# MEDICAL MALPRACTICE: AN ANALYTICAL STUDY IN THE LIGHT OF SHARĪ'AH AND LAW

Submitted in partial fulfillment of the requirements for the degree of PhD (Sharī'ah, Islamic Law & Jurisprudence)


Submitted By

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DEPARTMENT OF SHARIAH

FACULTY OF SHARIAH & LAW

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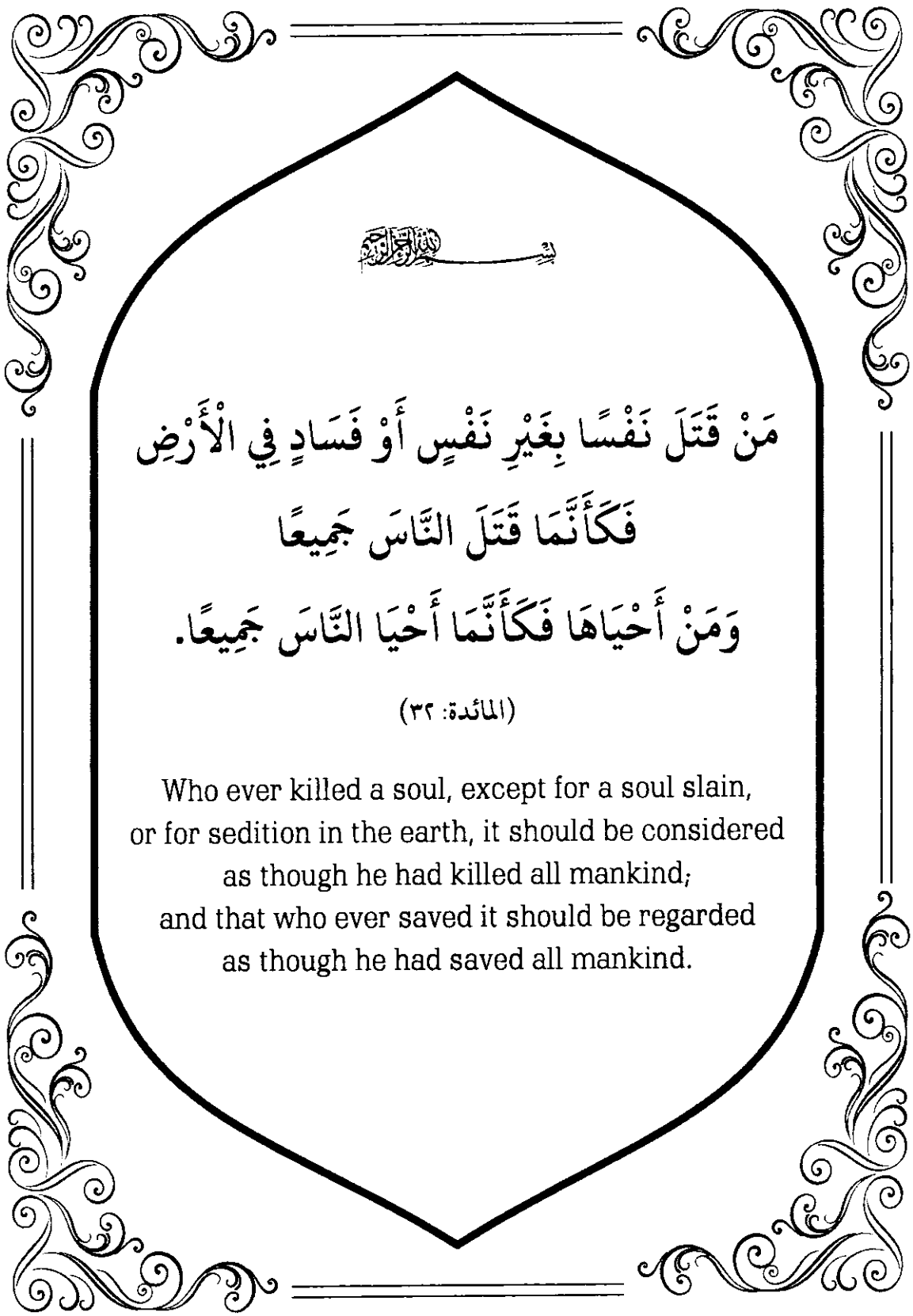
بسم الله الرحمن الرحيم
In The Name Of Allah, The Most Beneficent, The Most Merciful



بسم الله الرحمن الرحيم

مَنْ قَتَلَ نَفْسًا بِغَيْرِ نَفْسٍ أَوْ فَسَادٍ فِي الْأَرْضِ
فَكَأَنَّمَا قَتَلَ النَّاسَ جَمِيعًا
وَمَنْ أَحْيَاهَا فَكَأَنَّمَا أَحْيَا النَّاسَ جَمِيعًا.

(المائدة: ٣٢)

Who ever killed a soul, except for a soul slain,
or for sedition in the earth, it should be considered
as though he had killed all mankind;
and that who ever saved it should be regarded
as though he had saved all mankind.

# ACCEPTANCE BY THE VIVA VOCE COMMITTEE

## TITLE OF THESIS:

## "MEDICAL MALPRACTICE: AN ANALYTICAL STUDY IN THE LIGHT OF SHARIAH AND LAW"

***Submitted by: Rukhsana Shaheen Waraich***
***Reg. No. 24-FSL/Ph.DIJ/F11***

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# DECLARATION

INTERNATIONAL ISLAMIC UNIVERSITY, ISLAMABAD

STATEMENT OF UNDERSTANDING

I, RukhsanaShaheenWaraich bearing the university registration number 24/FSL/PhD IJ/F11declare in the name of Allah that my thesis entitled,

**MEDICAL MALPRACTICE: AN ANALYTICAL STUDY IN THE LIGHT OF SHARĪ'AH AND LAW**

Submitted to the Department of Shariah, Faculty of Shariah and Law, is a genuine work of mine originally conceived and written down by me under the supervision of Assistant Professor Dr.Muhammad Anwar and Dr. Asim Iqbal, by Allah's will and approbation.

I do, hereby, understand the consequences that may follow, if the above declaration be found contradicted and/or violated, both in this world and in the Hereafter.

RukhsanaShaheenWaraich

PhD Sharī'ah (Islamic Law & Jurisprudence)

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Signature: _____

Date: Feb 13, 2020

# DEDICATION

*Research is dedicated to the great teacher of the world*

*PROPHET (PEACE BE UPON HIM)*

*And*

*To my great parents*

*Muhammad Riaz Warraich*

*&*

*Nazir Begum*

# ACKNOWLEDGEMENTS

I am grateful to Allah The Exalted for His endless bounties and favors that accompanied me since the start of my existence. His blessings have made me accomplish this task.

I am indebted to all of my teachers specially Dr. Asmatullah, Dr. Hafiz Anwar, Professor Imran Ahsan Khan Nyazee, Dr. Asim Iqbal and Dr. Samina Bashir. Their scholarly guidance has made the completion of this study possible.

I am thankful to my parents and siblings who have been great support throughout my studies specially my father and sisters Shaista Atif and Anum Shaheen Waraich. I can never pay them back for what they have done for me.

My hearty gratitude is for all of my friends specially Ghazala Ghalib Khan, Soumia Aziz, Taimia Sabiha, Ali Ahmed Shah and other class fellows who helped and supplicated for me.

May Allah bless them all!

## TRANSLITERATION TABLES

Table 1: **Transliteration Table: Consonants**[1]

| Arabic | Roman | Arabic | Roman |
|---|---|---|---|
| ب | B | ط | ṭ |
| ت | T | ظ | ẓ |
| ث | Th | ع | ‘ |
| ج | J | غ | Gh |
| ح | ḥ | ف | F |
| خ | Kh | ق | Q |
| د | D | ك | K |
| ذ | Dh | ل | L |

[1]http://rotas.iium.edu.my/?Table_of_Transliteration

| | | | |
|---|---|---|---|
| ر | R | م | M |
| ز | Z | ن | N |
| س | S | ه | H |
| ش | Sh | و | W |
| ص | ṣ | ء | ’ |
| ض | ḍ | ي | Y |

Table 2: **Transliteration Table: Vowels and Diphthongs**

| Arabic | Roman | Arabic | Roman |
|---|---|---|---|
| ◌َ | A | ◌ً ا، ى | An |
| ◌ُ | U | ◌ٌ و | Un |
| ◌ِ | I | ◌ٍ ي | In |
| ◌َ ا، ٰ ى، | ā | ◌َ وْ | Aw |
| و◌ُ | ū | ◌َ يْ | Ay |
| ◌ِي | ī | ◌ُ وَ | uww, ū (in final position) |
| | | ◌ِيّ | iyy, ī (in final position) |

# LIST OF CASES

## A



## B



## C

**I**

Ingram vs. Williams [2010] EWHC 758 (QB)

**J**

Jones vs. Manchester Corporation (1952) Q.B. 852

**K**

Kapfunde vs. Abbey National plc (1999) Lloyd's Rep. Med.48

Knight vs. Home office (1990) 3 ALL ER 237

**L**

Laxman vs. Trimbak AIR 1969 SC 128

Lindsey County Council vs. Marshall (1937) A.C 97

Livingstone vs. Rawyards Coal Company (1880) 5 App. Cas.25 at 39

**M**

MacPhail vs. Desrosiers (1998)170 N.S.R. (2d) 145NSCA

Marriott vs. West Midlands Health Authority1999) Lloyd's Rep. Med. 23

Maynard vs. West Midlands Regional Health Authority (1984) 1 W.L.R. 634

Maynard vs. West Midlands Regional Health Authority1984) 1 W.L.R. 634

Mcfarlane vs. Tayside Health Board (2000) 2 A.C. 59

Mcfarlane vs. Tayside Health board (2000) 2 A.C.59

Medical Association vs. V.P. Shantha and Others AIR 1996 SC 550.

Muhammad Aslam vs. Dr. Imtiaz Ali Mughal PLD 2010 Karachi 134

**N**

North Glamorgan NHS Trust vs. Walters (2002) EWCA Civ 1792

**P**

Tasawar Naeem vs. Dr. Faisal & Others (Benazir Bhutto Hospital, Rawalpindi) Case no. 20/11.

Taylor vs. Somerset Health Authority 1993] 4 Med LR 34

Taylor vs. Somerset Health Authority (1993) 4 Med LR 34

Thake vs. Maurice (1986) QB 644

Tredget and Tredget vs. Bexley Health Authority (1994) 5 Med LR 178

## U

Udale vs. Bloomsbury Area Health Authority (1983) 2 All E.R.522

## W

White House vs. Jordon (1981) 1 ALL E.R 267

White vs. Chief Constable of South Yorkshire [1998] 3 WLR 1509

Wilsher vs. Area Health Authority (1987) Q.B 730

Wilsher vs. Essex Area Health Authority (1987) Q.B 730

Wilsher vs. Essex Area Health Authority (1988) 1 ALL ER 871

Wisniewski vs. Central Manchester Health Authority (1998) Lloyd's Rep Med 223

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# ABSTRACT

## MEDICAL MALPRACTICE: AN ANALYTICAL STUDY IN THE LIGHT OF SHARĪ'AH AND LAW

Medical malpractice is professional misconduct or unreasonable lack of skill by the practitioners in the field of medicine. At present, such malpractices are not only an issue of developing countries but of developed countries as well. In Pakistan, the situation of law regarding medical malpractice has not remained very encouraging, for two main reasons. First, Pakistan lags behind in healthcare system, although its basic structure is quite similar to the world's leading systems, that is, 'National Healthcare System' of England. Lamentably, this extensive infrastructure has not been translated in delivery of good healthcare due to the lack of political will, thorough supervision, insufficient legislation and inefficeinet implementation. Secondly, Pakistan, being former colony of British India, provides 'law of torts' to be invoked in cases of medical negligence, that has reached to commendable maturity in England nonetheless an immature segment of legislation in Pakistan. Consequently, unlike recent past, very few instances of medical malpractice were brought into litigation. However, a recent increase in number of such cases seems a good indicator to show that the law of medical malpractice has started taking roots in Pakistan under the influence of different jurisdictions. Thus, following Indian example, Pakistan has included medical services within the ambit of consumer protection laws. However, it is detestable to include medical services within the scope of consumer laws. It may lead to an acceptance to the element of consumerism in the field of medicine, which is a noble profession to serve humanity rather than a business venture for the maximization of profit. *Sharī'ah,* on the other hand, provides basic guidelines regarding medical ethics and liability of medical practitioners in case of medical

malpractice that may be adopted in legal system of Pakistan. Moreover, its criminal law provides a complete tariff of monetary compensation for bodily harm. Pakistan can learn lessons from *Sharī'ah* and English law, in order to develop a comprehensively dedicated law on the given subject. Thus, this thesis suggests proposal for development of medical malpractice law for Pakistan in the light of *Sharī'ah* and English law.

# CHAPTER 1

# INTRODUCTION

## 1.1 Thesis Statement

Medical malpractice law in Pakistan is going through the process of development under the influence of legal developments in different jurisdictions, especially U.K and India, however, in borrowing from these systems the extraordinary traditions of medical ethics and practices, based on the noble *Sharī'ah* must be given an effective role in guiding the growth of this law in Pakistan.

## 1.2 Significance of the Research

Medical profession is considered as one of the noblest professions of the world. Despite the wealth and social prestige that this profession enjoys, it attracts a large number of complaints too from patients and their families. Sometimes these complaints are genuine and medical practitioners are liable for the damage caused to the patients. Medical malpractice is not only an issue of developing countries but of developed countries too. Every year thousands of precious humans' lives are lost due to the medical malpractice.

Statistics suggest that it is the third leading cause of death in U.S. According to the Journal of Patient Safety: "the numbers may be much higher — between 210,000 and 440,000 patients each year who go to the hospital for care, suffer some type of preventable harm that contributes to their death".[2]

[2] John T James., "A New, Evidence-based Estimate of Patient Harms", *Journal of Patient Safety* (2013):122-8.

According to the statistics of The National Audit Office in 2005, there are up to 34,000 deaths a year in the National Health Service (NHS) in United Kingdom due to medical errors.[3]

The figures are multiplying each year. Over the last five years the annual number of clinical negligence claims notified to "The National Health Service Litigation Authority Report and Accounts 2011-2012 (NHSLA)" has risen by 52 % from 5,697 in 2005/6 to 9,143 in 2011/2012.[4] Thus, payments of damages and legal costs rose significantly too.

Cases related to medical malpractice are dealt by courts under "Law of torts". This area is developed through interpretation and decisions of courts. It has reached to commendable maturity in United Kingdom although there are still some gaps that need to be filled and some confusion to be cleared. United States and India too have its roots in the law of torts of England although both countries have developed their own version through decisions of respective courts and interpretation of judges.

Unfortunately, Pakistan lags behind in delivery of healthcare. Being former British colony, its basic structure is very similar to NHS but this extensive infrastructure is not translated in delivery of good healthcare due to the lack of political will, supervision, poor legislation and bad implementation. Therefore, number of cases of medical malpractice is very high and many go unreported.

Law of torts is to be invoked in case of medical malpractice in Pakistan too. Pakistan's courts often quote decisions of English courts and give their interpretation too.

[3] National Audit Office, *A Safer Place for Patients: Learning to improve patient safety,* 2005.

[4] The National Health Service Litigation Authority Report and Accounts 2011-2012, p. 11, http://www.official-documents.gov.uk/document/hc1213/hc02/0215/0215.pdf

Unfortunately, law of Torts is not a very developed area in Pakistan. Consequently, there are few cases in the entire history. However, recent increase in number of cases is a good indicator that shows that the law of medical malpractice has started taking roots in Pakistan under the influence of different jurisdictions, especially developments in India. For Instance, after courts of India decided that medical services are included in the jurisdiction of consumer courts and Consumer protection Act is applicable on medical services too, Pakistan included it in Consumer protection Act as well. These influences are likely to continue well into the future, however, in borrowing from these systems the extraordinary traditions of medical ethics and practice based on the noble *Sharī'ah* must be given an effective role in guiding the growth of this law in Pakistan.

There is concise guidance on the said subject in classical books of *Sharī'ah.* Contemporary scholars further updated that knowledge in the light of modern system and cases.Therefore *Sharī'ah,* has wealth of knowledge that can guide on this subject. Researcher has chosen three topics for this thesis:

1. Medical malpractice and liability in *Sharī'ah.*
2. Guidance of *Sharī'ah* for the practice of medicine through legal maxims.
3. System of indemnification from the section of *Qiṣāṣ* and *Diyah.*

In the light of above facts, researcher has strived to revisit *Sharī'ah* and highlight the traditions and rulings regarding medical malpractice and discussed the laws of various foreign legal jurisdictions. Researcher has analyzed the influence of these laws in Pakistan and made humble endeavor to present comprehensive overview and proposed amendments to improve the legal scenario of malpractice and damages in Pakistan.

This thesis consists of six chapters. Chapter one is an introductory section which is comprised of the background and objective of the research, thesis statement, literature review, research methodology and outlines of the chapters.

Chapter Two encapsulates the concept of liability of medical practitioners in English Law, U.S and Indian Law. English Law, being the mother law, is dealt.

Chapter Three focuses on Pakistan. This portion throws a glance over the prevailing healthcare system and the laws regarding medical malpractice.

Chapter Five is related to *Sharī'ah.* Topics of liability and monetary compensation for medical malpractice are discussed in this chapter.

Chapter Six is regarding the general principles to seek guidance from the noble *Sharī'ah* to be practiced in modern healthcare and legal system. The discourse regarding legal maxims is consulted for the said purpose. As an example of application of legal maxim on the issues of practice of medicine, three contemporary issues: assisted conception techniques, abortion and organ donation are discussed.

Research is concluded with a final chapter of recommendations and suggestions. Main focus is on suggestions for legislation in Pakistan in the light of *Sharī'ah* and various legal jurisdictions.

## 1.3 Research Questions

1. What is the current law related to medical malpractice in United Kingdom, U.S and India and how is it influencing Pakistan's law?

2. How much Pakistani law related to medical malpractice is adequate and what changes are made in it after following laws of above-mentioned jurisdictions and what further changes are needed?
3. What is the guidance of noble *Sharī'ah* on the said subject and how Pakistan can learn and develop its law by giving *Sharī'ah* an effective role in guiding the growth of this law?
4. What are the main principles of *Sharī'ah* to avoid medical malpractice? How does *Sharī'ah* guide the medical professionals to make decisions about treatment, in order to avoid the liabilities of malpractice?

## 1.4 Objectives of the Research

The objectives of this research are:

1. To analyze the current law related to medical malpractice in United Kingdom, U.S and India and how is it influencing Pakistan's law?
2. To assess the development of medical malpractice in Pakistan and the changes made in it after following laws of above-mentioned jurisdictions?
3. To investigate the general principles of noble *Sharī'ah* regarding liability in case of medical malpractice in order to extract fruitful recommendations for Pakistan; and to propose effective legislation to minimize medical malpractice cases and mitigate patient's sufferings.
4. To explore the application of the general rules of *Sharī'ah* related to the medical professionals to make decisions about treatment, in order to avoid the liabilities of malpractice?

## 1.5 Research Methodology

This study is exploratory in its nature. Emphasis is given on the discovery of insights to formulate specific solutions for identified problem. Majority of findings are based on the survey of literature and analysis of selected cases reports. The data has been collected from both sources i.e. primary & secondary. Research on *Sharī'ah* was based upon *Qur'ān, Sunnah* and the *Āthār* of Prophet's companions. Works of classical and modern Muslim jurists were revisited. Books, articles, Statutes, reports and cases decided by learned courts were examined to get a clear picture of healthcare and legal systems of Pakistan and foreign jurisdictions.

The published data was analysed to find out what was already known about this topic, identify gaps in the literature, define areas of weakness, identify trends in research activity and develop ideas to provide recommendations and draw conclusions.

## 1.6 Literature Review

After reading classical texts, it is evident that fuqahā'were aware of issues related to medical malpractice and resulting liability. However, most of them didn't make it a distinct heading; rather covered under different topics, mostly under "Ajīr al-Mushtarak". Some glimpses of such books are mentioned below:

For example, Ḥanafī scholar Sarakhasī[5] wrote about this in his book *"al-Mabsūt"* under the topic "*Bāb Mā Yaḍman Fī Hī al-Ajīr*". Another Ḥanafī scholar Zain al-dīn Ibn

[5] Abū Bakr Muḥammad ibn abū Sahl al-Sarakhasī, *Al- Mabsūt,* vol. 16 (Beirut: Dār al-Ma'rifah, 1978), 10-12.

Nujaim[6] mentioned the liability of medical practitioners under the topic of "*Bāb Ḍamān al-Ajīr*". Ibn 'Ābidīn[7] too mentioned it under the topic of "*Bāb Ḍamān al-Ajīr*".

Mālikī Jurists Ibn Rushd[8] dealt this issue under the topic of "*Kitāb al-Diyyāt*". Another Mālikī Jurists Ibn Juzey inscribed about it in his book "*al-Qawānīn al-Fiqhiyyah*" under the topic of "*Mūjibāt al-Ḍamān*"[9]. Dusūqī[10] touched this area under the heading of "Ḥadd al-Shārib".

Shāfi'ī mentioned it in his book "*al-Umm*[11]" as a sub heading under "*Tabi' al-Jinayyāt*". Ḥanbalī scholar Ibn Qudāmah mentioned this notion under the topic "*al-Ajīr al-Khāṣ*" in his famous book "*al-Mughnī*,[12]"

Ibn al-Qayyim stands out among other jurists in this regard. He dedicated a chapter about the liabilities of doctors in his book "*Zād al-Ma'ād*"[13] and wrote about Prophetic medicine. He mentioned different categories of doctors and gave verdict accordingly.

Contemporary Muslim scholars wrote extensively on the topic of doctors, medical errors and liability of medical practitioners. Dr Aḥmed Sharfuddīn wrote about doctor's liability and medical errors in his book "*Al-Aḥkām al-Shar'īayah lī al-'Amāl al-Ṭibbīyah*"[14]. He

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[6] See Zain al- dīn ibn Nujaim, *Al- Baḥr al- Rā'iq Sharḥ Kanz al- Daqā'iq*, vol. 8 (Dār al-Kitāb al-Islāmī), 33

[7] See Muḥammad Amīn Ibn 'Ābidin, *Ḥashiyat Ibn 'Ābdin: Radd al-Muḥtar 'ala al-Durr al-Mukhtar Sharḥ Tanwīr al-Abṣār*, vol. 6 (Beirut: Dār al-Fikr, 1992), 69.

[8] Abū al-Walīd Muḥammad ibn Aḥmad ibn Muḥammad ibn Rushd al-Ḥafīd, *Bidāyat al-Mujtahid wa Nihāyah al-Muqtaṣid*, vol. 4 (Cairo: Dār al-Hadīth, 2004), 200.

[9] See Abū al-Qāsim Muḥammad ibn Aḥmed Ibn Juzey, *al-Qawānīn al-Fiqhiyyah*, vol.1 (Beirut: Dār al-fikr), 221.

[10] See Muḥammad ibn Aḥmed Dusūqī, Ḥashiyah 'alā al-Sharḥ al-Kabīr, vol. 4 (Dār al-fikr), 355.

[11] Muḥammad ibn Idrīs al--Shāfi'ī, *al-Umm*, vol. 6 (Beirut: Dār- al Ma'rifa: 1990), 190

[12] Muwafffaq al- Dīn Abū Muḥammad 'Abd Allāh ibn Qudāmah al-Maqdisī, *Al-Mughnī*, vol. 6, (Cairo: Maktabah al-Qāhirah: 1968), 390.

[13] Muḥammad ibn Abū Bakr ibn al-Qayyim al-Jawziyyah, *Zād al-Ma'ād fī Hadyī Khaīr al-'Ibād*, vol. 4 (Beirut: Mu'assasah al-Risālah, 1994), 129.

