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LIABILITY FOR MEDICAL NEGLIGENCE ACCORDING TO ISLAMIC SHARIAH: A CRITICAL STUDY

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ABSTRACT

According to Islamic Shari'ah, life and health are the blessings of Allah and should not be wasted. Ensuring preservation of life is one of the five objectives of Shari'ah. For this purpose, Shariah allowed the practice of medicine and urged people to use it for cure. Medical negligence in Shariah refers to the failure of a healthcare professional to meet the required standard of care, resulting in harm to a patient. Shariah law, derived from the Quran, Sunnah (the practices of Prophet Muhammad), Ijma (consensus), and Qiyas (analogy), encompasses a comprehensive legal and ethical framework that guides various aspects of Muslim life, including medical negligence. This article investigates the conditions under which medical negligence is established in Shariah, focusing on the breach of duty, causation, and resultant harm. It highlights the criteria for determining liability, emphasizing the importance of intent, professional competence, and adherence to accepted medical practices.

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INTRODUCTION

Medical Negligence is defined by the scholars of Shariah in following words:

"Every deviation of medical practitioner from the standard practice of medicine that is taught during the teaching of medicine or prevalent during the doctor-patient relationship. In other words, medical negligence is breach of duty to care; due diligence and thoughtfulness that medical practitioner was bound to observe by provision of laws. Moreover, this deviation has consequences on patient's body" (Ahmed Hosniyah *et al.*, 2017)

The liability of Muslim Physicians in consequence of medical negligence was discussed and decided by Fuqaha' (Muslim Jurists). The subject of medical negligence law in Shariah started with the tradition of Prophet Muhammad (ﷺ) when he said:

> "He who sets himself up, and undertakes the treatment of others, but had not prepared himself well for medical practice and as result has caused harm, is liable" (Ibn Mājah, *et al.,* 1986 and Abū Dawūd, *et al.,* 2004)."

CONCEPT OF LIABILITY IN SHARIAH

The concept of "ḍamān" encompasses the details of liability in Shariah. Ḍamān is closer to multiple notions of English Law. It can be considered a synonym of "surety ship" but it is broader concept than mere surety ship. Likewise, it can be translated as "obligation" but it is wider term than it. Similarly, at times, ḍamān can be translated as "indemnification" too.

MEANING OF ḌAMĀN

The literal meanings of ḍamān are Kafālah (surety ship), Iltizām (obligation), and Taghrīm (monetary compensation) ([1] Aḥmed ibn Muḥammad ʻAli al-Fayūmī, *et al.,* 364). Ḍamān is merging of one liability with another in respect of demand for performance of an obligation **(**Muwafffaq al- Dīn Abū Muḥammad ʻAbd Allāh ibn Qudāmah al-Maqdisī, and Al-Mughnī, 1968**).**

"ضَمُّ ذِمَّةِ الصَّامِنِ إِلَى ذِمَّةِ الْمَضمُونِ عَنْهُ فِي الْتِزَامِ الْحَقِّ"

> "The most relevant notion to the medical malpractice is the liability to pay monetary compensation for the damage caused to the patient due to Physician's treatment."

JUSTIFICATIONS FOR THE LIABILITY OF ḌAMĀN

Various Muslim Sunni juristic schools of thought put forward varying reasons for holding somebody liable for ḍamān.

According to Ḥanafi School, usurpation, transgression, direct and indirect destruction are the reasons for the liability of ḍamān (Abū Bakr ibn Masʻūd al-Kāsānī, *et al.,* 1982). Thus whoever commits such wrongs, he/she is liable in ḍamān. In Maliki School, Transgressions, usurpation, direct and indirect destruction leads to ḍamān (Abū al-walīd Muḥammad ibn Ahamad ibn Muḥammad ibn Rushd al-Ḥafīd, n.d). Moreover, seller will be ḍāmin (liable) for the goods till it is handed over to the buyer. According to Shafii School Contract, transgression and destruction are main reasons for liability (Abū al-Faḍl, *et al.,* 1990). According to Hanabla Contract, destruction and possession are the reasons for ḍamān in the opinion of Ḥanbalīs. (Zain al-dīn Ibn Rajab, n.d).

