important steps that must be addressed by the Jordanian and Palestinian legislators alike, which can be summarized as follows:

- 1- A reformulation of the legal aspects of medical liability and an attempt to limit it to a private lawyer instead of keeping it under the umbrella of general laws.
- 2- Enhance the existence and approval process of general and specific standards for medical practice that currently face many problems and delays in their approval process. The standards are critical to fill legal loopholes in this field. Existing international medical standards can provide a basis for the national standards to be adapted and adopted, facilitating the overall efficiency of the process.
- 3- With regard to criminal responsibility in particular, the Jordanian legislator must create a legal template for a new crime called, for example "the crime of medical error or negligence" in the special section of the Penal Code, and not be satisfied with leaving the matter to the general rules related to crimes of causing death, causing harm, abortion or causing abortion or crimes of abstaining from assistance. Hence, there is a need to include special provisions in the penal code for this crime to provide a special penal protection for patients and health care recipients. It would also oblige the criminal judiciary to allocate penal rooms for this type of crimes that differ in their nature and legal the dimensions.



This will lead to greater flexibility in the judicial application and will accelerate and shorten the litigation period to protect the interests of those affected by medical errors, while protecting doctors and health care providers from malicious and unjust cases. A specific crime of medical error will also protect the health sector as a whole by adjudicating in cases of medical errors in the shortest period of time, and prevent doctors and health care providers, who are proven to be negligent, from continuing to provide medical care and take administrative measures to ensure that the lives and safety of patients are not endangered.

- 4- Improve the readiness of the courts when considering cases of medical errors, by providing judges and members of the Public Prosecution Office, in particular, with the necessary skills to deal with cases of medical errors in a more in-depth manner.
- 5- Reconsider the procedures followed before the courts and the competent authorities with regard to the points of proof and compensation in cases of medical errors, in a way that guarantees that these cases do not stay in courts for years which can reflect negatively on the patients.
- 6- Pushing for more activation of the role of the special committees in the medical liability laws of 2018 in both Palestine and Jordan, especially with regard to submitting medical reports to the courts and resolving medical errors cases before them.
- 7- Continue developing specialized research in the field of medical liability through a comparative perspective with best practices at regional and international level.

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## **Annex. Medical liability in the Arab world**





A different set of laws discussed the issues of liability for medical errors in the Arab world. Between civil, criminal, and special laws, we will present in this section the most prominent of those laws.

Country	Criminal Liability	Civil liability	Disciplinary liability within the Special law for doctors (Professional Association)	Special laws for medical liability
UAE	Penal Code of the United Arab Emirates No. (3) of 1987	Law 5 of 1985 regarding the issuance of the Civil Transactions Law		Federal Decree-Law No. 4 of 2016 regarding medical liability
Saudi Arabia			Regulations for the Practice of Health Professions, Third Edition, 1440 A.H. - 2019 A.D., issued by Royal Decree No. (M/5)	
Egypt	Egyptian Penal Code No. 58 of 1937	Egyptian Civil Code No. 131 of 1948	Law No. 45 of 1969 regarding the Physicians Syndicate	
Lebanon	Penal Code Decree No. 340 - issued on 1/3/1943	Regarding the Obligations and Contracts Law issued on March 9, 1932.	Medical Ethics Law (No. 288/1994)	
Morocco			Law No. 10-94 relating to the practice of medicine	
Tunisia	Journal of Obligations and Contracts 1906	The Criminal Journal issued in the Official Gazette No. 79 of October 1, 1913	Draft Basic Law No. 41/2019 regarding patients' rights and medical liability	
Qatar	Law No. (11) of 2004 promulgating the Penal Code	Law No. (22) of 2004 promulgating the Civil Code	Law No. (2) of 1983 in the matter of practicing the professions of human medicine and dental medicine and surgery	
Iraq	Penal Code No. 111 of 1969	Iraqi Civil Code No. 40 of 1951	Physicians Syndicate Law No. (81) of 1984	
Algeria	Order No. 66-156 of June 8, 1966, containing the Penal Code	Order No. 75-85 of September 26, 1975, which includes the Civil Code	Executive Decree No. 393-09 dated November 24, 2009 The law includes the basic basic law for employees belonging to the medical practitioner corps in public health	
Jordan	The Jordanian Penal Code No. 16 of 1960	The Jordanian Civil Code of 1967	the Jordanian Medical Association Law No. 13 of 1972 and its amendments	The Medical and Health Liability Law No. 25 of 2018
Palestine	The Jordanian Penal Code No. 16 of 1960	The Code of Judicial Provisions	the Jordanian Medical Association Law No. 14 of 1954	Decree-Law No. 31 of 2018 regarding medical and health protection and safety



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