[14] See Aḥmed Sharfuddīn, *Al-Aḥkām al-Shar'īayah lī al-'Amāl al-Ṭibbīyah* (Egypt: n.p, 1987).

discussed in detail conditions for permission of treatment of patients. He categorized these conditions into conditions related to the permission of *Sharī'ah* and conditions related to permission of patient. He asserted that failing to meet these conditions will create liability of doctors with respect to the medical error committed and harm caused to the patients. He not only expounded the liability but mentioned the compensation in both direct and indirect harm. Besides it, he dedicated a portion of book for legal maxims related to the field of medicine, kinds of rights in human body and soul; lastly, he discussed some contemporary medical issues.

'Abd al-Fattāḥ Meḥmood Idrīs[15] wrote a comprehensive book *"Qaḍāyāh Ṭibbīyyah Min Manẓūr al-Islāmī"* on the topic of medicine. He divided the book into three chapters. First chapter deals with general guidelines for doctors. He discussed issues like treatment of male by female and vice versa, treatment by prohibited objects and treatment of non-Muslims. Second chapter is regarding liabilities of medical practitioner. In this chapter he discussed those conditions which discharge him from liability and the conditions that makes a medical practitioner liable and explained the concept of *'Aqilah* or insurance company for payment of compensation. Third chapter deals with some discussion about precarious diseases like aids. He discussed different legal issues related to it, like right of wife to seek divorce and abortion of child.

Muḥammad al-Mukhtār wrote a comprehensive book exclusively on the topic of surgery by the name of *"Aḥkām al-Jarāḥah al-Ṭibbīyyah wa al-Athār al-Muratbah 'Alaih"*[16]. First

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[15] See 'Abd al-Fattāḥ Meḥmood Idrīs, *Qaḍāyāh Ṭibbīyah Min Manzūr al-Islāmī*, (Egypt: n.p, 1993).

[16] See Muḥammad al-Mukhtār, *"Aḥkām al-Jarāḥah al-Ṭibbīyyah wa al-Athār al-Muratbah 'Alaih"* (Jeddah: Dār al-Saḥābah, 1994.)

chapter is dedicated for the introduction. Under this topic, writer has explained the meaning, history and legitimacy of surgery. He elaborated the conditions for permission of surgical procedures. He divided surgeries into two categories; permitted and prohibited. Fourth chapter deals with the liability of medical practitioners related to surgeries. He separately mentioned the kinds of liabilities for example Moral liabilities, Professional Liabilities. In addition to this he mentioned the law of evidence for establishment of liability of doctors.

*Fiqh al-Qaḍāyyāh al-Ṭibbīyyah al-Mu'āṣrah*[17] is a comprehensive book on contemporary medical issues and dealt with a number of contemporary fiqhi questions. Writer has laid down the foundation by first mentioning the concept of treatment and Islamic perspective regarding diseases and its medicine. One of its parts is dedicated for medicine, Medical Practitioners, its conditions and etiquettes. It gives good knowledge about contemporary fiqhi issues but does not speak about liability in detail.

As it is a comparative study, legal texts of western writers are very beneficial and important for the up taken research work. Many reports have been very insightful regarding medical malpractice cases of western world.

Institute of medicine published a report by the name of *"To Err Is Human: Building a Safer Health System"*[18]. The report gives the statistics of preventable medical errors and gives many recommendations through which health care system, government and medical practitioners can reduce preventable medical errors. Report suggests that these

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[17] See 'Ali Mohyīuddin al-Qurradaghī and 'Alī Yūsaf al-Muḥammad, *Fiqh al-Qaḍāyyāh al-Ṭibbīyyah al-Mu'āṣrah*, (Beirut: Sharikah Dār al-Bashāir Islamīyyah, 2006)

[18] Linda T. Kohn and Others, *To Err Is Human: Building a Safer Health System* (Washington D.C: National Academy Press, 2000)

institutions should set a goal of minimizing preventable medical errors by 50 percent in next five years.

*"Clinical Negligence Annual Report 2012"*[19] is a very informative report about National Healthcare System of United Kingdom. This report reveals the statistics of clinical negligence claims and the payment made in this regard. Besides data, it discussed hot legal topics and major legal issues too.

William O Robertson wrote a comprehensive book *"Medical Malpractice: A Preventive Approach"*[20]. In this book he has tried to touch all those issues that are related to mal practice. For example, failure to inform of material risk, failure to obtain consent, failure to diagnose, surgical complications, errors in the usage of drugs, failure to transmit lab results are among such topics which are discussed in this book.

*"Medical Malpractice: A Comprehensive Analysis"*[21] is a helpful book that not only gives an insight to the scenario of Medical mal practice but also informs about the tort reforms and its impact. According to the writer, there is a consensus among the health care service providers, consumers and lawyers that United States is facing too many issues related to medical malpractice and liability issues but as far as litigation is concerned medical practitioners are of the view that litigation is far more than it ought to be while lawyers claim that they are insufficient. Writer has analyzed different tort reforms that has been made in some states and scrutinized its impact on costs, the supply of physicians, disciplinary action.

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[19] Penningtons Solicitors LLP, "*Clinical Negligence Annual Report 2012*, United Kingdom.

[20] William O Robertson, *Medical Malpractice: A Preventive Approach,* (University of Washington Press, 1985)

[21] Vasanthakumar Bhat, *Medical Malpractice: A Comprehensive Analysis,* (Greenwood Publishing Group, 2001)

B. Sonny Bal wrote an article by the name of *"An Introduction to the Medical Malpractice in United States*[22]". In this article he stated the origin of the medical malpractice litigation in U.S and briefly enlighten about the current procedure of litigation. He claims that the United States has an adversarial system of adjudication of medical malpractice claims, similar to the method of resolving other civil disputes. In his opinion: "the complexity and incidence of healthcare delivery, injuries, and adverse outcomes require a system of patient redress that is equitable, fair, economical, and just". It is a good article that reveals the litigation and justice system related to medical mal practice but does not provide any recommendation for correction of the system.

Thomas May and Mark P. Aulisio's *Medical Malpractice, Mistake Prevention and Compensation",* [23] inscribed the importance of reporting of medical mistakes. He asserted that, "without open reporting of medical mistakes, however, root cause analysis of mistakes cannot be done, thus undermining efforts to implement safeguards to minimize the occurrence of future mistakes". According to him, physician's fear of litigation to prevent reporting of medical errors and thus leading to a system where root causes of errors can't be caught and thus remain uncured.

Regarding English law, most important book for this thesis is Michael A. Jones's *"Medical Negligence"*[24]. It is a very detailed book that shed light upon all aspects of medical malpractice in U.K. Basically, written for lawyers, it is a bit technical. It is difficult for lay persons to understand. Writer deals with some points in great detail but

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[22] B. Sonny Bal. "An Introduction to Medical Malpractice in the United States", *Clinical Orthopedics and Related Research* 467, no. 2 (2009): 339-347

[23] Thomas May and Mark P. Aulisio, "Medical Malpractice, Mistake Prevention and Compensation", *Kennedy Institute of Ethics Journal*, Volume 11, Number 2, June 2001, pp. 135-146

[24] Michael A. Jones, *Medical Negligence* (London: Sweet & Maxwell, 2010)

leaves open—ended without any conclusion. It leaves the reader confused. As a whole, it is a great book to understand medical malpractice in England.

Another important book is "*Medical Law and Ethics*"[25] by Jonathan Herring. It is a very comprehensive book on medical law and ethics. One chapter related to medical malpractice. Writer has very precisely covered the topic of medical malpractice. Basically it is written from litigation point of view. Sometimes, a reader feels like an inappropriate comprehensiveness and feels a thirst to know more. Overall, it's a good read on the said subject.

Emily Jackson's "*Medical Law: Text, Cases, and Materials*"[26], is a valuable book on the said subject. Book is up to date. Like previous book, it is a general book on medical law. A chapter deals with medical malpractice. Writer has elucidated every point with clarity. It is very easy to understand as it is in a very clear language and every point is concluded and reader is given a clear concept.

Dr Sania Nishter's "*Choked Pipes: Reforming Pakistan's Mixed Health System*"[27] is a good insight to the healthcare system of Pakistan. Although it is a valuable book, but it badly needs to be updated. Pakistan's healthcare system has undergone many changes, but book has not been updated accordingly. For Pakistan's legal system, Researcher has mostly relied upon Statutes, Case Laws and reports.

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[25] Jonathan Herring, *Medical Law and Ethics* (Oxford: Oxford University Press, 2012)

[26] Emily Jackson, *Medical Law: Text, Cases, and Materials* (London: Oxford University Press, 2013)

[27] Dr Sania Nishter, *Choked Pipes: Reforming Pakistan's Mixed Health System* (Karachi: Oxford University Press, 2010)

The above review of the literature reveals that although much has been written on the topic but after the humble endeavors, researcher is unable to find a single piece of research where the writer would have scrutinized the influence of legal developments of different western jurisdictions upon Pakistan and evaluated the compatability of *Sharī'ah* with those developments for the purpose of proposing a law for Pakistan. Therefore this research is conducted to analyze the existing laws in western jurisdictions regarding malpractice and to scrutinize its effects on Pakistan's Laws and examine compatibility of *Sharī'ah*.

# CHAPTER 2

# MEDICAL MALPRACTICE & LIABILITY IN FOREIGN JURISDICTIONS

Malpractice is defined as: "Professional misconduct or unreasonable lack of skill".[28] Thus medical malpractice is professional misconduct or unreasonable lack of skill by medical practitioners in the field of medicine. At present, medical malpractice is not only an issue of developing countries but of developed countries too[29].

The concept of liability for medical malpractice is developed over the centuries. The legislative measures throughout the history in this regard are significant for the present study. Moreover, it is pertinent to analyze that how did the developed countries like U.K and U.S regulate the issues of medical malpractice? And how did developing countries more specifically in the neighborhood, like India[30], is dealing with this burning issue?

Therefore, this chapter discusses the historical development of the concept of medical malpractice; and the liability of medical practitioners in English, U.S and Indian Law. English Law, being the mother law, is dealt in detail than others.

[28] Black's Law Dictionary, 5th ed., s.v. "Malpractice". The concept will be elaborated with sufficient detail in the next part.

[29] Please see above para 1.1

[30] Pakistan, being a developing country, can learn a lot by analyzing the measures taken by developing country in neighbourhood.

## 2.1 Medical Malpractice Law: A Historical Overview

The concept of liability of medical practitioners is not recent rather its quite ancient and can be traced back to the 2030 BC to the Code of Hammurabi[31] which stated that "if a physician make a deep incision upon a man with his bronze lancet and cause the man's death, or operate on the eye socket of a man with his bronze lancet and destroy the man's eye, they shall cut off his hands."[32]. This clause of Code of Hammurabi indicates that the physician must be penalized by cutting off his hands that caused harm to the patient during his treatment and as a result, patient died or lost his eye, thus making him liable for the loss of the patient.

Likewise, Greeks too were not unaware of the concept of regulation and liability of medical practitioners. Hippocratic Oath attributed to the ancient Greek physician Hippocrates[33] is clear evidence that the ancient Greeks had concept of the duties of a medical practitioner and patient-doctor relationship. In the oath, the physician takes his vows that he will prescribe only beneficial treatments, according to his abilities and judgment and will refrain from causing harm or hurt. For the next two and half millennia, this oath has been adopted as a guide to conduct by the medical profession.[34] Plato[35] considered it obligatory to seek the consent of patient before prescribing any

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[31]Hammurabi was born in Babylon (Iraq). He was sixth and best-known ruler of the 1st (Amorite) dynasty of Babylon and reigned from 1792 till 1750 BC. He was noted for his surviving set of laws that was once considered the oldest promulgation of laws in human history. Please see: https://www.britannica.com/biography/Hammurabi

[32]J. M. Powis Smith, *The Origin and History of Hebrew Law* (New Jersey: The Law book Exchange, Ltd., 2005), code no. 218, 211.

[33] An ancient Greek physician (460 BC - 375 BC), regarded as father of the medicine. For details please see: http://www.britannica.com/biography/Hippocrates

[34]Charles Foster, *Medical Law: A Very Short Introduction* (Oxford: Oxford University Press, 2013), 2.

[35] "Plato, (born 428/427 BCE, Athens, Greece—died 348/347, Athens), ancient Greek philosopher, student of Socrates (*c.* 470–399 BCE), teacher of Aristotle (384–322 BCE), and founder of the

medicine and that too only after constructing full case history. Plato's disciple Aristotle[36] considered that physicians must not be judged by lay man rather their peers only[37].

The first written laws, of the ancient Romans on the XII Tables[38], provided the legal foundation for medical malpractice law. The concepts of *delicts*, *iniuria*, and *damnum iniuria datum* were enshrined in these Tables. *Delicts* were types of wrongful conduct that resulted in penalties. It was divided into two types: *Inuria* and *damnum iniuria datum*. *Inuria* referred to personal injuries that were intentionally caused. A person could be compensated for pain of mind or body as well as monetary expenses resulting from the injury. *Damnum iniuria datum* also included harm caused by negligent actions, but only mandated compensation for economic lossescaused by harm to property[39]. Same laws were to be applicable if a physician gave wrong medicine to the patient or left the patient unattended after operation.[40]

Roman law expanded and was introduced throughout continental Europe around 1200. As a result, it influenced the laws of many countries. Contemporary Laws regarding

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Academy, best known as the author of philosophical works of unparalleled influence." Please see for details:https://www.britannica.com/biography/Plato

[36] "Aristotle, Greek Aristoteles, (born 384 BCE, Stagira, Chalcidice, Greece—died 322, Chalcis, Euboea), ancient Greek philosopher and scientist, one of the greatest intellectual figures of Western history". For details:https://www.britannica.com/biography/Aristotle

[37]Dieter Giesen, *International Medical Malpractice Law: A Comparative Law Study of Civil Liability Arising from Medical Care* (London: BRILL, 1988), 3.

[38] "The earliest statute or code of Roman law, framed by a commission of ten men, B.C. 450, upon the return of a commission of three who had been sent abroad to study foreign laws and institutions. The Twelve Tables consisted partly of laws transcribed from the institutions of other nations, partly of such as were altered and accommodated to the manners of the Romans, partly of new provisions, and mainly, perhaps, of laws and usages under their ancient kings. They formed the source and foundation for the whole later development of Roman jurisprudence. They exist now only in fragmentary form. These laws were substantially a codification, and not merely an incorporation of the customary law of the people. There were Greek elements in them, but still they were essentially Roman". See Black's Law Dictionary, 5th ed., s.v. "Twelve Tables".

[39]Jeffrey O'Connell and Keith Carpenter. "Payment for Pain and Suffering through History" *Ins. Counsel J.*50 (1983): 411.

[40]Giesen, *International Medical Malpractice Law*, 3.

personal injury and medical malpractice of many countries have still their roots in Roman origin[41]. Roman law greatly influenced English common law too.

The first reported case of medical malpractice was decided in 1374 by Chief Justice John Cavendish of the Court of Kings Bench in England by the title *Stratton v. Swanlond.* The fact of the case states that a London surgeon named John Swanlond had treated the patient, Agnes of Stratton, for a mangled hand. She alleged that the said surgeon had guaranteed to cure her wound for a reasonable fee, but after his treatment the hand remained severely deformed. She and her husband sued for breach of contract. Although the surgeon was not held liable in the case due to an error in the writ of complaint, nonetheless, the learned Judge mapped out basic principles for medical malpractice. Justice Cavendish decided that a physician will be liable if his negligence caused harm to the patient. However, if the physician treated the patient with due diligence and tried his best to cure, yet he was unable, in this situation, he will not be held liable.[42]

Patients kept on bringing cases for medical malpractice for next many centuries. Decisions of the court entailed that not only the law of Torts were to be applied on the cases of medical malpractice but that of the contract too is applicable in such cases.[43]

Sir William Blackstone was the first to use the term "malpractice"[44] for professional negligence in the field of medicine, in the mid-eighteenth century. He explained the concept in his famous "Commentaries on the Laws of England" which he had written in

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[41] B. Sonny Bal. " An Introduction to Medical Malpractice in the United States", *Clinical Orthopedics and Related Research* 467, no. 2 (2009): 339.

[42] Robert I. Field, "The Malpractice Crisis Turns 175: What Lessons Does History Hold for Reform?" *Drexel University Law Review* 4, no. 7 (2011): 7.

[43] Giesen, *International Medical Malpractice Law*, 7.

[44] Black's Law Dictionary, 5th ed., s.v. "Malpractice".

1768. He used the Latin term "*mala praxis*" for the concept of professional negligence by medical practitioners which he defined as "...injuries...by the neglect of unskillful [sic] management of [a person's] physician, surgeon, or apothecary...because it breaks the trust which the party had placed in his physician and tends to the patient's destruction".[45]

Over the next centuries, Common Law[46] kept on growing and developing through the decisions of the courts and for deciding medical malpractice cases, English judges preferred the concept of "negligence" of Law of Torts than adjudicating it on the ground of contractual liability of medical practitioners[47]. However, it is suggested that it is a complex relationship that keeps on shifting between time and place and, to varying degrees, society, law, ethics, medical practice, health professionals, and patients[48].

Medical malpractice law in U.S is based on the English Law[49] as is the case in majority of American jurisprudence.[50] Therefore, the concept of "negligence" of law of Torts is to be invoked in the cases of medical malpractice in U.S[51]. Patients started suing the doctors for medical malpractice with regularity in the 1800s in United States. But these cases did

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[45] Wallace, R. Austin. "A Brief History of Medical Liability Litigation and Insurance" *West Virginia Medical Journal* 113, 5 (2017): 6.

[46] "As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England. The "common law" is all the statutory and case law background of England and the American colonies before the American revolution..." See Black's Law Dictionary, 5th ed., s.v. "Common Law".

[47] Giesen, *International Medical Malpractice Law*, 8.

[48] Kim Price, "Towards a History of Medical Negligence", The Lancet 375, 9710 (2010):192 - 193

[49] English common law forms the basis of jurisprudence in the United States because English settlers in America brought the common law with them and transplanted a homogeneous body of English law in American soil during the colonial period. Please See Morris L. Cohen, The Common Law in the American Legal System: The Challenge of Conceptual Research, *Yale Law Library Journal* 81, 13 (1989): 13-32.

[50] Austin. "A Brief History of Medical Liability Litigation and Insurance", 6-9.

[51] David M. Studdert and Others, "Medical Malpractice", *The New England Journal of Medicine* 350, no. 3 (2004): 283-292.

not caste a very strong impact on the field of medicine and medical practitioners did not consider malpractice case as a threat to their income or status[52]. The Boston Medical and Surgical Journal reported only three cases between 1812 and 1835. Likewise, the duration from 1790 to 1835 was a period of relative judicial safety for the doctors, and only rare cases appeared[53]. Till 1960s, situation remained same, but after that the number and frequency of medical malpractice claims have increased; and now the cases of medical malpractice against medical practitioners are quite common[54].

Like America, India was once a colony of British Empire. The conquest of British Empire began with the Bengal in the 1760s and was completed in mid-nineteenth century[55]. It lasted till 1947 when both states got independence. Therefore, the legal system of India too has its origin in Common Law and the concept of 'negligence' of law of Torts is to be sought for the redress of aggrieved party alongside some other avenues[56]. It has developed this concept through the decisions and interpretation of the courts of respective jurisdiction.

In the light of above fact, it is evident that Medical malpractice laws in English, American and Indian jurisdictions have its origins in English Common law. As mentioned earlier[57], Common law refers to law and legal systems that are developed through decisions of courts and judges, as opposed to laws developed exclusively through

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[52]Kenneth De Ville, *Medical Malpractice in Nineteenth-Century America: Origins and Legacy* (New York: NYU Press, 1992), 1.

[53] Robert I. Field, "The Malpractice Crisis Turns 175: What Lessons Does History Hold for Reform?," 7-39.

[54]B. Sonny Bal. "An Introduction to Medical Malpractice in the United States," 339.

[55]P. J. Marshall, *The Cambridge Illustrated History of the BritishEmpire* (Cambridge: Cambridge University Press, 2001), 358.

[56]Amit Agrawal, Medical negligence: Indian legal perspective, *Ann Indian Acad Neurol.* (2016); 19(Suppl 1): S9–S14. doi: 10.4103/0972-2327.192889

[57] Please see above footnote 50.

legislative statutes or executive decisions, therefore medical malpractice law too is mostly developed through the decisions of courts, thus it varies from jurisdiction to jurisdiction although the basic principles remain same. As all three jurisdictions have its origin in English Law, it sounds apt to discuss it in detail.

## 2.2 Medical Malpractice & Liability in English Law

National Health Service (NHS)[58] of UK has been declared as the best, safest and most affordable healthcare system out of 11 countries analyzed and ranked by experts from the influential Commonwealth Fund health think-tank[59]. Although it strives hard to ensure quality care and high standard of health but despite these steps, medical negligence claims have a good share in NHS funding.

For the year 2016, more than one billion was paid by NHS to the patients for negligence claims[60]. The NHS Litigation Authority, responsible for indemnifying the service against legal action had set aside £26.1bn to cover its existing and future liabilities - almost one quarter of the £113bn annual health budget in February 2015[61]. In 2014, over £1.3bn was paid out to cover medical negligence claims alone. Thus, no Healthcare system can be perfect and without malpractice litigation and claims. Every good healthcare system not only has good structure and services but ought to have good legal system too for redresses of patient's claim.

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[58] National Health Service (NHS) came into being as a repercussion of Second World War. It became functional on July 5th, 1948 when health secretary Aneurin Bevan opens Park Hospital in Manchester. All medical practitioners and staff i.e. hospitals, doctors, nurses, pharmacists, opticians and dentists came together under one umbrella organization for the first time for the medical services that were intended to be free for all. The central idea was to establish a health care service that will be provide services to all and funded entirely from taxation, thus all people would not spend equally for gaining health services rather they will spend according to their means

[59] https://www.theguardian.com/society/2017/jul/14/nhs-holds-on-to-top-spot-in-healthcare-survey (accessed july 14, 2017)

[60] The figures from NHS Resolution show £1.7bn in total on negligence claims - with almost £700,000 spent on lawyers. The total figure has almost doubled since 2010/11, the statistics show.http://www.telegraph.co.uk/news/2017/07/13/record-nhs-negligence-payouts-fuelled-maternity-blunders/(accessed July 13, 2017)

[61] http://www.telegraph.co.uk/news/health/news/11402075/NHS-sets-aside-quarter-of-its-budget-for-medical-negligence-claims.html (accessed April 2nd, 2015)

The ideal standard which a doctor ought to maintain, while treatment of patient, in order to avoid malpractice cases, is set not by law but the practice of medical profession itself. Its practice along with medical ethics determines the nature of relationship between doctors and patients. Law provides only the structure within which doctor patient relationship is conducted, leaving ideal standards to the profession.[62]

Rules of Tort, Equity and contracts determine the professional liability of medical doctors in United Kingdom[63]. Tort of negligence is invoked in large numbers of cases[64] while contractual liability is pleaded in private sector cases as treatment under NHS[65] is not provided under a contract, therefore contract law is applicable on private treatment.[66] In practice, there is not much difference between the obligation of the doctors practicing in NHS or working in private sector. All medical practitioners are required to exercise reasonable care during diagnosis, advice and treatment and to keep personal information of patients confidential.[67]

As mentioned earlier, there is no contract between doctor and patients in NHS. General Medical Services Regulations 1992[68] negated any kind of contractual relationship, case laws further affirmed that. For example, *Reynolds v The Health First Medical Group*[69]

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[62] Jones, *Medical Negligence*, 67.

[63] Ibid.

[64] Richard Goldberg, Medical Malpractice and Compensation in UK, *Chi-Kent.L.Rev* 87, (2012): 131-161.

[65] Although there is some private sector health care too in United Kingdom but majority of the health care provisions are by National Health Service (NHS) that is a public health service. Goldberg, Medical Malpractice and Compensation in UK, 131-161.

[66] Rogers, "Medical Liability in England", 186.

[67] Jones, *Medical Negligence*, 67.

[68] National Health Service (General Medical Services Contracts) Regulations 2004 and the National Health Service (Personal Medical Service Agreements) Regulations 2004 replaced these regulations.