CONDITIONS TO ESTABLISH THE CLAIM OF ḌAMAN

Sharīʻah requires two conditions to be fulfilled in order to establish ḍamān (Dr. Wahbah al-Zuhayli, 2012). There must be al- taʻaddī (transgression) or taqsīr (negligence); on the part of doer in order to consider him ḍāmin (liable) and as a result of that al- taʻaddī (transgression) or taqsīr(negligence); aggrieved party must have suffered al-ḍarar (harm). If the injury wasn't the result of transgression or negligence, doer will not be liable. In the light of these principles established under the concept of ḍamān, a medical practitioner will be liable if he transgressed the limits of his practice i.e. he did which he wasn't

supposed to didn't do what he was supposed to do. In both cases he will be ḍāmin if his action or omission caused harm to the patient

LIABILITIES OF MEDICAL PRACTITIONERS

Imam ibn al-Qayyim al-Jawziyyah in his book Zād al-Ma'ād fī Hadyī Khaīr al-'Ibād presented five different categories of medical practitioners and decided whether they are ḍāmin or not (Ibn al-Qayyim, n.d). Some other scholars increased or decreased the number of categories. Author of the thesis has chosen to divide into four categories after reviewing the literature.

PROFICIENT AUTHORIZED DOCTOR (WHO TREATED ACCORDING TO THE ACCEPTED PREVALENT METHODS)

According to the jurists, if a medical practitioner is proficient in his field and he treated his patient according to the prevalent accepted method and there was neither any transgression nor negligence, yet patient couldn't be cured and his state got worst and complications resulted from his treatment, in this situation doctor will not be held liable even if loss of any organ or even death was the consequence of the complications.

PROFICIENT AND AUTHORIZED DOCTOR THAT ERRS OR COMMITS NEGLIGENCE

The doctor is competent and is authorized by the government and patient, but he committed a mistake. Due to this mistake whatever damage is caused to the patient, he will be liable to compensate.

Mistake is the opposite of the correct or right (Ibn Manzūr, *et al.,* n.d). It is an unintended action (Jurjāni, *et al.,* n.d). A person intended the action, but he didn't intend to commit a prohibited action. For instance, a person wanted to shoot a bird, instead it hit a human being. He didn't intend to hit that human being, but his action missed the original target and instead hit that person (Ibn Humām, *et al.,* n.d).

Therefore, a mistake in the context of medical practice is when the doctor didn't intend the harm to the patient rather harm was caused to the patient by his unintended action. Either he misdiagnosed the disease or gave the wrong medicine by mistake. Moreover, it can be due to the negligence. He may not intend that harm to the patient. But his negligence in performance of his duty may cause harm to the patient. Mistakes may or may not be due to the negligence. Muslim jurists have differentiated between negligence and mistake. If an error took place by medical practitioner without any negligence, then he will not be sinful for it in the sight of Allah the Exalted as he said in Glorious Qur'ān:

"وَلَيْسَ عَلَيْكُمْ جُنَاحٌ فِيمَا أَخْطَأْتُمْ بِهِ وَلَكِنْ مَا تَعَمَّدَتْ قُلُوبُكُمْ"

> "There is no blame upon you for that in which you have erred but [only for] what your hearts intended" (Al-Quran 33:5).

And he taught us the supplication:

"رَبَّنَا لَا تُؤَاخِذْنَا إِنْ نَسِينَا أَوْ أَخْطَأْنَا"

Prophet (peace be upon him) said:

"إِنَّ اللَّهَ قَدْ تَجَاوَزَعَنْ أُمَّتِي الْخَطَأَ، وَالنِّسْيَانَ، وَمَا اسْتُكْرِهُوا عَلَيْهِ"

> "Indeed, Allah has excused my people from error, forgetting things, and what they were forced or compelled to do" (Ibn Mājah, Ḥadīth no. 2043, n.d).

A person is not sinful when he commits any mistake, but it doesn't eradicate the liability of causing harm to other human beings. A person needs to compensate the damage no matter it was intentional or unintentionally caused. Thus, if he a competent doctor makes error, he will not be sinful if he was not negligent, but he will be required to compensate. However, if he was negligent and committed the mistake due to his recklessness, he will be sinful as well as liable to compensate the damage.

CRIMINALLY NEGLIGENT MEDICAL PRACTITIONER

Those medical practitioners who behave criminally negligent may have to redress it by retribution according to some jurists. Fuqahā are not unanimous in this regard. Ḥanafī fiqh makes it mandatory to kill directly or through an instrument that is meant for killing like sword or shotgun. If it is achieved through some intermediary means, it will not amount to killing. Injecting poison or stifling with pillow will not be a murder in the sight of Imam According to Abu Hanīfa it will be compensated through diyah not retribution (Ibn ʻĀbidīn, *et al.,* 2006). They mentioned the instance of intentional murder like cutting the vein and letting the bloodshed so that he dies out of it. Ahmed Abdel Aziz broadens the ambit of this scenario and pictured an instance that can be included in this example and the punishment thereof. He gave the example of a doctor who was permitted for a limited simple procedure but transgressed and operated beyond his permission and as a result cut his vessels or commits a mishap that claimed the life of patient (Aḥmed Abdel Aziz Yacoub, n.d).

Imam Mālik was quite reluctant in assuming that a medical practitioner will intend murder of the patient by treatment or omission. It is narrated:

Although qiṣāṣ is due in case of loss of life, it is impossible to be certain that the crime was intended as this is not what is expected of medical practitioners nor is it the known behavior amongst physicians; besides, it is impossible to prove beyond reasonable doubt. Therefore, it should not be treated as murder (Zurqani, n.d).

Imam Shāfiʻī held the strict opinion. According to him criminal negligence is intentional crime and it should be penalized either by qiṣāṣ or through diyah.

He said: In cases of circumcision if the practitioner removes the whole penis, an act which is unacceptable by the standards of his colleagues, then he is kept in custody until the youngster becomes of age. It is up to the youngster then to choose between retribution and the full diyah. On the other hand, if the youngster dies after the injury, then it is up to the heirs to choose between retribution and the full diyah (al-Shāfi'ī, al-Umm, n.d).

The fourth school, that is, Ḥanbalī School of law too holds a strict point of view. It says:

> "If the practitioner removes a part (organ) without permission, and causes death, then he is liable for retribution (qiṣāṣ or qawad)**"** (Ibn Qudāmah, Al-Mughnī, n.d).

Thus, Muslim Jurists classify doctors into different categories for the purpose of ascertainment of liability and the remedy available for the patient. Doctor does not have to indemnify the patient if he was qualified for the treatment and did not deviate from the standard guidelines, yet patient was caused harm. Whereas he will be liable where the doctor was not proficient or qualified for the treatment, yet he undertook the treatment and harmed the patient. Negligence and mistake too will lead to liability and damages while the criminally negligent doctor may be prosecuted for murder.

OFFENCES AND THEIR INDEMNIFICATION IN SHARIAH

Shariah has prescribed various punishments of diverse nature to safeguard the rights of individuals. Some penalties are retributive in nature while some are deterrent. Some aims at rehabilitation whereas others are preventive. Actions and omissions are declared crimes on the basis of the rights and interests violated. Thus, crimes in Shariah are classified by jurists in categories of Ḥudud (fixed Punishments), Qiṣaṣ and Diyah. (Punishments for Killing and Hurt) and Ta'zīr (State prescribed meaning) (Abū Zahra, Al-Uqūbah, n.d). The topic of Diyah includes culpable homicide, manslaughter, indirect homicide and bodily harms. The last-mentioned types of punishments are relevant to the medical negligence and its punishments. The topic of Qatl al-Khatā covers all the wrongful deaths that are caused unintentionally due to mistakes or misadventures including deaths that are results of the negligence, mistakes or misadventures of the medical practitioners. Therefore, this Law is applicable to cases of Medical malpractice in the same way as it is valid in other cases of unintentional homicide. Shariah explicates ample rulings for monetary compensation of wrongful death. Alongside, it covers bodily injuries too in adequate detail. This entire realm of diyah and arsh is almost a complete tariff for estimating the damages for medical malpractice. Following is the brief summary of the concept of diyah and the compensation fixed by Shariah in terms of camels, dirham and dinar.