[69] Reynolds vs. The Health First Med. Group, (2000) Lloyds' Rep. Med. 240 (Hitchin County Court)

where plaintiff brought her claim in contract and not in tort of negligence as she couldn't win the case in negligence. She wanted to avoid the precedent of *Mcfarlane v Tayside Health Board*[70] where court has decided that under tort of negligence, financial costs of raising a healthy child is not recoverable. It was argued that Doctor's remuneration is increased when a patient's name is added to his lists which should be deemed as consideration on the part of the patient. This argument was rejected, and it was declared that there is no contract between a patient and the doctor in NHS.

### 2.2.1 Contract

In private setup, doctors and patients do enter into a contract and thus patients can sue their doctors if they breach any term decided by the contract, however the doctor can be sued for both contract and tort as the doctor is not only duty bound because of the contract but owes a concurrent duty in tort too[71]. If a doctor enters into a contract to perform the operation and agrees to give his personal attention, in this situation he will be liable if he doesn't operate personally and didn't pay subsequent necessary visits and delegate the performance of operation to someone else[72].

Doctors in NHS too are duty bound to treat personally due to the contract of employment. However, patients will not be able to sue them if doctors didn't treat personally and delegate it someone else. Health authority can put restrictions on such deputizing.

Another important question with respect to contract is regarding warranty. Theoretically, doctors can give warrantees, but courts will be slow in inferring such guarantee in the

[70]Mcfarlane vs. Tayside Health Board (2000) 2 A.C. 59
[71] Jones, *Medical Negligence*, 74.
[72]Ibid., 76.

absence of any express terms[73]. Two cases are important in this regard. In *Eyre v Measday*[74] court of appeal held that where the patient wanted to undergo sterilization[75]and doctor had explained its irreversible nature but didn't warn her of less than 1 percent risk of pregnancy, in this case it was not reasonable for her to conclude that doctor had given her a guarantee that she would be absolutely sterile.

Likewise, in *Thake v Maurice*[76] where patient underwent vasectomy[77] operation, doctor had given a graphic demonstration about the nature of the procedure and its effect but fail to give its warning that there is a slight chance of claimant being fertile again. The court of appeal held that doctor hadn't guaranteed because medicine is an inexact science and results are unpredictable. The learned judge said that a doctor cannot be objectively regarded as guaranteeing the success of any operation or treatment unless he says as much in clear and unequivocal terms[78].

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[73] Jackson, *Medical Law*, 103.

[74]Eyre vs. Measday (1986) 1 All E.R. 488

[75] Sterilization is a usually permanent method of contraception in which the fallopian tubes are sealed in order to prevent sperm reaching the ova. The procedure is done by various surgical techniques, usually under general anesthesia. See http://www.nhs.uk/conditions/contraception-guide/pages/female-sterilisation.aspx

[76]Thake vs. Maurice (1986) QB 644

[77] Vasectomy is an operation that makes a man unable to make a woman pregnant. It is a procedure in which the two tubes that carry sperm from the two testicles to the urinary tract are surgically altered so sperm cannot pass through and be released to fertilize a woman's egg during sexual intercourse. See http://www.emedicinehealth.com/vasectomy/article_em.htm; http://www.medicinenet.com/script/main/art.asp?articlekey=23219.

[78] Jones, *Medical Negligence*, 78-9.

### 2.2.2 Law of Torts

Most patients in England are required to bring their cases of medical malpractice in negligence.[79] And the entire test of committing medical negligence is woven into the very fabric of tort.[80]

#### 2.2.2.1 Negligence

Medicine is not only a science; it is also an art.[81] Thus sometimes this art may go wrong. But it doesn't necessarily entail that doctor was negligent. In order to prove that doctor committed malpractice, a patient must establish three things:

1. Defendant has a legal duty to care;
2. Defendant breached that duty;
3. Breach of duty resulted in damage to the claimant[82].

#### 2.2.2.2 Duty of Care

Duty to care is the principal control device for deciding the reach and extent of liability for negligence. There must be a legal relationship between the parties that make the doctor bound to take reasonable care[83]. It is absolutely clear within the doctor patient relationship that doctor owes a duty to care but sometimes it is blur when does this duty arises. For example, in case of accident, there is no legal obligation upon a doctor to

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[79] Herring, *Medical Law and Ethics*, 105.

[80] Marc Stauch, *The Law of Medical Negligence in England and Germany* (Oregon: Hart Publishing, 2008), 27.

[81] S.A.M Mclean and J.K Mason, *Legal & Ethical Aspects of Healthcare* (London: Greenwich Medical Media Limited, 2003), 71.

[82] Rogers, "Medical Liability in England", 173.

[83] Mclean and Mason, *Legal & Ethical Aspects of Healthcare*, 73

render his treatment to a stranger[84] who has met an accident[85]. It is important to determine when the status of a person changes from stranger to patient. In English Law, a doctor who chooses to treat a patient has assumed the responsibility. Now he owes a duty to care[86].

Thus, a duty to care arises when a doctor stops at an accident to rescue the victim, but the expected standards wouldn't be same. Level of treatment at roadside accident will be lower than the level in hospital with all facilities[87]. Likewise, general rule for the one who extends his offer to treat a patient is that he comes under the same duty of care even he does not possess the relevant qualification, expertise or skill because by offering, he represented as though he possesses same qualities.[88] But the rules will be different in case of an emergency. A trained volunteer who is competent to render first aid will be judged according to that extent. When he offered first aid help in an accident, the standard of care required from the volunteer will be of skilled first aider and not that of a doctor.[89]

In hospitals, a duty of care may arise where a patient has presented himself for treatment in hospital causality department, before he could be seen by the doctor. This ruling was given in the case of *Barnett vs. Chelsea and Kensington Hospital Management Committee.*[90] Three night-watchmen drank tea but discovered that it contained arsenic.[91] As a result, they started vomiting and went to causality department of Kensington

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[84] Stranger here means a person with whom that specific doctor has never had any doctor patient relationship.

[85] Although it is a rigid rule, but it can be relaxed in certain medical emergency cases.

[86] Emily Jackson, *Medical Law*, 104.

[87] Mclean and Mason, *Legal & Ethical Aspects of Healthcare*, 73

[88] Michael A. Jones, *Medical Negligence*, 88.

[89] Ibid., 89.

[90] Barnett vs. Chelsea and Kensington Hospital Management Committee (1969) 1 QB 428

[91] A chemical element that is very poisonous often used to kill rats. http://dictionary.cambridge.org/dictionary/british/arsenic

Hospital. The nurse on receiving these patients, called the doctor who was on duty at that time. Dr. Banergee when heard the details, asked nurse to tell them to go home and call their own doctors. Patients died of arsenic poisoning some hours later. Learned judge decided Dr. Banergee had owed the duty to care.[92]

Similarly, a person is GP's patient when he is accepted on his patient's list even if he has never seen him in person. And he will be obliged to treat the patients even if they are not on the list in case of emergency. But situation is uncertain regarding consultants. General Practitioners refer patients to consultant. It is not clear when the patient –doctor relationship starts. When the consultant accepts or when he actually provides consultation. Termination of relationship is also vague. GP refers a patient to a specialist for an illness of his domain. He should not be liable for not treating the illness out of his specialization. And orthopedic surgeon who is specialist of bone cannot be held liable for not diagnosing and treating heart disease.[93]

#### 2.2.2.2.1 Extent of Duty of Care

In ordinary circumstances, doctor's negligence results in the harm to the patients and thus they are sued for the injuries caused to the patients. However, there are certain situations where doctors are sued for harming non-patients. Claims are that the third party has faced harm due to the negligence of doctors in treatment of their patients[94]. These situations can be broadly categorized under following headings:

A. Wrongful Pregnancy

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[92] Jackson, *Medical Law*, 105.
[93] Jones, *Medical Negligence*, 91.
[94] Claudia Carr., *Unlocking Medical Law and Ethics* (New York: Routledge, 2013), 20.

B. Psychiatric Harm

C. Financial Loss

D. Failure to Prevent the Patient from Causing Harm

E. Medical Examinations

#### *2.2.2.2.1.1 Wrongful Pregnancy*

Negligence of medical staff may result into the birth of children in variety of situations where parents had or would have preferred not to have them.[95] For instance, where patients didn't want children and opted for sterilization procedure but it resulted into a failure or doctors failed to inform that there is a risk of pregnancy even after sterilization procedure. Or where mother decided termination of pregnancy but doctor negligently did abortion or where they didn't inform the parents about the fetus abnormalities. Claims in such situation are brought in the name of "wrongful birth". Claims for negligence committed before conception is known as "wrongful conception" while claims for negligence after conception but before birth is known as "wrongful birth"[96]. Nature of negligence is different in both circumstances; however same rules applies in both cases and practically there is no difference between the two in terms of redress.

If a patient faced 'wrongful conception', there will be three possibilities:

a. **She might miscarry:** In this situation she would claim for pain and suffering.
b. **She decides for abortion**: Costs of abortion, pain and suffering plus loss of income will be contested.

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[95]Rachael Mulheron, *Medical Negligence: Non-Patient and Third Party Claims* (Surray: Ashgate Publishing, Ltd., 2013), 238.

[96] Jones, *Medical Negligence*, 97.

c. **She gives birth to a healthy child:** Claims will be for cost of child birth and child rearing cost.

Judgments of English courts and legal rules under went many changes regarding wrongful pregnancies and birth. Initially courts were reluctant to grant damages for failed sterilization and birth of a health child[97]. But the issue was re-evaluated in the case of *Emeh vs. Kensington and Chelsea and Westminster Area Health Authority*[98]. In this case Court of Appeal reasoned that sterilization procedure is lawful and there is no reason on policy ground to deny the right of claimant for financial loss because of negligent sterilization procedure performed by defendant. This matter was re-considered in later cases. For example, in Scottish case *Mcfarlane vs. Tayside Health board*[99], where a male claimant underwent sterilization. After the procedure medical practitioner negligently told him that he is completely sterile. Believing this statement, the couple stopped using contraceptive methods and as a result, wife of claimant became pregnant and gave birth to a healthy child. Claim for child rearing cost by claimant was rejected by the learned court on following grounds:



a. Responsibility for economic loss is not assumed by the doctor and it is not just to make him liable.
b. Such losses can't be recovered according to the principles of distributive justice.
c. Child rearing cost spent by parents is far less than the incalculable benefits that parents will enjoy because of the child.
d. Law should treat the child as a blessing not a damage.

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[97]Please see: *Udale vs. Bloomsbury Area Health Authority* (1983) 2 All E.R.522.
[98](1985) Q.B. 1012.
[99](2000) 2 A.C.59.

Thus, this case maintained that child rearing cost for negligent sterilization is not recoverable under English Law. However, claims for the damage suffered by mother were accepted. General damages for the inconvenience, discomfort and pain of unwanted pregnancy and birth and special damages for medical expense of pregnancy, delivery and loss of earnings were granted to her.

While loss of earning due to pregnancy is recoverable but loss of earning due to leaving the work to look after the baby is not recoverable. Court of appeal in the case *Greenfield vs. Irwin*[100] considered the loss of earning tantamount to child rearing cost.

The case of wrongful pregnancy resulting in disable child is a bit different. In the case of *Parkinson v St. James and Seacroft University Hospital NHS Trust*[101], the court of appeal decided that claimant was entitled to additional cost of child rearing due to the disability. Whereas disabled mother was not entitled to extra costs of raising a child. She had severe visual impairment and wanted to get sterilization as she considered herself unable for looking after a child.[102] But she got pregnant after negligent sterilization. It was held by House of Lords in the case *Rees v Darlington Memorial Hospital NHS Trust*[103] that she was not entitled to damages for the extra cost of raising the healthy child due to her disability. House of Lords reasoned that where ever a healthy child is born, the rules in *Mcfarlane* case would apply irrespective of the mother's disability. Although mother

[100](2001) EWCA Civ 113.
[101](2001) EWCA Civ 530.
[102]Jones, *Medical Negligence*, 104.
[103](2003) UKHL 52.

couldn't get extra cost however she was awarded £ 15000 for the loss of freedom to limit the size of their family[104].

#### *2.2.2.2.1.2 Psychiatric Harm*

Sometimes relatives or someone closely related to the patient develop a psychiatric injury because they witness negligent medical treatment[105]. Courts don't tend to impose such liability on doctors where psychiatry injury is caused to a third party. Case Laws have formed certain rules in order to succeed in such claims. These three elements are:

1. Claimant must establish that he has a close relationship with the primary victim and he is close to her in time and space and
2. He has witnessed the trauma with own unaided senses and
3. Psychiatric illness was caused due to witnessing the said event. There should be a link between witnessing the event and harm caused. [106]

These principles[107] were developed in the cases *Alcock vs. Chief Constable of South Yorkshire Police*[108] and *White vs. Chief Constable of South Yorkshire*[109]. These were not cases of medical negligence however they are relevant.

Both cases were the result of unfortunate incident that took place at Hillsborough football stadium in Sheffield when Liverpool and Nottingham Forest had to play the FA cup semi-final in 1989. This incident took place because of negligence and mismanagement

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[104] Jones, *Medical Negligence*, 112.
[105] Samanta, *Medical Law*, 95.
[106] Carr, *Unlocking Medical Law and Ethics*, 8.
[107] Samanta, *Medical Law*, 95.
[108] [1992] 1 AC 310
[109] [1998] 3 WLR 1509

of South Yorkshire Police who was responsible for crowd control at the football match. It directed an excessively large number of spectators to one end of the stadium resulting crush in which 95 people lost their lives and above 400 were injured. The unfortunate incident was broadcasted live on television. Sixteen claims were brought against the South Yorkshire Police by relatives and in one case fiancée for psychiatric injury. None of these relatives were parents or spouse. Some of them watched the incident on television while some were present in the stadium but not in the same area. The appeals were dismissed because they didn't meet the conditions for success of such claims i.e. claimant must establish that he has a close relationship with the primary victim and he is close to her in time and space and he has witnessed the trauma with their own unaided senses and this has caused to him psychiatric illness.

While *Alcock vs. Chief Constable of South Yorkshire Police*[110] was based on claims by relatives; *White vs. Chief Constable of South Yorkshire*[111] was based on the claims for psychiatric injury from police officers who were present on duty that day. This case was dismissed as well.

*Sion vs. Hampstead Health Authority*[112] and *Taylor vs. Somerset Health Authority*[113] are some more examples of cases where claimant failed in their claims for psychiatric injury caused due to the negligent handling of their relatives who were the patients of defendants.

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[110] [1992] 1 AC 310
[111] [1998] 3 WLR 1509
[112] (1994) 5 Med LR 170
[113] (1993) 4 Med LR 34

There are some cases where claimants fulfilled the criteria and they succeeded in their claims. In *Tredget and Tredget vs. Bexley Health Authority*[114]Mr. and Mrs. Tredget were able to successfully claim damages because their baby was negligently delivered in such a state that he was deprived of sufficient oxygen. As a result, he died two days later. They met all the conditions and thus succeeded.

*Froggatt vs. Chesterfield North Derbyshire Royal Hospital NHS Trust*[115] is another case where claimant successfully sued the doctors. It was considered as very generous decision by judge for the claimant as he interpreted the *Alclock* requirements in a very claimant friendly manner. A young lady was wrongfully diagnosed breast cancer because pathologist had mistakenly mixed up tissue samples. She unfortunately underwent the surgery for breast removal. It was revealed later on that she never had cancer. Her husband and 10 years old child got damages for psychiatric injury.

In the case of **North *Glamorgan NHS Trust vs. Walters***[116] claimant was with her 10-month-old son was in hospital. Baby was suffering from liver failure due to negligence of the doctor. Mother was with her son when he had suffered a severe attack of fit that resulted into server brain damage and later on in his death. Court was of the view thatmother had suffered shock and psychiatric illness, as a result of what she had gone through over a period of some 36 hours between her son's seizure and his death

[114] (1994) 5 Med LR 178
[115] (2002) All ER 218
[116] (2002) EWCA Civ 1792

*2.2.2.2.1.3 Financial Loss*

Courts have been facing difficulty in case of purely financial loss suffered by the patient as a result of negligent diagnosis or advice. This vacillation is not only in the context of medical negligence but in general law of torts too. Due to this confusion, there has been developed a body of law that has no coherence.[117] Likewise, in medical context there have been diverse judgments. In the case *Stevens vs. Bermondsey and Southwark Group Hospital Management Committee*[118] patient met an accident for which he had a claim against the local authorities. He went to the hospital and causality doctor examined him. He told the patient that there was nothing much wrong. As a result of this diagnosis, there was a settlement of very small amount between him and local authorities. Later on, it was discovered that this accident has caused him spondylolisthesis[119]. He sued the doctor for negligent diagnosis. He reasoned that had the doctor's advice appropriate and not negligent, he would have claimed larger sum. The learned court held that doctor's liability was only limited to the context of medicine and not to the sphere of legal liability unless he had done examination with that intention.

On the contrary, in the relatively recent case *Hughes vs. Lloyds Bank plc*[120] claimant met an accident because of the mistake of motorists. She was seen by a GP who negligently diagnosed her. As a result, she settled her case with motorist for much lesser than it could have been. Court of appeal held that GP was under the duty of care in accurately describing the condition. This case was different from Stevens in respect of decision

[117]Paula Giliker, *Tort* (London: Sweet & Maxwell, 2014), 128.

[118](1963) 107 S.J.478.

[119]Spondylolisthesis is a condition in which one of the bones of the spine (vertebrae) slips out of place onto the vertebra below it. Please see http://my.clevelandclinic.org/health/diseases_conditions/hic_your_back_and_neck/hic_Spondylolisthesis

[120] (1998) P.I.Q.R

because claimant has obtained a letter from the doctor for settlement of the case and doctor knew that claimant was obtaining this letter for the purpose of legal liability against the motorist.

Thus, Law attaches a duty to take reasonable care in accomplishment of the task whenever there is such relationship between claimant and defendant by virtue of which 'responsibility' is assumed.

#### *2.2.2.2.1.4 Failure to Prevent the Patient from Causing Harm*

There may be different situations where patients of doctors pose potential risks and hazards for other people[121]. If it is foreseeable for the doctor, he owes a duty to care. One category under this head can be of the patients with infectious disease. In Case *Lindsey County Council vs. Marshall*[122] a patient got admitted to the maternity home. They didn't warn the patient of the risk of infection by puerperal fever[123] which was widespread among the patients because of an outbreak of the disease. Resultantly she caught that fever. House of lord held the defendant liable for negligence in warning. [124]

There can be other instances like if the medical condition of the patient is such that it will be unsafe for the patient to drive for example in the case of epilepsy or the side effect of a drug, in this situation it is imperative for the doctor to warn the patient and if he does not do so and an accident occurs that injure him or someone else, the doctor will be held

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[121] Jones, *Medical Negligence*, 159.

[122](1937) A.C 97.

[123]**Puerperal fever,** also called **childbed fever,** infection of some part of the female reproductive organs following childbirth or abortion. Cases of fever of 100.4 °F (38 °C) and higher during the first 10 days following delivery or miscarriage see for more http://www.patient.co.uk/doctor/Puerperal-Pyrexia.htm; http://www.britannica.com/EBchecked/topic/482821/puerperal-fever

[124]John Devereux, *Medical Law* (London: Routledge, 2002), 120.

liable. There are some Canadian case laws on the said subjects but no English case so far.[125] For instance, in *Spillane vs. Wasserman*[126] the patient had long history of epileptic seizures.[127] Two doctors had been treating his epilepsy for years. Patient didn't follow the medication and prescriptions of the doctor but didn't run periodic test to keep a check over the patient for results and condition of patient. Had they conducted tests, it would have revealed that the patient is frequently missing medication. Neither doctor neither prohibited him from driving nor intimated the Registrar of motor vehicle which is required by Law. He didn't reveal his actual medical condition and misrepresented while renewing the driver's license. He suffered an epileptic seizure during the driving of a heavy vehicle resultantly killing a cyclist. The doctors were held liable in negligence. Likewise, in *MacPhail vs. Desrosiers*[128] doctors were held liable where they gave a sedative to a female patient after abortion. They didn't warn her. As a result, her car collided with car coming from the opposite direction on the highway. The clinic was held liable for the negligence.

Likewise, there may be cases where it is foreseeable that a psychiatric patient might pose a risk for some one. There are some English case laws in this regard, but they are sparse as comparative to the other countries. In Holgate v Lancashire Mental Hospitals Board[129]a mentally ill patient John Lawson was release on a short pass to live with his brother. Patient was under compulsory detention after conviction for violent behavior. During the leave, he assaulted and seriously injured Mrs. Holgate in her house when she

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[125] Mulheron, *Medical Negligence: Non-Patient and Third Party Claims*, 48.

[126](1992) 13C.C.L.T (2d) 267. Ont HC

[127] A disorder of the nervous system that can cause people to suddenly become unconscious and to have violent, uncontrolled movements of the body

[128](1998)170 N.S.R. (2d) 145. NSCA

[129](1937) 4 All E.R. 19.

was alone. It was held that doctors owed a duty of care, damages were awarded. Whereas in case *Partington vs. Wandsworth LBC*court held that although there was a reasonable duty of care owed by Hospital authorities to prevent their patient from causing harms to other but according to court there was no breach. In this case an autistic patient was sent on outing with a supervisor who was a care worker. Despite supervision she had pushed over an elderly stranger lady in street, consequently breaking her wrist. She sued the health authorities, but no liability was incurred.

Another important case in this regard is of *Palmer vs. Tees Health Authority*[130]. In this case, A man Shaun Armstrong who had a long history of psychiatric illness expressed his sexual feelings for children in front of a psychiatrist. Later on, he was released as an in-patient. 9 days after his release he abducted, sexually assaulted and later on murdered a 4 years old child named as Rosie Palmer. Her mother claimed that health authorities were responsible because they failed to provide satisfactory treatment to the patient to reduce the risk of such a heinous crime. Another claim was regarding their failure to foresee that there was substantial risk of such a crime against children and why such a patient was released. Court didn't pay much heed to the previous cases of *Partington*[131] and *Holgate*[132]and held that there is not sufficient proximity between Health Authority and Rosie palmer and According to learned judge, it will be unfair, injustice and unreasonable to impose a duty of care upon the defendant. Court of Appeal had the same view i.e. where a future victim was not identifiable, it will be impossible to guard them from harm.

[130](1999) Lloyd's Rep. Med.351.
[131]*Partington vs. Wandsworth LBC*
[132]Holgate vs. Lancashire Mental Hospitals Board (1937) 4 All E.R. 19

Whereas, an American case *Tarasoff vs. Regents of the University of California*[133], that has similar kind of history, but a different decision. Patient had told the doctor that he intends to kill her former girlfriend which he did. Supreme Court of California held that psychologists owed a duty to care. Protection of confidentiality must end where there is a real risk of public peril.

English court has difficulty in following the above American case. The basis of this case was foreseeability of harm to victim. But there must be proximate relationship between claimant and defendant to impose a duty of care. Foreseeability is not sufficient alone. And there would be two conflicting duties imposed upon a doctor i.e. duty of confidentiality and duty to disclosure of patient's intention. American court has resolved latter issue in this case by giving the verdict that protection of confidentiality must end where there is a real risk. However, doctors will have to be burdened to ascertain where patient merely intend to do his catharsis and where he is revealing his true intention.

***2.2.2.2.1.5 Medical Examination***

For a number of purposes, doctors may have to prepare the reports on individual to be used by others. Harm can be inflicted on that individual if doctor prepare the reports negligently. Cases can be divided into two broad categories where medical practitioner prepares reports for other than purpose of treatment. First category is where a doctor examined a person for the private purpose of third party such as for employer or insurance company. Second class is where the doctor examines a person for legal

[133]131 Cal. Rptr. 14 (1976)

purposes such as if it is a requirement for a legal proceeding or it is a statutory requirement.

In the situations mentioned above, doctor will have a duty to care not to cause any physical injury to the patient. As regard to the negligence in making statements that may cause financial loss to the examinee where employer refuses to employee him or insurance company declines to enter into contract, English court have not incurred upon doctors a duty to care but it is not an absolute rule it is fact dependent.

It was held in *Baker vs. Kaye*[134] that a doctor could owe a duty to care where he had to assess future possible employees for a company. Claimant had provided his complete detailed medical history and information to the doctor. And it was completely foreseeable that a negligent statement by the doctor can harm the individual. A duty of care was imposed by the court because there was sufficient proximity between the claimant and the defendant along with the foreseeability.