DIYAH (BLOOD MONEY)

The word "diyah" is used for the damages payable to deceased's family. It may be defined as the "Liability for the financial compensation accrued due to causing homicide". In Islamic criminal law, diyah will be paid in cases of accidental and semi intentional homicide. It may be fixed and paid in cases where retaliation (qiṣāṣ) was original sentence but it was dropped and the option of diyah was adopted for some reason (al-Kāsānī, *et al.*, n.d).

Allah commands to pay the monetary compensation to the deceased's family in the case of wrongful death in the following verse:

"وَمَنْ قتل مُؤمِنًا خطأ فتحريرُرَقَبَةٍ مُؤْمِنَةٍ وَدِيَةٌ مُسَلَّمَةٌ إِلى أَهْلِهِ إِلا أَنْ يَصَدَّقُوا"

> "And whoever kills a believer by mistake - then the freeing of a believing slave and a compensation payment presented to the deceased's family [is required]" (Al-Qur'ān 4:92).

Likewise, many Traditions of Prophet (Peace Be upon Him) explicate the rulings of diyah. For instance, it is narrated from Abdullah ibn Mas'ūd:

"قضى رسول الله صلي الله عليه وسلم في دية الخطأ عشرين بنت ،مخاض وعشرين ابن مخاض وعشرين ابنة لبون، وعشرين حقَّةً وعشرين جَذَعَةً"

"The messenger of Allah (Peace Be Upon Him) ruled that the diyah in the case of accidental killing should be twenty she-camels in their second year, twenty he-camels in their second year, twenty she-camels in their third year, twenty she-camels in their fourth year and twenty she-camels in their fifth year." (Ibn Hanbal, 1995).

AMOUNT OF DIYAH

First topic that calls for discussion in this regard is about the type of property that is payable as diyah. Jurists are divided into three different camps about the types of property that can be paid as financial compensation for the loss of life.

According to Imam Abū Hanīfah (al-Kāsānī, n.d), Imam Mālik (Ibn Rushd, n.d) and old opinion of Imam al Shāfi'ī (Shīrāzī, n.d), three types of properties can be given as monetary compensation for accidental homicide. These properties are camels, gold and silver as it is mentioned in the Ḥadīth where Prophet (Peace Be upon Him) sent a letter to the people of Yemen and explained different matters and wrote:

"وَإِنَّ فِي النَّفْسِ الدِيَةُ مِائَةٌ مِنَ الْإِبِل...وعَلَى أَهْلِ الذَّهَبِ أَلْفُ دِينَارٍ"

"And for the people of gold, it is 1000 Dinar (al-Hākim, n.d)."

Imam Aḥmed ibn Ḥanbal and two companions Imam Ḥassan Shaybānī and Abū Yūsuf of Abū Hanīfah are of the view that there are six types of properties that can be given as monetary compensation for accidental homicide. These properties are camels, gold, silver, goats, cattle and full clothing. They form their opinion on the basis of Hādīth of Prophet Muhammad (Peace be Upon Him) and Āthār of 'Umer (may Allah be pleased with him) mentioned in Sunan abī Dāwūd. It says:

"كانَتْ قِيمَةُ الدِيَةِ عَلَى عَهْدِ رَسُولِ اللَّهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ: ثَمَانَ مِائَةِ دِينَارٍ أَوْ ثَمَانِيَةَ آلَافٍ دِرْهَمٍ، وَدِيَةُ أَهْلِ الْكِتَابِ يَوْمَئِذٍ النِّصْفُ مِنْ دِيَةِ الْمُسْلِمِينَ "، قَالَ: فَكَانَ ذَلِكَ كَذَلِكَ حَتَّى اسْتُخْلِفَ عُمَرُ رَحِمَهُ اللَّهُ، فَقَامَ خَطِيبًا فَقَالَ: أَلَا إِنَّ الإبل قَدْ غَلَتْ، قَالَ: فَفَرَضهَا عُمَرُ عَلَى أَهْلِ الذَّهَبِ أَلْفَ دِينَارٍ، وَعَلَى أَهْلِ الْوَرِقِ اثني عشر ألفا، وعَلى أَهْلِ الْبَقَرِ مِائَتَيْ بَقَرَةٍ، وَعَلَى أَهْلِ الشَّاءِ أَلْفَيْ شَاةٍ، وَعَلَى أَهْلِ الْحُلل مائتي حُلَّةٍ، قَالَ: وَتَرَك دِيةَ أَهْلِ الذِّمَّةِ لَمْ يَرْفَعْهَا فِيمَا رَفَعَ مِنَ الدِيَةِ"