Whereas in *Kapfunde vs. Abbey National plc*[135] doctor was not held liable rather they commented on the *Baker vs. Kaye* that it was wrongly decided. In *Kapfunde* doctor never physically saw the individual who has filled a medical questionnaire for a job. After consideration, doctor was of the view that the claimant will be absent from work longer than other. Resultantly, he wasn't offered the job. The Court of appeal held that there is no proximity of relationship between doctor and that job seeker because doctor has never seen that individual. And employer was under no obligation to take reasonable care.

[134](1997) I.R.I.R. 219.
[135](1999) Lloyd's Rep. Med.48.

Likewise, in case where the doctor had examined the claimant for the purpose of advising the insurance company in *A vs. Newham London Borough Council*[136] it was held that doctor was only under the duty not to damage the claimant. Apart from that, he only owes his duty to insurance company and not to the claimant.

Although it is argued that the doctor has just one duty towards examinee and that is not to cause damage but in certain cases he has other obligations too for instance if he finds something problematic during medical examination about the examinee, it is mandatory on him to intimate him. Likewise, in *D vs. East Berkshire Community Health NHS Trust*[137] it was held by court of appeal that where a doctor is examining a child who is suspected to have been sexually abused, in this case doctors who the child a duty to care.

**2.2.2.3 Breach**

In a doctor patient relationship, it is very easy to establish that patient was owed a duty to care. However, it is difficult to prove is that the doctor breached that duty i.e. he fell below the required standard of care. In order to prove that, first the minimum standard that a doctor ought to meet must be established. In general torts, a person's actions are judged by a 'reasonable man' test as enshrined in the classic verdict of Alderson B in *Blyth vs. Birmingham Waterworks Co.* The learned judge said: "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do"[138]. It will vary from person to

[136] (1995) 2 A.C. 633
[137](2003) EWCA Civ 1151.
[138]Blyth vs. Birmingham Waterworks Co. (1856) 11 Exch. 781, 784

person, case to case and profession to profession that what is required of a person as entailed in the decision of the court in *Glasgow Corporation vs. Muir.* It says: "Those who engage in operations inherently dangerous must take precautions that are not required of persons engaged in the ordinary routine of daily life"[139]. Thus, a doctor will be required to display the minimum standard that is expected from a medical practitioner 'skilled in that particular art'[140].

While adjudicating the breach, court will take into account the time when alleged breach took place. *Roe vs. Minister of Health*[141] case was heard in 1954 while the incident when the alleged negligence occurred took place in 1947. Patient had to undergo a minor operation. He was administered a spinal anesthetic. This anesthetic[142]had unfortunately become contaminated because of the way it was stored. At that time, it was not known. Later on, in 1951 a leading text book gave a warning about this practice. As case was heard in 1954, court could not look at the accident which occurred in 1947 "with 1954 spectacles" and thus it was held that the defendants were not negligent. Denning L.J rightly said: "If the hospitals were to continue the practice after this warning, they couldn't complain if they were found guilty of negligence. But the warning had not been given at the time of this accident. Indeed, it was the extraordinary incident to these two men which first disclosed the danger. Nowadays it would be negligence not to realize the danger, but it was not then."[143]

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[139](1943) AC 448 (HL) 457

[140] Stauch, *The Law of Medical Negligence in England and Germany*, 31.

[141](1954) 2 QB 66.

[142]A substance that causes lack of feeling or awareness, dulling pain to permit surgery and other painful procedures. Please see: http://www.medicinenet.com/script/main/art.asp?articlekey=2247

[143]Roe vs. Minister of Health (1954) 2 QB 66

The touchstone by which the conduct of a doctor will be judged was established in the cases in *Bolam vs. Friern Hospital Management Committee*[144] and *Hunter vs. Hanley*[145]. Both cases are combined under one heading *Bolam* test. In this case a patient John Bolam was suffering from depression. His consultant advised him to undergo electroconvulsive therapy (ECT). This procedure carries a risk of fracture, but John Bolam was not warned of this risk. Moreover, neither relaxant drug was given to him nor he was physically restrained. Consequently, his hip was fractured. John Bolam claimed damages on the ground that doctor was negligent in not warning them of the risk and not giving him relaxant or physically restraining him. Expert witnesses gave diverse evidence regarding the techniques they use during ECT treatment; some of them give relaxant drugs to their patients, some use restraining sheets, while some manually control the patient. But every witness agreed on the point that there was a strong medical opinion that is against the use of relaxant drugs, and many competent practitioners believed that the less manual restraint there was, the less was the chance of fracture.[146] Decision of the case provided the touchstone for the liability of medical practitioners for negligence. It provided twofold criteria, that is, first regarding the level of competence demanded of a doctor and secondly it provided the definition of what amounts to failure to practice the standard care. Regarding first criteria McNair J explained: "The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is a well-established law

[144](1957) 2 All E.R 118
[145] 1955 S.C 200

[146] Ibid.

that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."[147]

Regarding the multiple opinion on one treatment the learned judge said:"A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. Putting it the other way round, a doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view."[148] Same point was elaborated in the Hunter vs. Hanley where Lord President Clyde said:

> In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusions differ from that of other professional men, nor because he has displayed less skill or knowledge than others would have shown. The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care.[149]

Therefore, where there is a difference of opinion, a doctor cannot be declared guilty merely on the basis that he opted one of the prevalent practices and not the other. House of Lords affirmed the decision of *Bolam* case in many cases like *Maynard vs. West Midlands Regional Health Authority*[150], *Whitehouse vs. Jordon*[151], *Sidaway vs. Bethlem*

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[147] Ibid.

[148] Ibid.

[149] 1955 S.C 200

[150] (1984) 1 W.L.R. 634

[151] (1981) 1 ALL E.R 267; In this case, mother was in labor for quite long time. After considerable time, senior registrar took the charge of delivery. She decided to try the delivery through forceps. She pulled the baby for six times through forceps but when baby showed no movement even after fifth and sixth trial, she abandoned the trial and went for caesarean section. After birth, it was found that baby suffered from severe brain damage. The Court of Appeal held that error of clinical judgment is not negligence and will not make the defendant liable. Please see for details Gerald Robertson, Whitehouse vs. Jordan- Medical Negligence Retired, *The Modern Law Review, Vol. 44, No. 4(July 1981). 457-461.*

*RHG*[152] and *Bolitho vs. City and Hackney Health Authority*[153]. House of Lords explicated the logic behind the *Bolam* decision in *Maynard vs. West Midlands Regional Health Authority*[154] that judge will not choose between the competing opinions. A doctor will not be adjudged as guilty as long as he adhered to actions that are considered as reasonable by a competent school of thought.[155] But there are some instances where English courts have departed from the principle settled in *Bolam* case. For example, *Hucks vs. Cole*[156], a case that was decided in 1968 but was not reported until 1993, defendant didn't treat the septic area of the skin with penicillin of claimant who was pregnant and about to give birth despite the fact that he knew

That it can lead to puerperal fever, if not treated. Although four expert witnesses agreed with the defendant's decision of not treating her, but court rejected and declared defendant as negligent. A leading case decided by the House of Lords made the law's approach very less clear[157] and was less deferential for *Bolam case*[158]. Case name is *Bolitho vs. City and Hackney Health Authority*[159]. A two years old child named as Patrick Bolitho was admitted to the hospital because he was facing difficulty in breathing. Nurse on duty on observing that the condition is deteriorating called the senior pediatric registrar but neither did she attend the child nor her house officer. Eventually his breathing system became blocked and he suffered cardiac rest and died. Evidence was

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[152] (1985) ALL ER 643

[153](1998) A.C 232.

[154](1984) 1 W.L.R. 634; Facts of the case are that the claimant was suffering from one of two possible conditions. For exact determination, she was asked to undergo the diagnostic tests. During those tests, one of her nerves got damaged that resulted in effecting her vocal cord. She claimed that one of the two conditions were clear enough and the doctor unnecessarily carried out those procedures.

[155] Herring, *Medical Law and Ethics*, 107.

[156](1993) 4 Med LR 393.

[157] Herring, *Medical Law and Ethics*, 108.

[158] Jackson, *Medical Law: Text, Cases, and Materials*, 115.

[159](1998) AC 232

admitted on the ground that doctor negligently failed to attend the child. While the doctor defended on the ground of causation. According to her, intubation was the only procedure that could save the child from respiratory failure, but she wouldn't have gone for that even if she had attended the child because the procedure had significant risks for the child of that age.[160] Expert witness of both claimant and defendant's side gave totally opposite view regarding the decision of intubation. Case was dismissed on the ground of causation. But the comments of Lord Browne-Wilkinson are very important to apprehend the circumstances where court will consider the defendant negligent even if his conduct was considered as reasonable by medical experts. According to him, the certification of expert witness that the defendant's course of action was reasonable doesn't entail that he will escape the liability[161]. Judges have to satisfy themselves that the decision of the doctor has logical basis. According to some Legal experts, Bolitho case has created a significant change in the court's approach. Now courts will more profoundly scrutinize the actions of the defendants and not rely only on the opinion of his medical fellow whereas according to others, Bolitho case has not marked any radical change in the way courts look at the standard of care and breach of duty. It is very unlikely that court will declare the expert opinion as illogical.[162] Lord Wilkinson said: "I emphasize that, in my view, it will very seldom be right for a judge to reach the conclusion that views genuinely held by a competent medical expert are unreasonable". On ground, post *Bolitho cases* don't refer to it and simply cite *Bolam* case but cases where Bolitho case is cited shows

[160] Carr, *Unlocking Medical Law and Ethics*, 17
[161] Samanta, *Medical Law*, 99
[162] Herring, *Medical Law and Ethics*, 108.

the impact of it on the scrutiny of expert opinion by judges[163]. Three such cases are mentioned below for contemplation:

***Wisniewski v Central Manchester Health Authority***[164]: In this case, claimant contended that there was mismanagement by hospital staff during her labor. CTG showed abnormalities in the fetus but they did not make any further investigations. It was claimed that further investigation would have led early caesarian that could have saved the child from having irreversible brain damage. Defendant presented expert opinions and argued that there is a reasonable body of opinion that would have not carried further investigations in these circumstances. The trial judge, contrary to expert opinion, concluded that there was negligence. However, the Court of Appeal concluded that it would be in rarest of situation that the opinion of eminent medical practitioner wouldn't have logical basis.[165]

***Marriott vs. West Midlands Health Authority***[166]: Mr. Marriott suffered a head injury due to a fall that rendered him unconscious for almost half an hour. He was admitted to the hospital and after X-rays and neurological observations sent to home next day. Following week, he showed the symptoms of being lethargic, headaches and loss of appetite. He sought GP's advice. He prescribed pain killers and asked his wife to monitor his condition and call on further deterioration. He failed to prescribe the full neurological investigation despite the case history. Four days later, claimant lost consciousness and had to undergo surgery that left him paralyzed and with speech disorder. At trial, expert

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[163] Ibid.,
[164] (1998) Lloyd's Rep Med 223.

[165] Ibid.
[166] (1999) Lloyd's Rep. Med. 23

witnesses of both sides had opposing views. Expert from claimant's side was of the view that GP should have sent the patient to the hospital for full neurological investigation whereas the defendant's expert said that the risk was so small that it was reasonable for the GP to leave the patient at home with the instruction he had given. The trial Judge held (supported by Court of Appeal) that although there is a body of opinion that supports defendant's action but when there is a risk of brain lesion, prudent decision was to send him to hospital for further investigation. Thus, court scrutinized the opinion of experts more critically and declared the defendant's expert opinion as illogical and irresponsible. This case proves that *Bolitho case* did mark a difference and authorize the judge to critically scrutinize the expert opinion and declare them irresponsible and illogical if he deems so.

***Burne vs. A.***[167]**:** is also an important case regarding judge's discretion of not accepting the expert opinion. A mother called the doctor and discussed her child's condition. She listed the symptoms she had observed. But that GP did not ask the questions himself and just listened to the mother's observation. It was alleged that he failed to ask the mother about the symptoms that would have revealed the blockage in a shunt[168] which had been inserted in his head to help drain fluid from the brain. GP knew about all the situations and could have asked related questions. The judge had rejected the expert opinion of defendant's side when he defended his action of not asking the questions from claimant that could reveal the actual problem of the child. The judge found that there was no logic

[167](2006) EWCA Civ. 24.

[168] A catheter (tube) that carries cerebrospinal fluid from a ventricle in the brain to another area of the body

and reason behind not asking the questions when he knew child had shunt and its situation could cause serious medical problem.[169]

Thus, case laws on correct reading and application of *Bolitho case* are conflicting. But according to most of the scholars Bolitho case has rare impact. Courts still regard expert opinion and if there are two conflicting views, then courts have to explain if it prefers one of the opinions in the decision.[170]

#### 2.2.2.3.1 Standard of Care in Specific Circumstances

A very important point regarding standard of care in medical negligence is whether standard of care is fixed or it may vary case to case? Following instances are important to consider for this issue:

##### *2.2.2.3.1.1 Innovative or Experimental Techniques*

Regarding experimental techniques, courts need to reach the balance between competing considerations. While untried and dangerous experimentation shouldn't be done on patients, law shouldn't be a hurdle in advancement of medicine. Doctor's decision to go for an experimental technique will be justified in the sight of law if the alternative of not trying that would be death or fatal harm.[171] Informed consent is another requirement for successful defense of his decision. Learned Judge Mustill L.J commented in *Wilsher vs. Essex Area Health Authority*[172] that if a doctor decides to try a comparatively untried technique on justified grounds and did with informed consent; the courts should be

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[169] Herring, *Medical Law and Ethics*, 110.
[170] Carr, *Unlocking Medical Law and Ethics*, 20.
[171] Samanta, *Medical Law*, 101-02
[172] (1987) Q.B 730

careful not to adjudicate negligence merely on the basis that something has gone wrong[173]. Likewise, according to Lord Diplock in *Sidaway vs. Bethlam Royal Hospital Governers*[174] discouraging attitude towards novel techniques will lead to defensive medicine. Thus courts admit experimental techniques with conditions. One of the conditions is that patient should be adequately informed, and his explicit consent should be acquired where possible. Hospital was held liable for breaching the standard of care when they tried alternative method without properly informing the patient about the inherent risk in *Cooper vs. Royal United Hospital Bath NHS Trust.*[175] Likewise, doctor should justify his decision for choosing that novel technique instead of established treatments. Justification of the decision will largely depend upon the nature of the disease and effectiveness and risks of the alternative treatments. If standard treatments are ineffective and disease is very serious, in this case he will be justified in taking greater risk and applying alternative novel technique which he deems on reasonable grounds that it will be beneficial for the patients. Law is cooperative to that extent, but it requires that patients should not be exposed to excessive risks and before employment of new technique, there should be some scientific validation for it. Defendant was held liable in *Hepworth vs. Kerr*[176] where the anesthetist experimented and used a novel technique which he knew that it does not have scientific validation in 15000 patients. It was not a minor modification but totally opposite to what a reasonable doctor would have done. Patient developed spinal stroke thus making defendant liable.

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[173] Jones, *Medical Negligence*, 256.
[174] (1985) A.C. 871
[175] (2005) EWHC 3381
[176](1995) 6 Med.L.R. 139.

*2.2.2.3.1.2 Scarce Resource*

It is argued that courts should consider the factual reality of scarce resources and it is inappropriate to hold the medical staff liable for services and treatment not provided for scarcity of resources. *Knight vs. Home office*[177] has a relevancy in this regard. A mentally ill patient was detained in the hospital wing of Brixton prison under Mental Health Act 1959. It was known about the prisoner that he had suicidal tendencies, but he was not put under continual watch. He hanged himself. It was alleged that home office didn't provide reasonable standard of care. The learned court held that prison doctors can't be held liable and was not negligent because they had limited resources and they couldn't maintain same standard of care as it is in a psychiatric specialist hospital.[178]

Later cases have a complete shift of decision and rational. In *Brooks vs. Home Office*[179]a high-risk pregnant prisoner needed an urgent referral for specialist advice because her scan showed that one of the twin's growths is not normal. There had been a delay of five days. As a result, weaker of twins died before birth. Learned judge didn't accept the proposition if lower level of standard of care. The Court of Appeal stated in *Bull vs. Devon AHA*[180]declared that regardless of financial constraints, a minimum standard of care should be provided.

[177](1990) 3 ALL ER 237.

[178] Ibid.

[179] (1999) 2 FLR 33 (QBD)

[180] (1993) 4 Med LR 117 (CA)

#### *2.2.2.3.1.3 Emergency Situations*

Doctors are not legally bound to stop by an accident and help the victim. However, when a doctor decides to treat, a duty of care arises, and doctor will be held liable for negligence. If a doctor does not help, he will not be liable, but he may be disciplined by General Medical Council because the given guidelines demands that.[181] It says: "In an emergency, wherever it may arise, you must offer assistance, taking account of your own safety, your competence, and the availability of other options for care"[182].

It is not reasonable to expect and demand from a doctor who is working in emergency to meet the standards of care that is demanded from a doctor working in normal conditions in well-equipped hospital.[183]

#### *2.2.2.3.1.4 Lack of Experience*

Standard of care expected from a doctor doesn't vary with the experience of the medical practitioner. Junior doctors undertake less complicated tasks and complex tasks are normally undertaken by experienced and specialists. If a junior doctor undertakes the complicated task that is beyond her competence and experience and something goes wrong, the basic negligence would be of undertaking tasks and not in lack of experience and skill. When one undertakes the tasks, he professes by undertaking that he is competent enough.[184] Court of Appeal asserted this point forcefully in *Jones vs.*

[181] Samanta, *Medical Law*, 103.

[182] Ibid.

[183] Jackson, *Medical Law*, 121.

[184] Jones, *Medical Negligence*, 284.

*Manchester Corporation*[185]and rejected the excuse given by junior doctor that she lacked experience. A patient had died because the junior doctor had administered excessive anesthetic. It was adjudicated in favour of victim as, "The patient was entitled to receive all the care and skill which a fully qualified and well-experienced anesthetist would possess and use. If Dr. Wilkes failed to exercise that care and skill, she would be liable to the patient or his widow for the consequences..."[186]

However junior doctors will be discharged from liability even if they made mistakes if they sought assistance of seniors or supervisors to check their work. Because of this reason, junior doctor was exonerated in *Wilsher vs. Area Health Authority*[187]. In this case a junior doctor inserted a catheter into a vein instead of an artery. Its position can be checked through x-ray which that junior doctor did, but he unfortunately couldn't notice the mistake. He sought the assistance of senior registrar and asked him to check the x-ray, but he too didn't notice that the catheter was mis-positioned. It led to a condition of retina that caused loss of vision and blindness of that immature infant. Junior doctor wasn't found guilty, but the senior registrar was held liable for negligence.

**2.2.2.3 Causation**

As mentioned earlier, claimant must establish three things to win the case of medical negligence, that is, defendant's legal duty to care; that duty been breached by defendant; which resulted in damage to the claimant. Last mentioned point is known as causation when the treating doctor is held liable if his omission or negligent act results in the injury

[185](1952) Q.B. 852.
[186] Ibid.
[187](1987) Q.B 730.

of patients.[188] A claimant can not suceed the case by establishing only first-mentioned two points, that is, there was a duty to care and defendant breached the duty. She must establish causation too. Damage is the gist in tort law for action and causation is related to the link between negligence of defendant and damage suffered by claimant.[189] A defendant will not be liable even if he made gross mistake if his action or omission did not cause the damage. Defendant's action will be the cause of damage if damage would not have occurred "but for" the negligence of defendant. It will be mainly depending upon the medical and scientific evidence like pathology of a specific disease and consequences of proper treatment. But if the injury would have occurred in any event, doctor's negligence is not the cause. Thus, sometimes establishment of causation is clear while sometimes it is hazy. For instance, if a doctor removes the healthy kidney instead of diseased kidney then the loss is no doubt result of defendant's negligence.[190] But where the accusation is that doctor didn't treat the patient properly or hadn't diagnosed it properly then claimant must establish two things for proving causation that if defendant didn't act negligently and acted properly then:

a. Disease would have diagnosed
b. There was a possibility of treatment which would have resulted in improvement of the illness of claimant or injuries wouldn't have sustained.[191]

In *Barnett vs. Chelsea and Kensington Hospital Management Committee*[192] three night-watchmen started vomiting after drinking tea that contained arsenic. They attended the

[188] Carr, *Unlocking Medical Law and Ethics*, 24.
[189] Jones, *Medical Negligence*, 442.
[190] Herring, *Medical Law and Ethics*, 114.
[191] Samanta, *Medical Law*, 106.
[192](1968) 1 All E.R. 1068.

hospital and presented themselves in the causality department. They clearly appeared ill. The Nurse telephoned the on-call doctor, but he refused to see them and told to go home and see their own doctor. One of the watchmen died after five hours. His widow brought the claim of negligence against the doctor. Although it was doctor's negligence that he refused to see the patients and asked them to go home, however there was very little or no chance that an effective antidote be given to the patient as arsenic was very rare[193]. Thus, the doctor couldn't save the life even if he had seen him and patient had died in any event. Doctor's negligence wasn't the cause of patient's death. Causation wasn't satisfied and claim failed. The Court held that even if he had admitted the patient, he would still have died.[194]

Above mentioned case was a clear one but there are certain instances where there is more than one causes that contributes in injuring the patient. Case becomes complex when defendant's negligence is one among the causes that was the reason of damage or where his negligence posed a significant risk for the claimant. [195] There are various such instances which ought to be dealt separately.

#### 2.2.2.3.1 Ambiguity Regarding the Damage (whether caused by defendant's negligence or some other cause)

In *Wilsher vs. Essex Area Health Authority*[196] a baby was suffering from several disability conditions as she was born three months prematurely. He needed additional oxygen because he had breathing difficulties. Negligently he was given excessive oxygen

[193] Herring, *Medical Law and Ethic*, 114.
[194] Carr, *Unlocking Medical Law and Ethics*, 24.
[195] Herring, *Medical Law and Ethic*, 114.
[196] (1988) 1 ALL ER 871

on two occasions. It caused blindness in one eye and seriously damaged the vision of other. Plaintiff sued the defendant alleging that his negligence regarding providing excessive oxygen caused the damage. There were six possible causes that could have caused the blindness, only one of which was attributed to the defendant's negligence. Medical evidence could not prove itself conclusive in establishing the actual cause. House of Lord demanded that it was mandatory for claimant to establish that defendant's negligence caused the injury. They failed to do so eventually action failed.

In *Fairchild vs. Glenhaven Funeral Services Ltd*[197]some workers were negligently exposed to asbestos[198] fibers at work that caused mesothelioma. It was clear that their disease was caused by their occupation. But there was still problem of causation. These workers had worked for several employers all of whom had negligently exposed them to asbestos. It was not possible to spot the employer's asbestos's dust caused the injury. It was held that all the employers were liable for their disease. This decision was different from *Wilsher,* but House of Lords did accept the decision and said that if *Wilsher* had been decided differently, it would have massively increased the liability of NHS. It can be inferred from the comment of House of Lords that requirement of causation can be strict in medical negligence cases on policy ground[199]. But in *Bailey vs. Ministry of*

[197] (2002) UKHL 22

[198]Asbestos is a group of fibrous materials used in insulation, fireproofing and building materials. Asbestos is a known human carcinogen, a substance that causes cancer. Its use was banned by the Environmental Protection Agency in 1989 but is still present in many structures built prior to that time. Exposure to asbestos is the leading cause of mesothelioma, a rare cancer involving the lining of the lungs. Please see : http://lungcancer.about.com/od/glossary/g/asbestos.htm (accessed June , 2015)

[199] Herring, *Medical Law and Ethics*, 115.

*Defense*,[200] court rejected the idea that medical negligence cases should be treated differently from other tort cases.[201]

In *Bailey,* claimant was admitted in the hospital for removal of gallstone. The night gallstone was removed; she bled a lot and felt very unwell next morning. She developed pancreatitis.[202] It has nothing to do with the treatment. She was sent to ICU and then returned to ward. In ward, she drank lemonade but vomited. She couldn't evacuate the vomiting. As a result, she suffered brain damage. Her pancreatitis or weakness wasn't the fault of hospital but she contended that lack of care aggravated the risk of damage. Claimant couldn't present the argument that 'but for' the claimant negligence, brain damage wouldn't have occurred. Court of Appeal held that material increase in the risk was equivalent to the casual link required for the causation. Therefore, if the negligence of the doctor contributes substantially in claimant's injury, it amounts to material cause and it doesn't need to fulfill 'but for' test. Decision of this case was followed in the *Canning-Kishver vs. Sandwell and the West Birmingham Hospitals NHS Trusts*[203] and defendants were held liable for the cerebral atrophy of a baby who was prematurely born and was admitted in the hospital. Nursing staff didn't monitor the heart rate and respiration of the baby properly and didn't respond the problem timely. Baby suffered cardiac rest and then cerebral atrophy. Court applied the dictum that the negligence was more than a negligible contribution to the claimant's injury and was therefore a material cause.[204]

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[200](2008) EWCA Civ 883.
[201] Carr, *Unlocking Medical Law and Ethics*, 28.
[202] Inflammation in Pancreas
[203](2008) EWHC 2384 (QB).
[204]Herring, *Medical Law and Ethics*, 116.

#### 2.2.2.3.2 Defendant didn't examine the claimant

In Bolitho vs. Hackney Health Authority[205]a two-year old child was admitted in the hospital that had respiratory difficulties. Nurse called the defendant on two occasions, but she didn't examine the child. The child got cardiac arrest and died subsequently. It was argued by the claimant that defendant breached the duty by not attending the child, if she had attended she could prevent the injury by intubation. Defendant although admitted that there was a breach of duty, contended that her failure to attend didn't cause the child's death. His death would have occurred in any case because she wouldn't have opted for intubation as it has serious risk for a child of such tender age. And there is a substantial body of opinion for this decision. House of Lords accepted the argument of defendant that intubation had serious risk and even if she had attended, she wouldn't have intubated and thus *Bolam* test was applied and claim failed on the ground of causation. Whereas in *Gouldsmith vs. Mid Staffordshire General Hospitals NHS Trusts*[206] a patient has lesions[207] on her finger. It was necessary that she be referred to a specialist. But the doctor failed to refer her, and he treated her. One finger needed amputation which he didn't. Later on, her situation deteriorated, and other fingers too were amputated. She contended that if she had been referred earlier, specialists would have operated earlier that could save her from subsequent amputation. Defendant was held liable applying Bolitho that the defendants should have referred her to specialist who would have operated earlier on balance of probabilities and claimant could have been saved from subsequent amputation.

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[205] (1997) 4 ALL ER 771
[206] (2007) EWCA Civ 397
[207] Damaging of tissue or organ

#### 2.2.2.3.3 Claimant Deprived of Chance of Recovery

In medical negligence litigation, a lot of complaints are not that doctors caused them additional injury but that because of their negligence, they were deprived of the chance of full recovery and their negligence led to the deterioration of the illness or prevention of improvement.[208] Following cases highlight this complicated area of law:

***Hoston vs. East Berkshire Area Health Authority:*** In this case[209] a 13 years old boy fell from the tree and injured his hip. He was taken to the hospital but want properly diagnosed. He was sent back to home but after five days he returned to the hospital because he was still feeling the pain. At that time, he was properly diagnosed and treated. But unfortunately, he was left disabled for good. For this reason, he sued the defendants that had he been diagnosed and treated properly, there was 25 percent chance that he would have recovered. Initially defendants were held liable and claimants were granted damages equivalent to the 25 percent of the total pecuniary award which would have granted to them if they were fully responsible. However, this approach was rejected by House of Lords. Lord Bridge stated: "...unless the plaintiff could prove on a balance of probabilities that the delayed treatment was at least a contributory cause... he failed on the issue of causation and no quantification could arise..."[210]

***Gregg vs. Scott:*** Facts of the case Gregg v Scott[211] are that the claimant Mr. Gregg was examined by GP Mr. Scott because claimant had a lump under his arm. Mr. Scott

[208] Jones, *Medical Negligence*, 493.
[209] Hoston v East Berkshire Area Health Authority (1987) A.C. 750

[210] Ibid.
[211] (2005) UKHL 2

negligently considered lump as benign and didn't refer the patient to the specialist. Nine months later Mr. Gregg was seen by another GP who referred him to specialist where it was discovered that he had cancer and it had spread by that time. Mr. Gregg sued Mr. Scott on the ground that had he referred him to specialist earlier, his cancer would have diagnosed at that time and there could have been much greater chance of cure. Trial Judge held that if it had been diagnosed and treated earlier, there would have been 42% chance of survival of patient for next ten years but because of defendant's negligence this has been reduced to 25% but it wasn't the negligence that caused the loss. Had there been a timely diagnosis, still there wasn't a good chance of cure. The Court of Appeal upheld the decision of Trial Court. The case finally went to House of Lords. Mr. Gregg's appeal was dismissed by House of Lords. According to them, if there would have been no negligence, even then claimant would have suffered the loss he did. The loss of chance for a favorable outcome is not recoverable in tort.[212]

Medical malpractice law in England can be summarized that a claimant needs to establish three things in order to succeed the claim of medical malpractice:

a. Doctor had a duty to care
b. Doctor breached that duty
c. Harm was caused to patient due to the breach of the duty.

Although it seems simple but as observable from the previous discussion, it is quite difficult for a claimant to establish that doctor has breached the duty and to prove the causation is even more difficult.

[212] Ibid.

### 2.2.3 Damages in English Law

Medical malpractice claims are mostly brought in respect of death, personal injuries and financial loss suffered due to the negligence of defendant. Principles applied for the estimation of damages in medical negligence cases are similar to the one applied in general cases of negligence in tort.

Basic principle in tort for the assessment of damages is to reinstate the claimant to the place where he would have been, had the negligence not been committed.[213] Thus he should be fully compensated as far as it could in terms of money. This principle was enunciated in the judgment of *Livingstone vs. Rawyards Coal Company*[214] by Lord Blackburn:

> Where any injury is to be compensated by damages, in settling the sum of money to be given for reparation or damages you should, as nearly as possible, get the sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.[215]

This principle is similar to the contract. Where the principle is to restore the position of claimant to the position where he would have been, had the contract been performed. This principle is true and adequate as far as the loss is pecuniary but in non-pecuniary loss it is not appropriate, no amount can redress the loss of a beloved or his organ or the pain suffered.[216] They can't be compensated through any amount of money. For this, the

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[213] Samanta, *Medical Law*, 114.
[214] (1880) 5 App. Cas.25 at 39.

[215] Ibid.
[216] Jones, *Medical Negligence*, 971.

court applies the principle of "reasonable" and "fair".[217] This is a difficult question to estimate what would be just and reasonable. The courts go with the flow. It means that they adopt the tariff for similar types of injuries granted by other courts. This way a basis for the assessment and a certain level of consistency is achieved.[218]

A claim for the damages usually includes:

a. Reasonable and fair monetary compensation for the injury caused.
b. Small amount of damages can be granted under the head of pain and suffering.
c. Loss of amenity can be demanded to be compensated. It is the loss of ability to participate in the activities which the claimant used to participate before the injury caused due to the medical negligence.
d. Medical expenses can be claimed.
e. Loss of earnings
f. Future pecuniary losses[219]

Brief details are mentioned below:

### 2.2.3.1 Pecuniary Loss

A patient who is a victim of medical negligence usually suffers from two types of losses i.e. pecuniary and non-pecuniary. Loss that can be calculated in monetary terms is called as pecuniary loss for example, medical expenses, travelling expenses, the cost of equipment bought because of the injury, loss of earning, future loss of earning and cost of

[217] Herring, *Medical Law and Ethics*, 124.
[218]. Jones, *Medical Negligence*, 971.
[219]Herring, *Medical Law and Ethics*, 124.

hiring someone else for performing chores which the patient is no longer able to perform due to the injury caused to him because of medical negligence.

#### 2.2.3.1.1 Medical Expenses

In English law, a patient can recover medical and other expenses as damages.[220] If the patient had to avail private medical services, he will be compensated but if he utilized NHS facilities then he will not be awarded damages for this. However, claimant can be awarded damages under this head if the patient is compelled to live in a special care homes like nursing home or he has to hire a special attendant for care at home. Likewise, damages can be granted for travelling cost and additional housing or adapting accommodation for the special needs of the patient.[221]

#### 2.2.3.1.2 Loss of Earning

It has to be estimated for two periods. First: The lost incomes due to the medical malpractice till the date of estimation, secondly: Future loss of earnings. Calculating the prospective loss of earning is a difficult question for the court. It has to foretell that what will be the future income of the patient and what would have been, had the injury not been caused to him due to medical negligence. The court will calculate the difference and grant the damages accordingly. Court may take account of future prospects of increased income. It was suggested in *Herring vs. Ministry of Defense*[222] that court may adopt loss of chance model where there is strong likelihood that claimant's career would have taken particular course which would have led to higher income, for instance promotions or

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[220]Ibid.
[221] Jones, *Medical Negligence*, 1001-1002.
[222][2003] EWCA Civ 528.

shifting to a better place of work. If the injury caused by medical negligence has reduced the life expectancy of the patient, court may consider pre-accident life expectancy and grant damages for the loss of earning of those years. This rule was enshrined in the decision of House of Lords in *Pickett vs. British Rail Engineering Ltd.*[223]

It becomes more difficult for courts to estimate future loss of earning where no previous history of income or no record can be found. Court simply grants a lump sum. It mostly happens when injury is caused to young children.

### 2.2.3.2 Non-Pecuniary Loss

Non-pecuniary loss includes pain and suffering, and loss of amenity caused due to the injury caused due to medical negligence. The principle for award of damages in this case would be that it must be just and reasonable as the principle of restoration is impossible in this case.

#### 2.2.3.2.1 Pain and Suffering

Under this head, patient can be awarded damages for the pain and suffering borne by claimant as a result of injury because of medical malpractice. If he faces humiliation, discomfort or any part of his body got disfigured, he can demand for damages. Likewise, if he realizes that his life expectancy has been significantly reduced because of the negligent behavior of the medical practitioner, he is entitled to damages. If this injury affects the marriage prospects, it will be taken into account in award of damages. This addresses to the loss of companionship and comfort and not to the financial benefits of

[223][1980] A.C. 136.

the marriage. Similarly, if a patient develops any psychiatric condition due to the injury, it will be reflected in the award of damages.

#### 2.2.3.2.2 Loss of Amenity

Loss of amenity includes the loss of activities of claimant, his job satisfaction, hobbies and recreational activities. Court will take into account all these losses during award of damages. This will include in the damage even if patient is unconscious and doesn't realize the loss of all these activities.

Patients are not always granted damages according to the calculations made after taking into account the heads mentioned above. These damages can be reduced if patient's own negligence contributed in the harm caused to the patient in addition to the negligence of the doctor[224]. Instances may arise when a patient doesn't disclose his some of his medical history that may be instrumental for diagnoses and prescriptions. A patient was incorrectly diagnosed in *Ingram vs. Williams*[225] but it was held that doctor was not negligent as patient didn't disclose that she was suffering from incontinence[226]. Likewise, if patient didn't take necessary steps that would have helped in mitigating the harm she is suffering, damages would be reduced. For example, where patient should have followed up the necessary treatments, but she didn't, in this case compensation will be reduced. But if there was a negligence on the part of the patient that she didn't disclose a certain fact and inquiring about that fact was equally important for the doctor for making a correct diagnosis and prescription, but he failed to ask, in this case he will be

[224] Herring, *Medical Law and Ethics*, 125.
[225] [2010] EWHC 758 (QB)
[226] Unintentional Passing of Urine

liable and the negligence on the part of patient would not be counted as contributory negligence. In *P vs. Sedar*[227] a patient was not held contributory negligent when she didn't notify the doctor about not giving her follow up appointment.

#### 2.2.3.2.3 Secondary Sufferers

Secondary victims are those people who didn't have directly suffered the injury due to the negligence of the doctor rather her beloved relative is the victim of medical negligence and this secondary victim has suffered mental distress due to the harm inflicted on his beloved. Courts are quite hesitant in granting damages to the secondary victims for the distress they suffered due to harm to primary victims. But it's not completely impossible. There are certain exceptions where court may overlook the position of secondary victim and recognize the causation between her and the defendant's negligence. For instance, what has been observed by the patient's relative is exceptionally awful or where the news was communicated in a negligent manner that caused psychological injury. Following cases may clarify the stance of the courts further:

**Sion vs. Hampstead Health Authority**[228] In this case, the son of claimant met an unfortunate accident. He was taken to the hospital. Defendant failed to make a diagnosis that the patient is bleeding from his kidney. He went into coma after three days of accident and suffered heart attack. He was kept under intensive care, but he couldn't survive and after fourteen days of accident, passed away. His father has been at his bed side throughout this period. He brought the claim in front of court of Law for psychiatric illness that he developed due to these fourteen days when he witnessed the collapse of the

[227] [2011] EWHC 1266 (QB).
[228] [1994] 5 Med LR 170

condition of his son. Although there was proximity between defendants' action and claimant's psychological illness, learned court held that it was not a sudden horrifying event, unfortunately it was an expected outcome of the fatal accident and deterioration of his condition later on.[229]

**Taylor vs. Somerset Health Authority[230]:** Patient died due to the heart attack that he suffered at his job's place. He didn't die instantly rather he was taken to the hospital after heart attack. He died in the hospital after sometimes. His wife Mrs. Taylor was informed about his heart attack. She came to the hospital and after twenty minutes of her arrival, she was told about the death of her husband. She identified the dead body of her husband in mortuary. As a result she claimed that she has got a psychiatric illness thus she deserves damages. House of Lord held that claimant can only recover the damages when she has actually seen or heard the primary injury or death.

#### 2.2.3.2.4 Bereavement

The Fatal Accidents Act grants damages for bereavement. Thus, an amount of £11,800 is awarded as bereavement damages to the spouse of deceased, his parents or children.[231] The sum amount is to be distributed equally between parents if both claim for bereavement damages. There is no need to prove financial dependency for bereavement damages.[232]

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[229] Carr, *Unlocking Medical Law and Ethics*, 8.
[230] [1993] 4 Med LR 34.

[231] "The Fatal Accidents Act" (1976), sec. 1(A).
[232] Ibid.

#### 2.2.3.3 Dispensation of Award

Damages used to be awarded in lump sum form till recently for the suffered loss as well as future losses but now court has got the authority to make decision of periodical payments. These payments can be reviewed and increased after sometimes if it turns out that patient suffers greater loss then estimated earlier and it can be decreased if proved otherwise at a later date. Thus, court has the power to grant a lump sum award and if it considers reasonable it can make it periodical.[233]

This concludes the brief of the damages in England for medical malpractice. Calculation of damages has been quite problematic for the judges.[234] It is challenging for the judges specially to estimate the appropriate compensation for the non-pecuniary losses. For example, what should be the appropriate compensation for loss of a limb, eye or hand? Secondly, future losses are a kind of guesswork for the judges. Sometimes, a lump sum amount is awarded for future loss and care needed for the patient, but he unexpectedly doesn't survive that much and dies shortly. This issue was addressed by allowing the periodical payments but that mandates that both the parties will be hanging for a very long time because of the dispute.

The current system of medical malpractice compensation is not adequate according to the majority of the people. According to a survey, almost 70% of the patients are completely or very dissatisfied with the current system.[235] Main drawbacks of the system can be summed up as:

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[233] Jones, *Medical Negligence*, 980.
[234] Herring, *Medical Law and Ethics*, 56.
[235] Jonathan Herring, *Q & A Medical Law* (Oxon: Routledge, 2015), 16.

a. The litigation process is slow;

b. Legal cost is rather huge;

c. The procedure is stressful for both parties;

d. It leads to the secretiveness instead of revelation;

e. This system discourages the process of learning lessons from mistakes;

f. Some claimants receive more compensation than they need, and some patients don't receive at all. Sometimes even for the same damage[236].

There have been multiple proposals for the reform in the system. One such proposal is NHS Redress Act, 2006. The main proposition of the idea is to settle the claims under £20,000 out of court in a separate tribunal. It doesn't intend to replace the current court system, rather an alternative for the minor claims which would require explanation, apology or payment so that the litigation may be expedited at both forums along with low cost. This Act has not yet been translated into implementation.

Another proposal for the reform of the system is no-fault scheme. This scheme proposed that every patient should be redressed who suffers with medical mishap without invoking the proof of negligence or labeling the doctor as negligent. This system is already implemented in New Zealand. There are pro and corns of the system. This system may reduce the legal cost; patients who suffer may be redressed as in current system two patients who suffer same medical mishap, may have two different fates in redress. One may get huge damages because he was fortunate enough to identify and proof the negligence, the other with same mishap may not be lucky like former and may be left with nothing after long legal battle. Another benefit of no-fault scheme is that it will

[236]Ibid.

remove enmity between doctors and patient which is an obvious result in case of the litigation on the basis of negligence. This system makes doctor more open about the mistakes and help them learning from it while the tort-based system they tend to hide their mistakes. No fault scheme tends to find the fault in the system and not on the particular individual as in the case of tort-based litigation. Sometimes, it is the system who is to blame rather than the individual. It reduces the level of stress and anxiety too that medical practitioners continuously complains in current system.

It's not all sunshine about this scheme; there are some real problems with it on the other side. No-fault scheme tends to redress the patients who suffer from medial mishap, but it will become pretty complex to distinguish between those who are facing the usual side-effect of the treatment which happens in allopathic system and those who suffers from medical mishap. Obviously, this system doesn't intend to pay every single person who falls ill but the complications in this scenario are real. Moreover, this system lacks accountability. Tort based system requires to identify the tortfeasor and publicly brand him as negligent and require him to compensate but in the no fault scheme, it only announces that the patient has suffered a mishap without identifying the individual who caused this mishap through his negligence. This will obviously eliminate the factor of accountability that is mandatory for deterrence and improvement. Lastly, it is very costly and places a huge burden on the governments. But it is not about the cost; its more about who bears the burden that is in tort-based litigation system is borne by the disabled and ill people. No fault scheme can be proved as a better alternative to the current system if it is properly combined with the disciplinary orders by the health regulatory authorities.

## 2.3 Medical Malpractice and Liability in American Law

According to a study in 1999 by "The Institute of Medicine's (IOM)" about preventable medical errors, 98,000 people die every year in United States of America,[237] making medical errors, the 6th. leading cause of death in America.[238] Recent statistics suggest that it is the third leading cause of death in U.S. According to the Journal of Patient Safety: "the numbers may be much higher — between 210,000 and 440,000 patients each year who go to the hospital for care, suffer some type of preventable harm that contributes to their death".[239]Despite many initiatives for improvement of quality of delivery of healthcare, statistics are still very high.[240]

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[237]To Err is Human: Building a Safer Health System, Institute of Medicine, 1999

[238]Report of "American Association of Justice" by the name of "Medical Negligence: The Role of America's Civil Justice System in Protecting Patients' Rights" has quoted many unfortunate cases of medical malpractice and inadequate measures from authorities. Some of them are mentioned below:

Doctors diagnosed Linda McDougal, who was 46 years old with cancer in May 2002 and doctors advised the removal of both breasts. When she gained consciousness after double mastectomy, she was told by surgeons that she never had any form of cancer. She was horrified to hear that. Two pathologists had exchanged her biopsy results with another woman's – consequently her both breasts had been amputated unnecessarily. She suffered from many infections and underwent emergency surgeries as a result.

Matthew Magargee, 28, was diagnosed with non-Hodgkin's lymphoma which is a treatable disease. He got two different drugs as treatment — one drug was given into his abdomen and one through a port into his head. The oncologist and resident mistakenly switched the chemotherapy drugs during a routine chemotherapy session. As a result, Matthew went into a coma and died two weeks later.

Report has written about those doctors too who were involved in medical malpractice Like Dr. Robert Ricketson who shifted from state to state, leaving a record of seriously injured patients and finally settled in Hawaii in 1998. He did not tell the Hawaii authorities about his record. During a spinal surgery, he had to implant titanium rods in patient's spine, but rods were missing. Instead of waiting for the rods to be delivered, Ricketson cut up a stainless-steel screwdriver and used the pieces to brace the spine. Some days later, the screwdriver broke. Patient was rendered paraplegic and died two years later.

An orthopedic surgeon Dr. Eric Scheffey used to live in Texas had left hundreds of patients dead or maimed during a two-decade career. He lost his privileges at three different hospitals.

The Texas Board of Medical Examiners allowed him to continue practicing, even after a judge recommended his license be taken away. After 24 years of practice and more than 78 medical negligence lawsuits, the board revoked his license in 2005.

[239] John T James., "A New, Evidence-based Estimate of Patient Harms", *Journal of Patient Safety* (2013):122-128.

[240]Nancy J. Niles, *Navigating the U.S. Health Care System* (Burlington, Jones & Bartlett Learning, 2017), 3.

Medical malpractice law in U.S is based on the English Law[241] as is the case in majority of American jurisprudence.[242] Therefore, the concept of "negligence" of law of Torts is to be invoked in the cases of medical malpractice in U.S.[243] It was later developed by rulings of various courts of the states, as it is under the authority of the individual states andnot the federal government. Decisions of lawsuits filed in state courts have established the framework and rules for medical malpractice. Therefore, although the basic principles are same, laws regarding medical malpractice can vary from state to state.[244]

Alongside these rulings, multiple statutes have been passed by states' legislatures during the last 30 years that have further developed the governing principles of medical malpractice law[245]. Thus, medical malpractice law in the United States is based on common law, modified by state legislative actions that vary from state to state.

Litigation against medical malpractice started in 1800s in United States. But they were rare till 1960s. After 1970s, the number of lawsuits for claims of damages against medical practitioner escalated and now the medical malpractice suits are quite common in United States.[246]

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[241]English common law forms the basis of jurisprudence in the United States because English settlers in America brought the common law with them and transplanted a homogeneous body of English law in American soil during the colonial period. Please See Morris L. Cohen, The Common Law in the American Legal System: The Challenge of Conceptual Research, *Yale Law Library Journal* 81, 13 (1989): 13-32.

[242] Austin. "A Brief History of Medical Liability Litigation and Insurance", 6-9.

[243] David M. Studdert and Others, "Medical Malpractice", *The New England Journal of Medicine* 350, 3 (2004): 283-292.

[244]Bal, An Introduction to Medical Malpractice in the United States, 339–347.

[245]Donna k. Hammaker and others, *Health Care Management and the Law* (Burlington, Jones & Bartlett Learning, 2017), 161.

[246]Barry R. Furrow, "Medical Malpractice Liability" in *The Oxford Handbook of U.S. Health Law*, ed. I. Glenn Cohen and Others (New York, Oxford University Press, 2017), 421.

Aggrieved parties file the case in the state trial court. If a case involves the damage caused by a federally funded clinic or a Veteran's Administration facility, then the case is filed in a federal district court. Moreover, the case can also be filed in federal court if there is a violation of a fundamental constitutional right during the medical malpractice or if the parties to the litigation are from different states. In United States, the right to a jury trial is regarded as a fundamental constitutional right[247] and a physician can expect a jury trial in nearly all cases of medical malpractice

To win monetary compensation for injury related to medical negligence, a patient needs to prove that healthcare provider engages in negligence or deviated from accepted standards of care.[248] Medical profession has set its own standard and courts have strived to enforce that.[249] Although there is no national standard of care, however clinical practice guidelines help a lot nowadays in establishing the standard of care.[250]

The injured patient must show that the physician acted negligently in rendering care, and that such negligence resulted in injury. To do so, four legal elements must be proven:

a. the existence of a legal duty on the part of the doctor to provide care or treatment to the patient;

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[247]A jury trial is a legal proceeding where a group of individuals chosen from the public is asked to consider the evidence presented during the case and make a decision. The choice of jurors is guided by court rules and with the participation of lawyers from both sides. Demographic information about the jurors is known to both parties, each of whom can usually strike a limited number of jurors to assure impartiality of the jury panel. In contrast to a jury trial, a bench trial is one in which a judge or a panel of judges makes the ultimate decision.