"The value of the blood-money at the time of the Apostle of Allah (Peace be Upon Him) was eight hundred dinars or eight thousand dirhams, and the blood-money for the people of the Book was half of that for Muslims.He said: This applied till Umar (Allah be pleased with him) became caliph and he made a speech in which he said: Take note! Camels have become expensive. So 'Umar fixed the value for possessed silver at twelve thousand (dirhams), for those who possessed cattle at two hundred cows, for those who possessed sheep at two thousand sheep, and for those who possessed suits of clothing at two hundred suits. He left the blood-money for dhimmis (protected people) as it was, not raising it in proportion to the increase he made in the blood-wit (Abū Dāwūd, n.d).

MONETARY COMPENSATION FOR BODILY HARM

In Islamic Law, the term "arsh" refers to the financial compensation for bodily harm. Islamic jurists have established a list of tariffs for calculating the financial compensation for various injuries, impairments, and organ losses. Organs are categorized into four types by jurists to determine the damages for the loss of organs, faculties, or injuries.

The Single Organs will be compensated with full Diyah (100 camels, 1000 gold coins, 12000 silver coins) that human body has only one. These organs include: nose, tongue, penis, backbone and urinary or bowel tract. Hair and beard too fall in the same category.

Prophet (peace be upon Him) commanded to write for full Diyah for a complete cut off of the nose (al-Ḥākim, *et al.,* n.d).

Same Hadīth mandates for full Diyah if tongue is amputated. Same is decreed if the tongue of a child who doesn't talk is cut off according to jamhūr (Ibn Qudāmah, n.d), while Imam Abū Hanīfah required judge to decide. If the tongue of a dumb person is amputated (al-Ḥākim, *et al.,* n.d). Mālikī, Shāfi'ī and Ḥanafī decide that the judge ought to estimate while Ḥanbalī prescribe one third Diyah (Al-Zuhaylī, n.d).

If a person lost his penis or hashfah (head of penis) due to mistake of other, accused will be asked to pay full diyah (ibn Rushd, *et al.,* n.d). In the same way, full diyah is mandated if backbone is broken or damaged in a way that it made sexual intercourse impossible or it caused spinal curvature or inability to urinate or pass stool. Likewise, medical doctor will have to pay for full diyah if, because of their mistake, urinary or bowel tract is destroyed of a patient (al-Kāsānī, *et al.,* n.d).

If patient lost his hair or beard in a manner that it prevented to re-grow for good, medical practitioner will be liable for full diyah (Shaybānī, *et al.,* n.d).

Those organs that human body has in pairs, call for full diyah if entire pair is destroyed. If one is lost, half (50 camels) will be decreed. If both hands are amputated from shoulder or wrist or patient lost both of his legs, full diyah will have to be paid (ibn Qudāmah al-Maqdisī, n.d). If one hand or leg is lost, half of diyah will be paid as mentioned in the ḥadith (al-Kāsānī, n.d).

Medical practitioners will be liable to pay full diyah if both eyes are gorged out and half if one is lost (Shirbīnī, *et al.,* n.d). There is a difference of opinion if a person is one-eyed. Imām Mālik and Ahmed are of the opinion that if a person was one-eyed and he lost that single working eye because of the negligence or mistake of other, in this case he will be paid full diyah (ibn Qudāmah, n.d) whereas Imam Shafii still demands for half (al-Kāsānī, n.d).

Full diyah will be mandated if both ears are lost due to the mistake or negligence of doctors and half if one is lost (Shirbīnī, *et al.,* n.d). However, Imam Malik conditioned the loss of hearing for the payment of full diyah (al-Kāsānī, *et al.,* n.d).

Half diyah will be paid for the loss of single lip whichever is lost i.e. upper or lower, big or small and full if both are amputated (al-Kāsānī, *et al.,* n.d).