[248]Donna k. Hammaker and others, *Health Care Management and the Law* (Burlington, Jones & Bartlett Learning, 2017), 161.

[249]Furrow, "Medical Malpractice Liability", 423.

[250]Hammaker and others, *Health Care Management and the Law*, 163; Furrow, "Medical Malpractice Liability", 425.

b. a breach of this duty by a failure of the treating doctor to adhere to the standards of the profession;

c. a causal relationship between such breach of duty and injury to the patient; and

d. The existence of damages that flow from the injury such that the legal system can provide redress[251].

When the aggrieved party has proved in the court that doctor's negligence resulted in harm, the next question for the court to decide is the calculation of the monetary compensation to be paid to the injured person. Court takes into consideration both economic and non-economic losses. Medical practitioners protect themselves from such cases of medical negligence through insurance services. System is not fully matured and there is ongoing debate regarding reforms.[252]

## 2.4 Medical Malpractice Law in India

Like America, India too was once a colony of British Empire. Therefore legal system of India has its origin in Common Law and the concept of 'negligence' of law of Torts is to be sought for the redress of aggrieved party alongside some other avenues.[253] It has further developed the concept of 'negligence' through the decisions and interpretation of their own Indian courts to better suit their system and circumstances.

The Supreme Court in Laxman vs. Trimbak, held:

[251] Joseph S. Kass, "Medical Malpractice Reform", *American Medical Association Journal of Ethics*, 18 (2016): 299-310.

[252] Bal, An Introduction to Medical Malpractice in the United States. , 339–347

[253] Agrawal, Medical negligence: Indian legal perspective, S9–S14.

> The duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties viz., a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.[254]

In *Achutrao Haribhau Khodwa vs. State of Maharashtra* the Supreme Court said;

> The skill of medical practitioners differs from doctor to doctor. The very nature of the profession is such that there may be more than one course of treatment which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of a doctor if he has performed his duties to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient, but as long as a doctor acts in a manner which is acceptable to the medical profession and the Court finds that he has attended on the patient with due care skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor to be guilty of negligence.[255]

In India, a professional is liable both under law of contract and tort. In general, a professional man owes to his client a duty in tort as well as in contract to exercise reasonable care in giving advice or performing services. Liability in contract depends on the express or implied terms agreed upon by the patient and the medical man. While tortious duties of professional man are limited to taking reasonable care, the contractual

[254] AIR 1969 SC 128.
[255] [AIR 1996 SC 2377].

duties are generally more onerous in nature. Indian Supreme Court in Rajkot Municipal Case[256] held that if the claim depends upon proof of contract, action does not lie in tort. If the claim arises from relationship between the parties independent of the contract, an action would lie in tort at the election of the plaintiff, although he might alternatively have pleaded in contract. In cases where the services offered by the doctor or hospital do not fall in the ambit of 'service' as defined in the consumer Protection Act, patients can take recourse to the law relating to negligence under the law of torts and successfully claim compensation.

The Indian parliament enacted the Consumer Protection Act in 1986 to be safeguarding the consumer interest in compliance with UN guidelines. In India the High Courts had different versions regarding whether medical profession falls within the ambit of Consumer protection Act, recent decision of Indian Supreme court in *Indian Medical Association vs. V.P. Shantha and Others*[257] held that medical services provided by all private hospitals and health centers except government hospitals are "contract for service" and fall within the ambit of CP Act.

In India, the judge in the consumer court, or the civil court, has complete discretion over the compensation amount and hence is bound to consider the impact of the judgment because he/she sets a precedent even in the manner and quantum of damages awarded.

In a recent judgment on medical negligence, the Supreme Court awarded compensation amounting to Rs. 11 crores to a victim, which was to be paid by the doctors and the

[256]Rajkot Municipal Corporation vs. Manjul Ben Jayantilal Nakum, (1997) 9SCC, 1997.
[257]AIR 1996 SC 550.

private hospital deemed responsible for the wrongful death of a patient.[258] This landmark judgement was by far the largest compensation award in the history of Indian medical negligence litigation.[259] India, unlike the USA, does not have a jury system that determines culpability or quantum of compensation. Inconsistency in awarding compensation in medical negligence cases is a problem that currently plagues the Indian health sector.

As the Supreme Court noted:

> The lack of uniformity and consistency in awarding compensation has been a matter of grave concern... If different tribunals calculate compensation differently on the same facts, the claimant, the litigant, the common man will be confused, perplexed, and bewildered. If there is significant divergence among tribunals in determining the quantum of compensation on similar facts, it will lead to dissatisfaction and distrust in the system.[260]

Alongside civil liability, doctors can be tried for medical negligence under Indian Penal Code, 1860 ("IPC") too, However, it doesnot specifically deal for "medical negligence" rather the clauses are general in nature.[261] For example, Section 304A of IPC (which deals with the death of a person by any rash or negligent act and leads to imprisonment up to 2 years), it involves cases of causing death due to negligent driving of motor vehicle and medical negligence leading to the death of a patient, likewise, other general provisions of IPC, such as Section 337 (causing hurt) and 338 (causing grievous hurt), are also often invoked in relation to medical negligence cases.

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[258] Dr. Balram Prasad and others v Dr. Kunal Saha and another (2013)

[259] Chandra, M. S., & Math, S. B. Progress in Medicine: Compensation and medical negligence in India: Does the system need a quick fix or an overhaul? *Annals of Indian Academy of Neurology*, 19 (2016) S21–S27. http://doi.org/10.4103/0972-2327.192887

[260] Sarla Verma vs. Delhi Transport Corporation (2009) 6 SCC 121.

[261] Agrawal, Medical negligence: Indian legal perspective, S9–S14.

Criminal liability may also arise under a number of other statutes such as the Indian Medical Council Act, 1956, the Dentists Act, 1948, the Medical Termination of Pregnancy Act, 1971, the Preconception and Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, the Transplantation of Human Organs Act, 1994 and other penal laws enacted by the Parliament and State legislatures from time to time.

The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of *mensrea* must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree.[262] Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution

The Supreme Court in *Dr. Suresh Gupta vs. Govt. of NCT Delhi*[263] required the medical negligence to be "gross" or "reckless" in order to be prosecuted for criminal liability[264]. Mere lack of necessary care, attention, or skill was observed to be insufficient to hold one *criminally* liable for negligence. In *JacobMathew vs. State of Punjab*[265] Supreme Court observed that in order to hold the existence of criminal rashness or criminal negligence, it shall have to be found out that the rashness was of such a degree as to amount to taking a hazard knowing that the hazard was of such a degree that injury was most likely imminent."

[262]Kumar, Lavlesh & K Bastia, B. Medical negligence- Meaning and Scope in India. *Journal of the Nepal Medical Association.* 51(2011): 49-52.

[263](2004) 6 SCC 422.

[264]Chandra. Progress in Medicine: Compensation and medical negligence in India, S21–S27.

[265] Criminal Appeal No. 144-145of20004 decided by the Supreme Court on August 5, 2005.

The demarcation between civil liability and criminal liability is vague, and Supreme Court is not yet successful in providing a clear guideline for categorizing the action for civil or criminal liability.[266] Moreover, the criminal liability and civil liability are not exclusive remedies and for the same negligence, both actions may be available.

Another avenue for the aggrieved party for redress is to seek disciplinary action against doctors. The Indian Medical Council (IMC) (Professional Conduct, Etiquette, and Ethics) Regulations, 2002, made under IMC Act, 1956 govern the professional misconduct by medical practitioners. Medical Council of India (MCI) and the appropriate State Medical Councils have the power to take disciplinary action against the negligent doctor and they may remove the name of the doctor forever or temporarily.

## 2.5 Conclusion

English, American and Indian Legal systems, all three jurisdictions have their origin in Common Law.[267] Therefore, it is developed by decisions and interpretation of the courts of respective jurisdictions. English courts have developed the concept of 'negligence'[268] of Law of Torts for dealing medical malpractice to a considerable maturity although there is still some confusion in some of its concepts, such as in estimation of damage for different losses. Law of torts of England mandates the claimant to prove that there was a duty of care and doctor breached that duty that resulted in harm caused to the patient. Basic principle in tort for the assessment of damages is to reinstate the claimant to the place where he would have been, had the negligence not been committed. Majority of

[266] Agrawal, Medical negligence: Indian legal perspective, S9–S14.
[267] Please see above para 2.1
[268] Please see above para 2.2.2.1

the claimants are dissatisfied with the system of compensation in England. There have been multiple proposals for the reform in the said system.[269] American Courts too followed the same concept of English law of Torts and interpreted and further developed it according to their own circumstances. Health is under states' law and not under federal law. For this reason, interpretations by court vary from state to state. However, the basic principles of negligence remain same.[270] There is an ongoing debate in U.S regarding compensation too. India being a former colony of Britain follows the same law of Torts for redress of the aggrieved party, harmed by the negligence of the doctor. However, Indian Laws have included medical services in consumer protection laws too and consumer courts are dealing with the medical negligence cases. This has made the redress quick and efficient for the aggrieved parties in India, though it is still contested that the field of medicine should be kept separate from the concepts of consumerism.[271]

[269] Please see above para 2.2.3
[270] Please see above para 2.3
[271] Please see above para 2.4

# CHAPTER 3

# MEDICAL MALPRACTICE & LIABILITY IN PAKISTAN

Law does not exist in a void; rather it is interwoven in the very fabric of the social, economic and political realities of a society. Therefore, in order to better understand the law of medical malpractice in Pakistan, it seems apt to briefly analyze the healthcare system first, where the art of medicine is practiced and from where the malpractice stems out.

Pakistan is a developing country with a federal system of government, with its four provinces. Different remedies are available for aggrieved parties for medical malpractice, through various national and provincial legislations. However, the system needs improvements due to various reasons.

Present chapter explores the healthcare sector of Pakistan and different national and provincial legislations to combat medical malpractice. Moreover, it also analyzes the courts' trends to deal with the liability of medical professionals.

## 3.1 Healthcare Sector of Pakistan

Like other developing countries, Pakistan is undergoing the process of development and progress in every field including health and the road to the goal is still very long. Increased remuneration[272] of doctors and actions against negligent doctors and quacks[273]

[272] "Pay Raise for Doctors Notified" *Dawn*, July 22, 2011, online edition, www.Dawn.com/news/646140; "Salary of Balochistan Doctors set to be Doubled" Dawn, September 15, 2011, online edition, www.Dawn.com/news/659267; (accessed August 2016)

are some of the positive signs but still a lot have to be done to have an efficient healthcare system. Healthcare system is weak, so is the legal redress[274].

Before 18th constitutional amendment, because of concurrent list, authority in health sector was shared between federal government and provinces. In order to give provinces larger autonomy, concurrent Legislative list was abolished in 18th. Amendment.[275] Therefore, it became the responsibility of provincial governments primarily to provide health services that include planning, financing, implementation, management and oversight, supervision and monitoring, regulation, medical education and training.[276] However, Ministry of National Health Services Regulation and Coordination was later re-instated at federal level and was given some responsibilities of national & international coordination in the field of public health[277]. For instance:

1. Oversight for regulatory bodies in health sector
2. Population welfare coordination
3. Enforcement of Drugs Laws and Regulations
4. Coordination of all preventive programs, funded by GAVI/GFAT (TB, HIV/AIDS, Malaria, Hepatitis etc.)
5. International commitments including attainment of MDGs
6. Infectious disease quarantine at ports

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[273] Hassan Ahmed "Noisy Quacks under the Knife" *Pakistan Today*, June 6, 2015, online edition, www.Pakistantoday.com.pk/2015/06/06 (accessed August 2016)

[274] Rukhsana Shaheen Waraich, "Healthcare and Medical Malpractice Law in Pakistan" *Policy Perspective*, Vol. 15 issue no. 3 (2018): 85-98.

[275] http://www.na.gov.pk/uploads/documents/1302138356_934.pdf

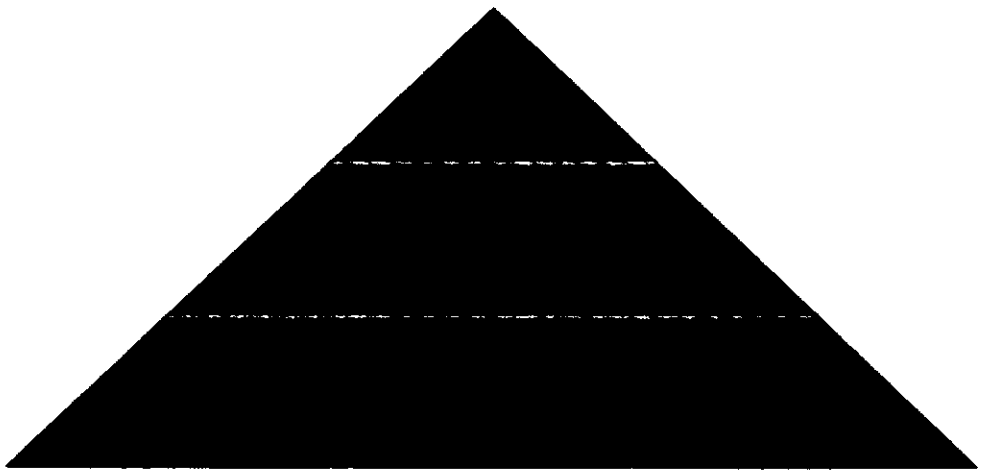
[276] Sabeena Jalal and Inam ul haq, Revisiting the three different tiers of the health system of Pakistan and their Implications for the achievement of MDGs by Pakistan, *J Pak Med Assoc* 2014 Feb;64(2):195-200

[277] RS Waraich, "Healthcare and Medical Malpractice Law in Pakistan", 88.

7. Coordination of Hajj medical mission
8. Provision of medical facilities to the Federal employees in provinces.[278]

As per system, Pakistan has mixed healthcare system. It has both public and private care health facilities.[279] As Pakistan had been a colony of British Empire, it has a public system similar to the National Health Services.[280] It is financed through development assistance finance and revenues[281] and is free for its citizens.[282] It has a three-tiered delivery system: Primary, secondary and tertiary care.[283]

**HEALTHCARE SYSTEM: ORGANISATION**



Source:

[278] http://nhsrc.gov.pk/messageDetail.php?message_id=12 (accessed July 2, 2015)
[279] Khurshid Khowaja, Healthcare System and Care Delivery in Pakistan, *Jona*, Volume 39, Number 6, 263-265
[280] Nishter, *Choked Pipes: Reforming Pakistan's Mixed Health System*,40
[281] Ibid.,
[282] Khowaja, Healthcare System and Care Delivery in Pakistan, 263-265
[283] http://www.emro.who.int/pak/programmes/health-system-strengthening-hss.html (accessed June 29, 2015)

Infrastructure wise, Pakistan has a large healthcare system. It has 5000 basic health units, 600 rural health centers, 7500 other first-level care facilities and above 100 000 lady health workers. Secondary care consists of hospitals at tehsil and district level, while Tertiary care hospitals are mainly situated in big cities and are allied with teaching and research organizations. Total there are 989 public hospitals.[284][285]. Pakistan has 146939 registered GP's (with basic M.B.B.S degree), 14627 dentists (with basic BDS degree), and 1090 L.S.M.F (Licentiate State Medical Faculty) while Pakistan has 32116 registered specialists and 1268 registered dental surgeon[286]. Thus Pakistan has a good ratio of doctors but the statistics of nurses, pharmacists and Para medical staff is significantly low[287].

Besides this public sector health delivery system, Private sector has a significant role in Pakistan's health care system. Private sector mainly operates in cities or dense areas. Private healthcare system has further two kinds: for profit and non-profit. For profit sector provides a number of services for instances, diagnostic facilities, maternity homes, clinics, dispensaries and hospitals. The quality of service and the level of satisfaction

[284]http://www.emro.who.int/pak/programmes/primary-a-secoundary-health-care.html?-Secoundary-Health-Care-=

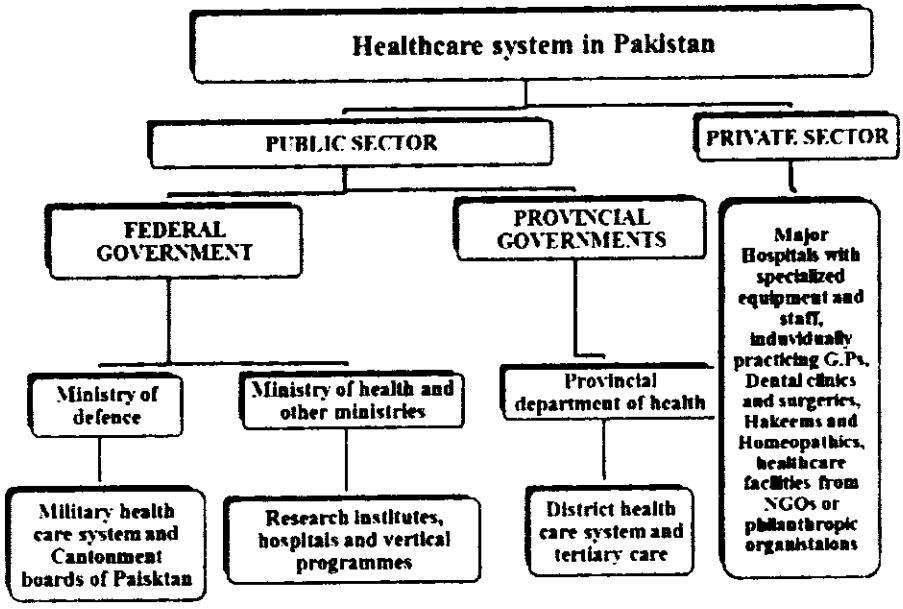
[285] Shaista Toufeeq and Others, Comparison and Analysis of Health Care Delivery System: Pakistan versus China, *International Journal of Health Science Research* 2 (2014): 46-50.

[286]http://www.pmdc.org.pk/Statistics/tabid/103/Default.aspx (accessed June 29, 2015)

[287] RS Waraich, "Healthcare and Medical Malpractice Law in Pakistan", 89.

vary private sector.[288] There are some highly sophisticated hospitals in Pakistan, but majority is not meeting international standards.[289]

# HEALTHCARE SYSTEM: DELIVERY




Source:

Non-profit healthcare is provided by diverse entities and includes NGO's and trust-funded organizations. Edhi Foundation[290], Shaukat Khanum Cancer Hospital[291], Sindh

[288] Afshan khattak and others, Patient satisfaction: A Comparison between Public and Private Hospitals of Peshawar, *International Journal of Collaborative Research on Internal Medicine and Public Health* , vol. 4, no 5 (2012); http://www.pakistantoday.com.pk/2013/01/04/city/islamabad/private-hospitals-lack-basic-medical-equipment/ (accessed June 29, 2015); http://www.dawn.com/news/1159989 (accessed June 29, 2015.

[289] Nishter, *Choked Pipes: Reforming Pakistan's Mixed Health System*,40

[290] http://edhi.org/

[291] https://www.shaukatkhanum.org.pk/

Institute of Urology and Transplantation[292] and Layton Rehmatullah Benevolent Trust[293] are few examples. There are 74 large hospitals comprised of 7000 beds and a very large number of clinics in Pakistan according to a survey done in 2005.[294] Apart from hospitals that are entirely charitable, there are few for profit private sector hospitals too that run significant charitable operations.

The Armed Forces health system and Fauji Foundation is also present in the big picture of Healthcare sector. They have an independent system of financing, infrastructure and governance.

Although allopathic medicine is prevalent in Pakistan, nonetheless it has not completely eradicated other types of treatments. People still get treated by Tibb-e-Unani, Homeopathy, and herbalists and they still go to spiritual healer, Unani (Greco-arab) healers and bonesetters.[295]

## 3.2 Regulatory Measures for Medical Profession

Pakistan's medical profession is regulated at two levels, that is, national and provincial level. Thus, the disciplinary measures against cases of medical malpractice are dealt under these legislations. It was mainly regulated by Pakistan Medical & Dental Council (PM & DC). No doctor could officially practice medicine in the country without being registered with the said council.[296] Howerver, Supreme Court disbanded the Pakistan

[292] http://www.siut.org/
[293] http://www.lrbt.org.pk/
[294] Nishter, *Choked Pipes: Reforming Pakistan's Mixed Health System,* 44.
[295] Shaikh TB, Hatcher J. Health seeking behavior and health service utilization in Pakistan: challenging the policy makers. *J Public Health* 27, no. 1 (2004): 49-54.
[296] http://www.pmdc.org.pk/AboutUs/tabid/72/Default.aspx

Medical and Dental Council on January 12, 2018 and ordered an interim committee to take charge of its affair.

### 3.2.1 National Level Regulatory Measures

Indian Medical Council Act, 1933 was adopted in 1947 after Pakistan gained independence. Health Conference was held that recommended this Act to be the basis for medical education. Some changes took place but the major reform was when Pakistan Medical & Dental Council (PMDC) was formed in 1962 after the promulgation of the PMDC Ordinance (1962). This Council was playing following key roles till Supreme Court of Pakistan disbanded the Pakistan Medical and Dental Council on January 12, 2018:

a. Prescribe the uniform national standards of medical and dental education;
b. Record keeping of Medical Practitioners;
c. Endorsing and accrediting medical colleges; and
d. Taking disciplinary actions against medical malpractice.[297]

### 3.2.2 Provincial Level Regulatory Measures

Patients who get treatment in the province of Punjab and suffered from negligence can file a complaint in Punjab Healthcare Commission. Section 2, clause xxii of The Punjab Healthcare Commission (PHC) Act 2010 defines medical negligence in these words: ""medical negligence" means a case where a patient sustains injury or dies as a result of

[297]http://www.pmdc.org.pk/Ethics/tabid/101/Default.aspx

improper treatment in a healthcare establishment and, in case of death, determined on the basis of medical autopsy report."[298]

The Punjab Healthcare Commission can investigate any matter that is related to medical negligence and act as a quasi-judicial body. It has the power to call people through summons and it can ask them to swear upon oath and give testimony. It has the power to force people to produce documents and ask them to give evidences on affidavits. It has the power to get its order executed through executive authorities and law enforcement agencies.[299] A complaint can be filed to commission in case any of following misconduct is observed but this list is not exhaustive:

1. If medical practitioners cause unreasonable delay in treatment without a justified cause, a complaint may be filed to Healthcare commission.
2. If medical practitioners have to provide treatment that necessitate obtaining informed consent, but they don't take or doesn't clarify enough for the patients to understand the sensitivity of the matter, Healthcare commission may intervene.
3. If medical practitioners don't maintain satisfactory services like proper assessment, diagnosis, and treatment and follow up, Commission can investigate.
4. If a hospital or medical practitioner undertakes the treatment of a patient while they know that they lack competency or other facilities that is required for performance of that procedure or treatment, it is malpractice.
5. If a hospital or medical staff failed to keep proper record maintenance or its security according to the standards, it amounts to misconduct.

[298]The Punjab Healthcare Commission Act 2010, Section 2, clause xxii
[299] http://www.phc.org.pk/crp.aspx

6. If a healthcare provider fails to take the necessary steps for possible misfortune or system failures, then investigations may occur against them.
7. If any medical practitioner or healthcare provider demanded or received unreasonable and unjustifiable amount for services and procedures. It may be questioned. Likewise, if any right of the patient was infringed that is provided by charter.
8. Unnecessary tests, treatments and procedures may lead to complaint and investigation.
9. Healthcare providers must make sure that no case of sexual harassment takes place, failure of which can cause action by healthcare commission.
10. Patient's data must be released when it is necessitated.
11. Commission will investigate and decide if any medical practitioner is involved in billing or documentary fraud.
12. Unqualified medical staff can be contested before Healthcare commission.
13. Standards should be maintained, failure to comply may result in proceedings.[300]

Public and private healthcare in the province of Khyber Pakhtunkhaw is regulated by Khyber Pakhtunkhaw Healthcare Commission. It was formed by promulgation of Khyber Pakhtunkhwa Health Care Commission Act 2015 on 27th of January, 2015[301]. It is a replacement of Health Regulation Authority that was formed in 2002. Health regulation

[300]http://www.phc.org.pk/crp.aspx
[301]http://hcc.gkp.pk/read_more

Authority had same functions, but it didn't show any performance due to which it was replaced with healthcare commission[302].

Sindh Healthcare Commission was formed in 2015[303] through Sindh Healthcare Commission Act, 2013 that was passed on February 24, 2014 and promulgated on March 19, 2014.[304] Following are the main purposes for the formation of Healthcare commission:

1. Improvement in healthcare quality,
2. Safeguarding patients' rights,
3. Ensuring doctors' safety,
4. Regulation and monitoring of public & private healthcare centers,
5. Elimination of quackery.[305]

This glance of Pakistan's healthcare system shows that the basic structure has a strong post-colonial imprint with an NHS model.[306] Therefore, it is not much difficult to improve it. It needs political will, proper legislation and efficient implementation.

### 3.3 Implication of Liability on Medical Malpractice in Pakistan

Like U.S and India, being former colony of Great Britain, Pakistan's legal system is based on British India too. Therefore, most important law regarding medical malpractice is law of torts. Apart from this, some other options are available too. For example, a case

[302] http://www.dawn.com/news/1205642 (Accessed August 7th, 2016)
[303] http://www.dawn.com/news/1220364 (Accessed August 7th, 2016)
[304] http://www.pas.gov.pk/index.php/acts/details/en/31/251 (Accessed August 7th, 2016)
[305] http://nationalcourier.pk/metropolis/sindh-fails-implement-healthcare-commission-bill/ (Accessed August 7th, 2016)
[306] Nishter, *Choked Pipes: Reforming Pakistan's Mixed Health System*,40

can be filed against medical practitioners under clauses of Qisas and Diyat of Pakistan Penal Code though Courts discourage this practice. Consumer Protection Act has been promulgated that added medical services in the ambit of Consumer laws following Law of India. Resultantly, cases can be filed in consumer courts as well. To date, this has been the most efficient, speedy and fruitful medium for the cases against medical negligence. Aggrieved party can seek help from provincial healthcare commissions too. Details of all these laws and remedies are mentioned below:

### 3.3.1 Law of Torts

As Pakistan is a former British colony too, it inherited common law system. Just like India, the application of this system dates back to seventeenth century when East India Company established a factory in the port of Surat after gaining the rights from Mughal Emperor. It subsequently founded its factories in Madras (Chennai) and Bombay in 1640. The charter of East India Company gave it the power to discipline its own servants i.e. to administer justice in civil and criminal matters of the people working in this company[307]. But these courts derive their authority from East India Company and not from the crown. In 1726, after the expansion of East India Company, it requested king to issue a charter granting them special powers of courts. Thus, Mayor's courts were established that were royal courts and derived its power directly from the crown and not from the company. These courts had uniform structure and its appeal lied to the Privy Council in London[308]. Mayor's courts were not given a law to be applied rather they were required to adjudicate

[307]P. N. Chopra, *A Comprehensive History of India,* Vol. 3 (New Delhi: Sterling Publishers Pvt. Ltd, 2003), 169.

[308]*Encyclopedia of Asian history*, ed. Ainslie Thomas Embree, (New York: Scribner, 1988), s.v. "Judicial and Legal Systems of India".

the cases according to Justice and rights. However, Courts applied common law and equity rules. After the war of Plassey, Judicial function of East India Company grew tremendously, and the courts were not restricted to these three cities. Rather it gradually did outplace the Mughal legal systems in Bengal where now Company's rule was established. In next two centuries, entire judicial system was transformed, Supreme Court was first formed and later transformed into high courts and majority of laws were codified mainly on the basis of English Law till the dawn of independence when India and Pakistan were divided into two states through Indian Independence Act 1947. It talked about the validity of previous laws in its section eighteen. Its clause three says:

> 18 (3) Save as otherwise expressly provided in this Act, the law of British India and of the several parts thereof existing immediately before the appointed day shall, so far as applicable and with the necessary adaptations, continue as the law of each of the new Dominions and the several parts thereof until other provision is made by laws of the Legislature of the Dominion in question or by any other Legislature or other authority having power in that behalf.[309]

This section was present in all constitutions of Pakistan. Article 268 of current Constitution that is of 1973 read it as follows:

> 268 (1) Except as provided by this article, all existing laws shall, subject to the constitution, continue in force, so far as applicable and with the necessary adaptations, until altered, repealed or amended by the appropriate legislature.[310]

Therefore, Law of torts of English Common law is directly applicable in Islamic Republic of Pakistan.[311] If any codified law didn't change any common law rule, Law of

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[309]http://www.legislation.gov.uk/ukpga/1947/30/pdfs/ukpga_19470030_en.pdf
[310]http://www.na.gov.pk/uploads/documents/1333523681_951.pdf
[311] Imran Ahsan Khan Nyazee, *Torts and Easements* (Rawalpindi: Federal Law House, 2010), 39.

torts will be still applicable here and medical practitioners are being tried for medical malpractice under tort law. However, the law of torts in Pakistan failed to grow much. Famous Pakistani legal scholar Professor Imran Ahsan Khan Niazi has mentioned some of the reasons for the failure in his book "Torts and Easments"[312]. He cited heavy court fees as one of the reasons. It was imposed by British that continued till last decade in Pakistan. This made the protection of the law of torts unreachable for the poor masses.[313] Moreover, lack of codification of law is another reason for failure of law of torts to grow in Pakistan.[314] Therefore, the number of cases for medical malpractice decided under law of torts is less.[315] Some of the cases decided under law of torts and Fatal Accidents Act, 1855 in Pakistan are mentioned below:

1. **Mrs. Alia Tareen vs. Amanullah Khan[316]:** Mrs. Adeeba Aman wife of Mr. Amanullah had three daughters through normal delivery. During her fourth pregnancy, she used to visit clinic of Dr. Mah Rukh frequently for consultation. Close to the delivery date, she started consulting Dr. Saddiqa Haq too who was gynecologist and supervising the maternity section of Pakistan General Hospital, Quetta. When the delivery date was overdue, she was advised by the said doctor to get admitted in the hospital. Patient was given the drip of Syntocinon for labor pain. After some time, fetal heart beats became irregular that was in a good state

[312] Ibid., 40.
[313] Ibid.
[314] Ibid.
[315] Acording to a report, by the Network for Consumer Protection, there have been only two judgments on medical negligence in Pakistan from 1947 to 2003. The report cited the reasons to be lack of awareness and the absence of medical malpractice litigation culture in Pakistan. The Netweork of Consumer Protection, Medical Negligence: Tragedy under Wraps (Islamabad: The Network Publications, 2006), 16.
[316] PLD 2005 Supreme Court 99.

previously. At that point, Dr. Saddiqa decided Caesarian Section operation without paying much attention two the ill-equipped hospital for such emergencies. Anesthetist was consulted who refused to give anesthesia because the apparatus was faulty. It was then decided that patient should be shifted to al-Rehman Hospital. She was shifted and operated there. After Caesarian, when she was shifted to the room, patient's state deteriorated and unfortunately, she expired. It was alleged by the claimant (Patient's husband) Mr. Amanullah, that she died because of uterus rupture and post-partum shock that was the result of negligence and mismanagement of Dr. Saddiqa, Mrs Alia Tareen (Managing director of the hospital) and Zahoor Ahmed Durrani (Administrator of the hospital). Mr. Amanullah brought a suit for damages against these three people for the recovery of PKR ten million as damages. The Trial court found and held all three that they were guilty of negligence, recklessness, lack of competence and lack of equipment. One million rupees were decreed as damages payable by the defendants. On reaching high court of Baluchistan, damages were enhanced to PKR ten million, but Mr. Zahoor Ahmed Durrani was discharged of liability. Appeals were made against this judgment before Supreme Court. Learned bench consisted of Sardar Mohammad Raza Khan, Rana Bhagwandas, and Hamid Ali Mirza. Sardar Raza Khan while discussing the concept of negligence in his judgment stated:

> The standard of care to be observed by a professional has always been that of the ordinary skilled person excercising and professing to have that special skill. A doctor or surgeon was not to be held negligent if he acted in accordance with the practice accepted at a relevant time as proper by a responsible body of medical opinion, irrespective of the

> fact that other doctors might have adopted different practices in similar conditions.[317]

He further quoted the governing principle by Lord Dunedin in Morton v. William Dixon Ltd. which says:

> I think it is absolutely necessary that the proof of that fault or omission should be one of the two kinds, either to show that the thing which he didn't do was a thing which was commonly done by other persons in like circumstances, or to show that it was a thing which was so, obviously wanted that it would be folly in anyone to neglect to provide it.[318]

He cited many different English cases and quoted books for explication of the concept of negligence. For instance, cases Hatcher v. Black and Hunter v. Hanley were discussed by the learned judge in his decision. According to the facts of case, he couldn't find any act of defendants either of negligence or of omission to have been the direct and immediate result of the unfortunate death of Mrs. Adeeba Aman. He thus set aside the previous judgment and dismissed plaintiff's suit for damages.

Learned judge Hamid Ali Mirza contradicted with the decision of the learned judge Sardar Raza Khan. He too cited English cases[319] and gave references from English books on the said topic. For instance, he mentioned "Halsbury's Laws of England" which says regarding negligence and duties owed to patients:

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[317] Ibid.

[318] 1909 SC 807,809

[319] For instance, he mentioned Lord Dunedm in Morton v. William Dixon Ltd (1909 SC 807,809), Lindsey County Council v. Marshall (1936 AELR (Vol. 2) 1076), Gold and Others v. Essex County Council (1942 AAER (vol. 1) 326), Cassidy v. Ministry of Health (1951 AELR (Vol. 1) 574, Jones v. Manchester Corporation and others (1952 AELR (vol. 2) 125) and many other English cases. He cited some Indian cases too for example, Dr Laxman Balkrishna, Joshi v. Dr. Trimbak Bapu Godbole and another (AIR 1969 SC 128).

> A person who holds himself out as ready to give medical advice or treatment impliedly undertakes that he is possessed of skill and knowedge for the purpose. Whether or not he isa registered medical practitioner, such a person who is consulted by a patient owes him certain duties, namely a duty of care in deciding what treatment to give, a duty of care in administration of that treatment and a duty care in answering a question put to him by a patient in circumstances in which he knows that the patient intends to rely on his answer. A breach of any of these duties will support an action for negligence by the patient.[320]

The learned judge concluded that the defendants were negligent and mismanaged the case and he upheld the decree passed by the Highcourt and dismissed the appeals. As Judgment was written by Sardar Raza Khan and Rana Bhagwandas agreed to it and signed while Hamid Ali Mirza disagreed with the learned judge, thus in view of the majoriy judgment of two to one, Supreme Court set aside the judgment of lower court and dimissed the plaintiff's suit for damages.[321]

Although plaintiffs couldn't win the case due to the 2:1 ratio, this case is a very important decision in the history of medical malpractice law. Judges discussed the concept of negligence at length and explicated its implementation in the context of Pakistan's legal and medical systems. This case is an important precedent with regard to the notions of malpractice and the amount of damages. Highcourt incurred a reasonable amount of damages upon defendant which was upheld by the learned judge of Supreme Court Justice Hamid Ali Mirza.

2. **Sikandar Shah & Others vs Dr. Nargis Shamsi & Others[322]:** Brief facts of the case are that plaintiff's wife Waseela Bibi was admitted in Punjabi Saudagraun Hospital Karachi for treatment. She lost her life due to negligence of the doctors.

[320] PLD 2005 Supreme Court 99.
[321] Ibid.
[322] 2014 MLD 149.

A civil suit was filed before Xth Senior Civil Judge Karachi under the Fatal Accident Act, 1885 and law of Torts for compensation. Various inquiry reports proved the negligence of two doctors and administration of hospital. Deceased was not provided by the post operation care and instead of shifting to ICU as her state demanded, she was shifted to ward. It was found that hospital didn't have fully equipped ICU and skilled staff which resulted in loss of life of Waseela Bibi. Learned judge found the doctors and hospital guilty and charged them to pay PKR 200,000 to the aggrieved party. Matter was later patched up between doctors and plaintiff while hospital administration still had to pay the said amount and carry out the decree passed by the learned Judge. Dissatisfied with the verdict, hospital administration filed a civil appeal which was won, and decree was set aside. Second appeal was made before High Court of Sindh that restored the judgment passed by the trial court and the judgment of appellate court was set aside. While discussing negligence, the learned judge Irfan Saadat Khan quoted Halsbury's Laws of England, Fourth Edition which says:

> A person who holds himself out as ready to give medical advice or treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Whether or not he is a registered medical practitioner, such a person who is consulted by a patient owes him certain duties, namely a duty to care in deciding whether to undertake the case; a duty of care in deciding what treatment to give, a duty of care in administration of that treatment and a duty care in answering a question put to him by a patient in circumstances in which he knows that the patient intends to rely on his answer. A breach of any of theseduties will support an action for negligence by the patient.

Although the said verdict is a good indicator for fight against medical malpractice, however, Rs. 2, 00,000/- is very less amount for the harm caused to the patients and her family.

3. **Abdul Basit and another vs. Dr. Saeeda Anwar**[323]: Ms. Nazneen went to Frontier Clinic situated at Hussain D'silva Town North Nazimabad, Karachi and got herself checked by Dr. Saeeda. The said doctor after examination informed the patient and her husband that her gall bladder is in very bad condition and urgently requires an operation. Patient and her husband were asked by the said doctor to report to her own clinic for the operation situated at Safoora Goth by the name of Rehman Memorial Hospital. Dr. Saeeda advised the patient that she should urgently undergo operation otherwise her gallbladder will be perforated. At that time, patient was suffering from jaundice but Dr. Saeeda not only ignored this fact but also that her hospital lacked operation theatre, pre and post operation facilities and competent and trained staff. Moreover, no proper record for admission and discharge of patient was being maintained at the said hospital. Despite these facts, Dr. Saeeda along with a surgeon Dr. Baderul Islam Zakai operated the patient. At the time of operation, patient was only given spinal anesthesia and no general anesthesia was given that itself is a major negligence. After operation, patient developed fistulae because of the mishandling of the case by doctors. Situation of the patient grew worst after operation and the said doctor asked the patient that she will be doing another operation of the patient. Ms. Nazneen's husband took her to another doctor for second opinion who told that her first operation is incorrect due to which she has developed fistulae. He operated and tried to save her life but couldn't save her. Aggrieved party made a complaint to the Ministry of Health who after inquiry declared the medical practitioners as negligent. The learned court declared doctors as negligent and

[323] PLD 2011 Karachi 117

decreed that both doctors who were involved in the operation will pay one million each to plaintiffs and Dr. Saeeda will further pay Rs. 3, 65,000 to plaintiff for the amount spent by husband on the treatment of the deceased.

This case is again a good indicator and the fact that Ministry of Health got involved and did its inquiry and declared the doctor negligent is further an encouraging sign. The amount of damages is bit better though still very meager as compared to the harm caused to the patients.

4. **Dr. Atta Muhammad Khanzada vs. Muhammad Sherin**[324] Dr. Atta Muhammad khanzada was an eye specialist who implanted an Intra-Ocular lens in one of the eyes of his patient Muhammad Sherin in his hospital named as "al-Noor Eye Clinic" in Peshawar. After operation, patient was advised to come after two weeks for follow up. But soon afterwards, he started feeling pain and swelling in the operated eye. Dr. Atta was again consulted who upon examination declared that his lens has been implanted upside down and thus it required another operation to correctly implant the lens. Second operation was carried out without a local anesthesia and post-operative care. Patient was advised to return to his home and take medicine for 20 days and return for follow up. It didn't improve the situation and patient kept on feeling pain. After 20 days, he was advised to take medicine for another one month. His agony didn't decrease. Resultantly, he went to another doctor in Abottabad who removed his lens because it was still incorrectly implanted. Patient had to remain in the hospital for nineteen days and lost the vision of that eye completely. Case was filed under law of Torts in the

[324] 1996 CLC 1440

court of first-class Civil Judge Peshawar who found the medical practitioner negligent and ordered for PKR 550,000 as damages. An Appeal was filed in High Court against this decision. The decision of trial court was upheld to the extent of the doctor found guilty of negligence. However, the compensation was reduced to Rs. 50,000.

Learned judge Qazi Muhammad Farooq too quoted Halsbury's Laws of England's definition of 'Negligence' and further mentioned that these principles were affirmed by the Supreme Court of India in Dr Laxman Balkrishna Joshi v. Dr. Taimbak Bapu Godbole[325].

Learned court applied the criteria of negligence and found the doctor negligent. However, the amount of damges incurred on medical practitioner for being negligent and causing harm was way too low.

The above-mentioned cases depict that Pakistan's courts follow English laew of torts and are well-versed with the concepts of negligence. They frequently quote English texts and decisions of the courts for the explication of the notion while occasionally mention Indian cases as well. They apply the criteria of the "negligence" and impose the damages on doctors if they are satisfied with the evidence that the doctors were negligent while handling the patient; however, they dismiss the case if the plaintiff fails to prove so.

[325] AIR 1969 SC 128

### 3.3.2 Pakistan Penal Code

Apart from law of Torts and Fatal Accident Act, 1885, doctors can be tried under Pakistan Penal Code (PPC) too under sections of *Qisās* and *Diyat* (299-338C) for gross negligence and misconduct. These sections are not directly related to medical malpractice. Rather, these sections deal with the general law of *Qatal-e-Khata*. The clauses important for the purpose of medical malpractice are the ones related to *'Qatl-i-Khata', Daman, Diyat* and *Arsh.*[326]

Section 318 of PPC defines *Qatl-i-khata* as: "Whoever, without any intention to cause death of, or cause harm to, a person causes death of such person, either by mistake of act or by mistake of fact, is said to commit qatl-i-khata".

Therefore, a medical practitioner may be tried for medical malpractice under PPC as he may, either by mistake of act or by mistake of fact, cause harm or death. However, courts are extremely reluctant to criminally charge the doctors for negligence. In *Muhammad Aslam versus Dr. Imtiaz Ali Mughal*[327] Learned Court observed:

> ...Thus, the standard of professional negligence in civil law (which is of course a well-recognized tort) differs from criminal negligence in two ways. Firstly, and more generally, the standard of proof in all civil litigation is the simply the balance of probabilities, whereas in criminal prosecution, the offence has to be proved beyond reasonable doubt. This is a fundamental and well recognized distinction...Secondly, the degree of negligence must be much higher for it to constitute a criminal offence...The level or degree of negligence is substantially higher i.e. it must amount to gross negligence or recklessness.[328]

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[326] Related clauses of the law have been attached in Anexture III
[327] PLD 2010 Karachi 134.
[328] Muhammad Aslam versus Dr. Imtiaz Ali Mughal

Thus, Pakistani courts discourage to prosecute medical practitioners under Pakistan penal code and instruct to seek remedy through civil law, that is, Law of Torts and Fatal Accident Act, 1885. However, if the medical practitioner's negligence is substantially high as mentioned in the judgement, Pakistan Penal Code may be invoked in this circumstance. Thus, a medical practitioner may be charged for criminal offence, but the court requires that this mistake should be the result of gross negligence in order to criminally charge a medical practitioner under Pakistan Penal Code. Learned court in the said case cited Indian cases for the definition of 'gross'. Justice Munib Akhter cited Indian case *Jacob Mathew v. State of Punjab and Others*[329] where the learned judge interpreted the clause of Indian Penal Code regarding involuntary manslaughter and said that there is no word 'gross' in the law but when a doctor has to be tried under the law, assumption will be that the word 'gross' is present there. The learned court further explicated the term 'gross' and said:

> To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

This excerpt from Indian case was cited by the learned Judge Munib Akhtar in his decision.The courts in Pakistan have yet to develop the case law where they criminally charged a doctor for gross negligence or our court has yet see a case where they could develop the jurisprudence as what would amount negligence to be gross in Pakistan's legal and medical context as to charge the doctor for criminal offence. However, such precedents can be found in U.K where doctors have been convicted of medical

[329] AIR 2005 SC 3180

manslaughter for committing gross negligence. Six doctors have been charged and convicted in the UK between 2006 and the end of 2013[330]. It is upon the jury to decide whether the conduct of the accused was so bad that she deserves a criminal conviction for manslaughter.[331]

To decide whether the conduct can amount to gross negligence or not, Lord Hewart CJ decided in the case of *Bateman*[332]:

> To support an indictment for manslaughter the prosecution must prove...that the negligence of the accused went beyond a mere matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.[333]

Later on, Lord Mackay LC established the governing principles for gross negligence in the leading case of *Adomako*[334]. He said:

> ...[T]he ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal[335].

Thus, the principle developed by the English court for being "gross negligent" is that the accused has departed from the proper standard of care so much so that it must have caused the risk of death to the patient and consequently be convicted. The court will

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[330] Philpe White, More Doctors Charged with manslaughter are being convicted, Shows Analysis, *BMJ* 2015 ; 351:h4402.

[331] Anne Lodge, Gross negligence manslaughter on the cusp: the unprincipled privileging of harm over culpability, *Journal of Criminal Law*, DOI: 10.1177/0022018317694719

[332] R v Bateman (1925) 19 Cr App R 8.

[333] Ibid.

[334] R v Adomako [1995] 1 AC 171

[335] Ibid.

evaluate the badness of the conduct, taking into account all of the circumstances of the accused and considering how far the conduct fell below the standard expected of the reasonable person in the accused's position.[336]

In the light of above facts, it is evident that English courts have criminally charged and penalized multiple doctors for gross negligence. Indian courts too have addressed the issue. Pakistan's courts have adopted the same strategy to deal with such cases. It requires higher degree 'gross negligence' to criminally charge a doctor. Further case-laws and jurisprudence is yet to be developed.

### 3.3.3 Consumer Protection Laws

After Indian courts[337] decided that medical services are included within the jurisdiction of consumer court and Consumer Protection Act is applicable on medical services too, Pakistan too followed the precedent and added medical services in Consumer Protection Act. Therefore, now aggrieved party can go to consumer courts for redress as well. All four provinces and federal legislaton have included the field of medicine within the ambit of consumer law. However, Punjab is ahead of all with regard to efficiency. It has set up consumer courts which are dealing with medical negligence cases swiftly. Following is the brief overview of the Consumer Acts of different jurisdictions of Pakistan:

The Islamabad Consumer Protection Act, 1995 construes 'services' as followed:

> "Services" includes services of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, manufacturing, processing, accountancy, supply of electrical, mechanical or any other form of energy,

[336] Ibid.
[337] Please see above para 2.4

> boarding or lodging, entertainment, *medicine*, education, construction work, amusement, catering, security, or purveying news or other information and similar other services, but does not include the rendering of any service free of charge or under the contract of personal services.[338]

North-West Frontier Province Consumers Protection Act, 1997 elucidate 'services' in these words:

> "Services" includes services of any description which are made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, manufacturing, processing, accountancy, supply of electrical, mechanical or any other form of energy, boarding or lodging, entertainment, *medicine*, education, construction work, amusement, catering, security, or purveying news or other information and similar other services, but does not include the rendering of any service free of charge or under the contract of personal services[339].."

The Sindh Consumer Protection Act, 2014 states: "Services includes the provision of any kind of facilities which includes all services such as communication etc. or advice or assistance such as provision of *medical,* legal or engineering services...."[340]

The Balochistan Consumer Protection Act, 2003 expounds the term 'service' as follows:

> "Services" include services of any description which are made available to potential users and includes the provision of facilities in connection with banking, Financing, Insurance, Transport, Manufacturing, Processing, Accountancy, Supply of electrical. Mechanical or any other form of energy, boarding or lodging, entertainment, *medicine*, education, construction work, amusement: catering, security or surveying news or other information, and similar other services, but does not include the rendering of any service free of charge or under the contract of personal services...[341]

Section 2 clause "k" of The Punjab Consumer protection Act 2005 includes medical services within the ambit of the consumer protection Act too which says: "Services"

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[338] Islamabad Consumer Protection Act, 1995, Section 2, clause n.
[339] North-West Frontier Province Consumers Protection Act, 1997, Section 2, clause n.
[340] The Sindh Consumer Protection Act, 2014, Section 2, clause q.
[341] The Balochistan Consumer Protection Act, 2003, Section 2, clause n.

includes the provision of any kind of facilities or advice or assistance such as provision of medical, legal or engineering services...."[342]

As mentioned earlier, the consumer courts in Punjab are dealing with the cases of medical malpractice efficiently[343]. There are courts in eleven districts of Punjab. These courts are established in Lahore, Gujranwala, Sahiwal, Dera Ghazi Khan, Sarghoda, Gujrat, Sialkot, Multan, Bahawalpur, Faisalabad and Rawalpindi. Headquarters has been established in Lahore by the name of Directorate of Consumer Protection Council[344]. Although the jurisdiction of consumer court is very clearly mentioned in the Act leaving no room for litigation, yet the jurisisdiction is contested. In a leading case in Lahore High Court in the case Dr. Shamshad Akhtar vs. District Consumer Court Lahore[345] , the learned court decided:

> It is, therefore, clear that respondent No. 2 is a consumer and the petitioner rendered services to the said respondent. The internal arrangement between the petitioner and the GCC states does not in any way affect the jurisdiction of the Consumer Court. The respondent No. 2 has availed medical services after paying consideration and is, therefore, a Consumer under the Act and the Consumer Court has the jurisdiction to try the complaint of respondent No.2.