Jurists do not hold a unanimous opinion regarding eyebrows. Ḥanafi and Ḥanbali stipulate full diyyah if they are lost in a manner that made its regrowth impossible and half if one is lost (al-Kāsānī, n.d). Maliki and Shafii jurists disagree with them and demand for a fair estimation by judge as eyebrows do not serve much purpose in a body except beauty and for the loss of little beauty, full diyah cannot be demanded (Ibn Rushd al-Hafīd, n.d).

Scholars are undivided in the matter of breasts and nipples. According to them if both breasts are amputated of a woman, she will be paid full diyah whereas if one breast is amputated, half will be payable (al-Kāsānī, *et al.,* n.d).

Imam Malik conditioned drying up of milk if only nipple is severed.

Regarding testicles and labia minora (The two inner folds of the vulva.) scholars are of the view that if both are amputated or become dysfunctional, in this situation full payment of diyah will be due and half will be given for loss of one (al-Kāsānī, *et al.,* n.d). While it is agreed upon matter among scholars that anyone who caused the loss of both buttocks will pay full diyah and if he caused damage to one, half will be payable (Ibn Rushd, n.d). In the same way, Shafii and Ḥanbali prescribed full diyah for loss of both jaws and half for one.

Organs that are Four in body includes eyelids and eyelashes. Jurists are divided into two groups regarding eyelids. Jamhur asked for full diyah if all fours are amputated and for onefourth if one is lost but Imam Malik disagree and suggest judges to decide (al-Kāsānī, Shirbīnī, *et al.,* n.d). Ḥanafis and Ḥanbalis prescribe full diyah for loss of all eye-lashes but Maliki and Shafii asked for adequate estimation by judge (al-Kāsānī, and Ibn Qudāmah, n.d).

The Organs ten in body in which Fingers of hands and toes of feet are included in this group. Diyah for each finger or toe is ten camels (al-Kāsānī, Ibn Rushd, *et al.,* n.d). One-third of ten camels diyah will be payable if only fingertips are severed except in the case of tip of thumb. If it is amputated, then half of diyah that is five camels will be payable (Ibn Qudāmah, n.d).

An average person has 32 teeth in his mouth. Five camels are the diyah of each tooth (al-Kāsānī, *et al.,* n.d) There is no difference in this regard if it is small or large or permanent or baby teeth. If it is broken by anyone, he has to pay for five camels. If a person doesn't lose the teeth entirely, instead it turns to be black, green or red, arsh will be payable according to Ḥanafi while jamhur prescribe the estimation by judge. Sometimes, a victim may suffer loss of faculty that means loss of benefit that an organ has while organ is still present in its shape or size. For example, loss of sight while eyes are still present in its actual shape, loss of hearing with ears still intact, loss of taste while tongue is still in the mouth, likewise loss of touching, holding, talking, smelling, chewing, walking, sexual intercourse etc. while the organs aren't amputated and are in their correct shape and form. They just became dysfunctional.

Full diyah will be payable if loss of sight of both eyes is caused (Shirbīnī, n.d). Likewise, loss of hearing will too be compensated with full diyah (Ibn Qudāmah, n.d). If a person lost his faculty of smelling, tasting or speech, he will be paid full diyah (Shirbīnī, *et al.,* n.d). Loss of intellect too will be compensated with full diyah.

If organ has become partially dysfunctional, diyah will be calculated accordingly. If it is impossible then judge will estimate the adequate monetary compensation.

WHO WILL PAY THE DIYAH?

The liability of paying diyah (blood money) in Islamic law is attributed to the concept of ‘āqilah (Ibn Rushd, n.d), which predates Islam and was refined by Islamic regulations. In the pre-Islamic era, ‘āqilah referred to adult males who were responsible for protecting the entire tribe. There are varying opinions among jurists regarding the definition of this legal term.

According to Ḥanafis, those male, adult and free registered soldiers are ‘aqilah who are registered in same payroll (diwan) (Muḥammad ibn Aḥmed ibn, n.d).

"العقل على أَهْلِ الدِّيوَانِ مِنْ الْعَاقِلَةِ"

“Diyah is upon the people of diwan among Aqilah” (al-Sarakhasī, n.d)

" فَلَمَّا كَانَ فِي زَمَنِ عُمَر رضىَ الله عَنْهُ وَدَوَنَ الدَّوَاوِينَ صَارَ التَّناصُرُ بَيْنَهُمْ بِالدِيوَان فَكَانَ أَهْلُ دِيوَانٍ وَاحِدٍ يَنْصُرُ بَعْضُهُمْ بَعْضًا وَإِنْ كَانُوا مِنْ قبائل شتّى فَجَعَلَ عُمَرُ الْعَاقِةَ أَهْلَ الدِيوَان"

> “They rely for their definition on the practice of ‘Umer (may Allah be pleased with him). During the time of Prophet (ﷺ), tribesmen used to pay diyah but with the passage of time this tribal system didn’t remain intact as it was in the past. Many people moved to different cities and started living in areas other than their tribes. At that time, ‘Umer (may Allah be pleased with him) had launched the system of dīwān.”

All the names of soldiers working in one unit were registered in it for the purpose of administration. This unit has to pay the diyah if anyone mistakenly killed anyone or caused injury. If no such unit is available for a person, then his tribesmen will be ‘āqilah. An opinion of **Mālikī fiqh** is similar to the notion of Ḥanafīs. It is narrated in some of the classical books on Mālikī fiqh (Muḥammad ibn ‘Abdullah al-Kharshī, n.d)

"أَنَّ الْعَاقِلَةَ عِدَّةُ أُمُورٍ العَصَبَةُ وَأَهْلُ الدِّيوَانِ وَالْمَوَالِي وَبَيْتُ الْمَالِ"

According to this opinion, ‘āqilah would be ‘aṣabah (agnatic male tribesmen), people of dīwān, Mawālī and then Bait al-māl. However, if wrongdoer is from people of dīwān and he is still getting stipend from dīwān, in this case his dīwān will pay the diyah (Ibid). It says:

"لَكِنْ أَهْلُ الدِيوَانِ مُقَدَّمُون على العصبة إنْ كَانَ لَهُمْ جَوَامِكُ تُصْرَفْ لَهُمْ"

According to an opinion of Mālik, Shafii and Ḥanbali, Agnatic male tribesmen are aqilah and thus liable to pay for diyah (Ibn Qudāmah al-Maqdisī, n.d). Imam Shafii didn’t accept ahl al-diwan as aqilah because at the time of Prophet (peace be upon him), clan of offender used to pay and this practice wasn’t abrogated or extended by him (Shīrāzī, n.d).

"والعاقلة هم العصبات الذين يرثون بالنسب أو الولاء غير الأب والجد والابن و ابن الابن"

Imam Sarakhsi responding to this objection, remarked that the decision of ‘Umer was made in front of the companion of Prophet (ﷺ) and none objected or rejected his decree. Thus, this decision has the sanction of ijma’ (al-Sarakhasī, n.d).

CONCLUSION

The noble Shariah possesses a profound capacity to provide guidance on the issue of medical negligence. The foundations of Islamic law in this regard can be traced back to the traditions of the Prophet Muhammad (peace be upon him) and the general principles outlined in the Qur'an and Sunnah. Islamic jurists, known as Fuqaha, have further elaborated on these concepts and stipulate that a doctor may be held liable for harm caused to a patient due to negligence or mistake.

The principles of Shariah law provide a relevant framework for addressing medical malpractice, even though there may not be direct references in the Quran or Sunnah specifically addressing monetary compensation for such cases. The concept of qiṣaṣ and diyah, which encompasses unintentional wrongful deaths resulting from mistakes or misadventures, including those caused by medical negligence, is applicable to cases of medical malpractice in the same way as other unintentional homicides. Shariah provides ample guidance on monetary compensation for wrongful death and bodily injuries in detail through the concepts of diyah and arsh, effectively serving as a tariff for estimating damages in cases of medical malpractice.

The use of the system of aqilah, where the entire institution takes part in compensating the loss, can help alleviate the burden on defendants. This approach would not only provide clarity and consistency in determining appropriate damages, but also spare judges from the challenging task of estimating reasonable amounts for compensation, considering the significant impact of such damages.

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