Even after this clear verdict, defendants raised the questions on the jurisdiction of consumer courts for trying medical malpractice. Such objections were raised in the cases of Muhammad Rashid Iqbal **vs.** Dr. Masood Iqbal and Mrs. Rashida Bashir **vs.** Brig. Dr.

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[342] The Punjab Consumer Protection Act, 2005, Section 2, clause k.

[343] Please see the details of the courts and cases on the official website of Directorate of Consumer Protection Council. http://pcpc.punjab.gov.pk/introduction

[344] http://pcpc.punjab.gov.pk/introduction

[345] PLD-2010-Lahore-214.

Muhammad Amer Yaqoob.[346] Some of the cases decided by consumer courts in Punjab for medical negligence are mentioned below:

**1. Syed Ali Murtaza vs. Dr. Tahir Masood Ahmed and Dr Huma Arshad Cheema (Children's Hospital Lahore)[347]:** It was claimed by Syed Ali Murtaza that her daughter was born on 31, 2007. In the month of June, she was examined by Dr. Tahir Masud Ahmed, a professor of pediatrics at Children's Hospital, Lahore as she wasn't feeling well. Dr. Tahir diagnosed that the infant is suffering from jaundice and that there was nothing to worry about. Child would be alright in two months which she didn't. After few weeks she was taken to the same doctor again because her condition had worsened. He prescribed a number of tests and referred them to Dr. Huma Arshad Cheema, a professor of hepatology and gastroenterology at Children's Hospital, Lahore who too prescribed different tests. She even suggested that there was some problem with the gall bladder of the child which was proved to be wrong after the report of test from Shaukat Khanum Cancer Hospital. Three months were wasted in these futile examinations and excessive pathological tests. Claimant contested that the excessive tests of the infant led to the permanent damage of her liver. She had to be taken to U.K as its treatment wasn't available in Pakistan. Baby had to undergo liver transplant at Kings College Hospital in London. It was told by doctors there that baby never suffered from jaundice. Claimant demanded following amount as damages in their prayer:

1. £206,625 as cost of the transplant,
2. Rs164,860 as travelling costs,

[346] Order was passed on February 1, 2013 by Learned Judge Sohail Nasir Judge Consumer Court Rawalpindi.

[347] http://tribune.com.pk/story/936377/medical-negligence-doctor-directed-to-pay-damages-worth-millions/; http://www.dawn.com/news/1199727. (accessed August, 2016).

3. £5,641 as living cost,
4. Rs20million for the mental and physical torture they suffered,
5. Rs20million for the health damages suffered by their daughter and the donor,
6. Rs646,693 medical expenditure during the first year after surgery
7. Rs395,820 for every year from then on.

Doctors denied the allegations in their written statement. Learned court rejected their defense. The court held Dr. Ahmed liable for making following payments:

1. £155,000 to the Punjab government, which bore the cost of treatment (the child's father is a government employee);
2. £57,267 for liver transplant;
3. Rs164,860 for travelling costs;
4. Rs646,693 as medical expenditure for the first year;
5. Rs395,820 per year for the child from the second year of her transplant;
6. Rs100,000 litigation charges to the complainants.

It was a landmark judgment in the history of legal history related to medical malpractice where such a huge amount was awarded i.e. 45 million rupees as damages although most of the amount was in lieu of the expenses incurred, yet the damages were exemplary.

**2. Mrs. Rashida Bashir vs. Brig. Dr. Muhammad Amer Yaqoob[348]:** It was claimed by Mrs. Rashida Bashir that she remained under treatment of eye specialist Br. Dr. Muhammad Amer Yaqoob from July 11, 2011 to December 11, 2012 for treatment of her

[348]Case No. 14.

eye. It was advised to her by the said doctor that she should undergo surgery of her left eye. As per advice, she got the appointment and reached Operation Theater for the surgery to be done by Dr. Amer. To their shock, they were informed that Dr. Amer is unavailable and surgery will be performed by Dr. Kashif Hanif in place of Dr. Amer. After surgery, her sight deteriorated, and she was not able to see from any eye though she was only operated on left eye. She was told by the defendant doctor that this complication arose due to raise in intra Ocular pressure. This complication couldn't be cured and resulted in total blindness. Patient filed the claim for negligence against the said doctors in Consumer Protection Court Rawalpindi and demanded Rs.50,00,000/- (fifty lacs) as damages. Defendants negated the charges and argued that there was no negligence on his part, but he failed to produce any documentary evidence to prove his claim in contrast to the clear guidelines of NICE (National Institute of Health & Care Excellence U.K). Learned court decided that the negligence of Dr. Amer is proved as he was reckless in this regard that he should have performed the surgery himself which he did not, and he didn't follow the guidelines. Had he followed the guidelines, complications could have been avoided. On the other hand, patient's claim can't be accepted entirely as argued by defendants that she was advised the frequent visits which she failed to pay. This contributory negligence added in her plight. Therefore Dr. Amer is guilty of negligence and at the same time claimant too is found to be guilty of contributory negligence. Learned Judge ordered the doctor to pay Rs.5, 00,000/- (Five lac) to the defendant for the loss suffered by her and Rs.1,00,000/- (One lac) for the expenses incurred on treatment. Thus, six lacs were ordered as damages.[349]

[349]Order was announced on 29.04.2015.

**3. Tasawar Naeem vs. Dr. Faisal & Others (Benazir Bhutto Hospital, Rawalpindi)**[350]: Patient went to Benazir Bhutto Hospital on 27th of January 2011 and remained there till 12th of February 2011 for severe chest pain. He was admitted in ICU. His severe chest pain sometimes used to radiate to the left arm. For this reason, his echocardiography was performed. Results of this test caused the suspicion of intra muscular pre-lapse. He was then shifted to the ward when his condition improved.

During treatment, he was administered an injection in his right arm. Patient started feeling severe pain instantly after injection. On complaining, he was redressed by doctors that it was a normal pain and there was nothing to worry about. He was given painkiller for relief. Afterwards, he was discharged from the hospital. Patient felt that he was unable to move his hand from wrist point. Resultantly, he went to PIMS hospital where Dr. Mazhar Bashah diagnosed that the injection that was administered on him, was wrongly injected in his nerve instead of muscle which incapacitated the wrist of patient permanently. Patient claimed for Rs. 50, 20,000/- (Fifty lacs and twenty thousand) as damages in the Consumer Protection Council. Learned court found the doctors to be guilty of faulty and defective services and ordered[351] the defendants to pay:

1. Rs.15, 000/- (fifteen thousand rupees) as treatment expenses.
2. Rs. 5,000/- (five thousand rupees) as the treatment expenses of PIMS hospital.
3. Rs. 1, 35,000/- (one lac and thirty-five thousand rupees) as damages for disabled right arm of the claimant.
4. Rs. 1, 20,000/- (one lac and twenty thousand rupees) as mental torture.

[350] Case no. 20/11.
[351] This order was announced on 17.05.2012.

This makes it the total sum of Rs. 2, 75,000/- (two lac and seventy-five thousand rupees). The defendant hospital was instructed too by learned court to make arrangements for the treatment of claimant.

These were the few glances of the cases filed against negligence of the doctors in consumer courts in Punjab.

### 3.3.4 Pakistan Medical & Dental Council

Another option for the aggrieved party was to file a complaint in PM & DC against medical negligence of the doctors. A code of conduct had been prescribed by Pakistan Medical & Dental Council to be used as guidelines by the doctors in Pakistan. Whenever a complaint was made to PM & DC regarding misconduct or malpractice of the medical practitioner, those guidelines were the touchstone against which the behavior of a doctor is tested[352].

Section 27 of the code outlined the procedure to address the issue in question regarding medical malpractice of the doctors. It stated that disciplinary committee of the PM & DC would investigate the matter by examining the record and seeking information from the relevant person. If it was satisfied that the terms of code have been violated and matter is grave enough to demand disciplinary action against the medical practitioner, it would send its report to executive committee for the disciplinary decision. When the matter reached to executive committee, it might agree or disagree with the report. It might ask for a further investigation or accept without rectification and pronounce disciplinary decision against the medical practitioner.

[352]http://www.pmdc.org.pk/Ethics/tabid/101/Default.aspx

Disciplinary action varied case to case. It might be in the form of mere admonition. A doctor could have been suspended temporarily. It might even lead to Permanent expulsion from PM & DC if the severity of the misconduct calls for it. It would inform the local health authorities about the expulsion of the doctor and announce in its gazette too[353]. However, on January 12, 2018 PM & DC was disbanded by Supreme court of Pakistan.[354]

## 3.4 Conclusion

Pakistan's courts follow English Law of torts.[355] Thus, the principles of 'negligence' are applicable here.[356] Duty to care, breach of duty and consequential harm are the criteria to make medical practitioners liable in Pakistan too. Judges in Pakistan quote the 'judgments' of English courts and give their own interpretation too.[357] However, it is not a very developed area in Pakistan. Researcher could not find many examples of cases decided against medical negligence. Medical practitioners can be tried under charges of criminal liability but courts are very reluctant to haul doctors in court under Pakistan Penal Code and want to contest such cases under civil liability.[358] Following Indian precedent, Pakistan has given the jurisdiction to Consumer Courts[359] too to try such cases and it has been proved to be more efficient in but in Pakistan, its jurisdiction is continuously being contested for trial of the cases related to field of medicine.[360] Moreover, it is detestable to include medical services within the scope of consumer laws.

[353] http://www.pmdc.org.pk/Ethics/tabid/101/Default.aspx
[354] www.Dawn.com (accessed on January 12, 2018)
[355] Please see above para 3.3
[356] Please see above para 3.3.1
[357] Please see above para 3.3.1
[358] Please see above para 3.3.2
[359] Please see above para 3.3.3
[360] Please see above para 3.3.3

It is contested that this addition will give an acceptance to the element of consumerism in the field of medicine while it is a noble profession to serve humanity and not a business for the purpose of maximization of profit. Thus, Pakistan's law of medical malpractice is going through the process of development under the influence of English and Indian laws.

# CHAPTER 4

# MEDICAL MALPRACTICE & LIABLITY IN SHARĪ'AH

Section 4 of "The Enforcement of Shari'ah Act, 1991"[361] makes it mandatory on Pakistan's courts to interpret Laws in the light of *Sharī'ah*. Therefore it is imperative to explore the discourse of *Sharī'ah* regarding every field that is subject to litigation. Medical Malpractice is one such field that is related to almost all people. Every human being falls ill at any point of life and needs a medical practitioner. If the doctor doesn't treat him according to the standards of his era, the patient is facing malpractice. Therefore, it is pertinent for doctors, patients and courts to investigate the perspective of *Sharī'ah* regarding practice of medicine. *Sharī'ah* guides medical practitioners by providing them general principles for the practice of medicine. It enlightens the patients about their rights. Furthermore, it directs the courts and doctors about their liability and compensation. Therefore *Sharī'ah,* has wealth of knowledge that can guide on this subject. This chapter and next chapter is journey through some of the golden principles of *Sharī'ah* related to the field of medicine. Some instructions are directly addressed to the field of medicine while some touch the subject circumlocutorily. Researcher has chosen three topics for this thesis:

1. Medical Malpractice and Liability in *Sharī'ah.*
2. Guidance of *Sharī'ah* for the Practice of Medicine through Legal Maxims (Discussed in Chapter Five).
3. System of Indemnification in the Form of *Qiṣāṣ* and *Diyah.*

[361] The Enforcement of Shari'ah Act, 1991, Section No. 4, www.pakistani.org/pakistan/legislation/1991/actXof1991.html

## 4.1 Sharī'ah Norms on Medical Treatment

Allah the Exalted created mankind and gave him his body as trust and produced everything that was needed for him. He brought animals and plants into existence to feed his body and created resources for his garments[362] and shelters. After making all arrangements, he directed human beings to employ their body with care and diligence and forbade them from harming it[363]. He asked human beings to eat pure things and to refrain from harmful things.[364] Health has been declared as blessing[365] and human beings need to maintain it. Diseases are one of the imperfections of the world that are bound to inflict human beings. Islam instructed Muslims to resort to cure if they befall any ailment. Prophet (Peace Be Upon Him) sought treatment for his ailments. For instance, 'Urwah asked 'Aisha (may Allah be pleased with her) that she learnt *Sunnah* from Prophet (Peace be Upon Him) while learnt Arabic language and poetry from Arabs but where did she learn the medicine. She told that Prophet (Peace be upon Him) was often sick and was visited by Arab medicine-men on many occasions so she learnt from them.[366] Likewise it

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[362] "O Children of Adam! We have revealed unto you raiment to conceal your shame, and splendid vesture..." (Al-Qur'ān 7: 26)

[363] There are several verses and traditions that prohibited self-harming and harming others for example Allah S.W.T said: "....and be not cast by your own hands to ruin....." (Al-Qur'ān 2: 195). Likewise, there are multiple traditions that forbade suicide. For instance, "Whoever throws himself down from a mountain and kills himself will be in the Fire of Hell, throwing himself down therein forever and ever. Whoever takes poison and kills himself, his poison will be in his hand and he will be sipping it in the Fire of Hell forever and ever. Whoever kills himself with a piece of iron, that piece of iron will be in his hand and he will be stabbing himself in the stomach with it in the Fire of Hell, forever and ever." Muḥammad ibn Ismā'īl Al- Bukhārī, *al-Ṣaḥīḥ* , vol. 7 (Dār Tauq al-Nijāh, 1422 H), 139, Ḥadīth no. 5578.

[364]For instance, pork and wine.

[365]Ibn Abbas reported: The Prophet, peace and blessings be upon him, said, "There are two blessings which many people waste: health and free time." Al- Bukhārī, *al-Ṣaḥīḥ*, vol. 8, 88, Ḥadīth no. 6412.

[366]Abū 'Abd Allah Muḥammad ibn 'Abd Allah al-Hākim al-Nīshāpūrī, *Al-Mustadrak 'alā al-Ṣaḥīḥayn*, vol. 4 (Beirut: Dār al-Kitāb al-'Ilmiyyah, 1990), 6737, Ḥadīth no. 6737.

is narrated that Messenger of Allah (peace be upon him) got the treatment for migraine through cupping when he was in Ihram.[367]

Prophet (peace be upon him) not only sought treatment but also treated others as well. During the battle of al-Ahzāb when Sa'd ibn Mu'adh (May Allah be pleased with him)'s ankle was wounded, Messenger of Allah (peace be upon him) cauterized[368] him with his own arrow. He cauterized him for second time when it got swollen.[369] It is reported from him that he (peace be upon him) cauterized As'ad ibn Zurārah too for the pain in his side.[370] He (peace be upon him) advised and encouraged his companions to get medical treatment. He said: "Allah has not sent down any disease, but He has also sent down healing for it".[371] It is narrated from 'Usāmah ibn Sharīk (may Allah be pleased with him) that he asked Messenger of Allah about seeking medical treatment. He (peace be upon him) said: "Seek medical treatment, for Allah has not created any disease but He also created a remedy for it, except for one disease: old age."[372] He not only advised seeking medical treatment but also encouraged research and discovering remedies in a way. He said: "Allah has not sent down any disease, but He has also sent down its cure. Those who know it, know it and those who do not know it, do not know it."[373] At another

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[367]Al- Bukhārī, *al-Ṣaḥīḥ*, vol. 8, 88, Ḥadīth no. 6412.

[368] The use of heat to destroy abnormal cells. http://www.medicinenet.com/script/main/art.asp?articlekey=2650

[369]Abū Dāwūd Sulayman ibn al-Ashas al- Sijistani, *Sunan*, vol. 4 (Beirut: Dār al-Kutub al-'Arabī),5, Ḥadīth no. 3866; Abū 'Abd Allah Muḥammad Yazīd Ibn Mājah, *Sunan*, vol. 2 (Dār Ihyā al-Kutub al-'Ilmiyyah), 1156. Ḥadīth no. 3494.

[370]Muḥammad Ibn 'Īsā al-Tirmidhī, *Al-Jāmi'*, vol.3 (Beirut: Dār al-Gharb al-Islāmī, 1998), 458, Ḥadīth no. 2050.

[371] Al- Bukhārī, *al-Ṣaḥīḥ* , vol. 7, 122, Ḥadīth no. 5678.

[372] Al-Tirmidhī, *Al-Jāmi'*, vol. 3, 451, Ḥadīth no. 2038; Ibn Mājah, *Sunan*, vol. 2, 1137, Ḥadīth no. 3436.

[373]Aḥmed ibn Hanbal, *Musnad*, vol.3 (Cairo: Dār al-Ḥadīth, 1995), 496, Ḥadīth no. 3578.

instance he said: "For every disease, there is a remedy, so if you find the right remedy for the disease, you will be healed by the leave of Allah."[374]

He (peace be upon him) advised his companions: "Allah created sickness and cures. There is a cure for every sickness. Seek treatment, but do not use forbidden procedures."[375] Thus there is an indication in these two traditions that Allah the exalted has created the cure with the creation of the disease. It is humans who have to work, research and discover.

## 4.2 Healthcare System in Islamic World History

Emphasis of Islam on seeking knowledge transformed the entire Arab world from an illiterate society to highly educated one and there was a tremendous growth in every field of knowledge including medicine. Scholars travelled to far off distant places to learn and share ideas. Muslims learnt from other nations too and innumerable work was translated from Greek, Latin and Chinese into Arabic language which opened the treasure of knowledge for them. Meanwhile papermaking was learnt from China which led to the construction of huge libraries in Cairo, Aleppo, Baghdad, and urban centers in Iran, central Asia, and Spain, while bookshops with thousands of titles opened in several cities[376]. Resultantly there was a tremendous growth and remarkable development in every beneficial field of knowledge including medical sciences.

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[374]Abū al-Ḥusayn ibn al -Ḥajjāj Muslim, *Sahīh*, vol. 4(Beirut: Dār al-Turāth al-'Arabī), 1729, Ḥadīth no. 2204.

[375]Abū Dāwūd, *Sunan*, vol. 6, 23, Ḥadīth no. 3874.

[376] Mathew E. Falagas and others, "Arab Science in Golden age (750 to 1258 C.E) and Today", *The FASEB Journal* 20, (2006): 1582.

Healthcare system was very advance in Muslim world. Works of Hippocrates[377], Rufus of Ephesus[378], Dioscurides[379], and Galen[380] was translated into Arabic Language. Muslims gave them the due acknowledgment and called their discoveries and methods as "Greek Medicine".[381] Muslim scrutinized their theories and knowledge and further developed it through their scientific researches and discoveries. History witnessed astounding advancements in the field of medicine. As a result, at the time of medieval era, hospitals had taken the form of the sophisticated version in modern sense of 'hospital'. These hospitals provided free services for all citizens without any discrimination of gender, race, color, religion and financial or social status of patients[382]. Muslims of that era built magnificent and large hospitals with gardens around with large team of physicians and sufficient equipment and pharmacies.[383]

### 4.2.1 Development of Medical Ethics and Codes by Muslim Physicians

Healthcare system was not only advance in terms of skills of physician and infrastructure but in terms of codes and ethics too. Medicine was practiced not only as a profession but on spiritual and ethical grounds too. While Physicians wrote extensively on diseases and

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[377] Ancient Greek physician (460 BC - 375 BC) who is regarded as father of the medicine. For details please look http://www.britannica.com/biography/Hippocrates

[378] Greek physician left valuable work on dietetics, pathology, anatomy, and patient care. Please check http://www.medscape.com/viewarticle/769263_7

[379]Pedanius Dioscorides, (40 C.E-90 C.E), Greek physician and pharmacologist writer of *De material medica* that is classical source of modern botanical terminology and remained primary text for pharmacology for around 16 centuries. Please see for details: http://www.britannica.com/biography/Pedanius-Dioscorides

[380]Galen was a physician, writer and philosopher who became the most famous doctor in the Roman Empire and whose theories dominated European medicine for 1,500 years. http://www.bbc.co.uk/history/historic_figures/galen.shtml

[381]M.G. Muazzam and others, Important Contributions of Early Muslim Period to Medical Science. I. Basic Sciences, *JIMA* 21, (1989): 8.

[382] Ibrahim B. Sayyid, "Islamic Medicine: 1000 years ahead of its Time", *JISHIM* 2, (2002): 4.

[383]Salim T. S. Al-Hassani, ed., *1001 Inventions: The Enduring Legacy of Muslim Civilization* (National Geographic, 2012), 153.

their cure, treatises were inscribed in those books to guide the doctors about their professional and ethical duties.[384] Thus the subject of medical ethics in Islam is as old as the healthcare is. Muslim Physicians provided the entire code of conduct for medical practice. When medical students used to learn about medicine, at the same time, from the same books, they used to learn about their duties and ethics too. Hunayn ibn Ishāq was the first one to translate the Hippocratic Oath into Arabic language. Apart from this oath, he translated many other works too on medical code of conduct. These precious works very employed by many Muslim physicians in their books. They quoted, interpreted, elaborated and added in it. Perhaps the oldest writing found of Muslim physician on the said subject is of Abu al-Hassan ibn Raban Tabarī who was a famous Muslim Physician, writer and psychologist. He was born around 783 C.E.[385] He is crowned as the writer of the first and most comprehensive encyclopedia of medicine and natural sciences by the name of "Firdaws al-Hikmah"[386] that took him twenty years to write. In this encyclopedia, He mentioned that all physicians need to possess four qualities in order to become a successful and reputable physician i.e. softness, mercy, contentedness and chastity. In al-Mu'alajat, he gave a detailed account of the moral code that a physician ought to follow. He advised:

> "The physician ought to be modest, virtuous, merciful, not slanderous or addicted to liquor, and speak no evil of men of repute in the community or be critical of their religious beliefs. He should be honest toward women, and should not divulge the secrets of his patients, or make jokes and laugh at the improper place

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[384] Bagher Larijani and others, "An Introductory on Medical Ethics History in Different era in Iran", *DARU suppl.*, no. 1 (2006):13.

[385]Helaine Selin, *Encyclopedia of the History of Science, Technology, and Medicine in Non-Western Cultures* (Netherlands: Kluwer Academic Publishers, 1997), 930.

[386]Max Meyerhof, "'Alī at-Tabarī's ``Paradise of Wisdom", one of the oldest Arabic Compendiums of Medicine", *Isis* 16, no. 1 (1931): 7.

and time. He should avoid predicting whether the patient will live or die. He should speak well of his acquaintances, colleagues, and clients and not be a money grabber. He should dress in clean clothes, be dignified, and groom his hair neatly. He ought not to lose his temper when his patient keeps asking many questions but should answer gently and patiently. He should treat the strong and the weak, the master and the slave, the rich and the poor, the wise and the illiterate alike, and God will reward him if he offers medical help to the poor. He should refrain from joining the ungodly and the scoffers, and from sitting with them at their parties; instead, he should sit with people of good reputation. If another physician has also been called to treat his patient, the family doctor should not criticize his colleague even if the diagnosis and recommendations of the latter differ from his own, while explaining to the patient's family what each point of view may lead to, since it is the physician's duty to give counsel as best he can. He must, however, warn that differing types of therapy may be fatal, as has happened, because the actions of drugs can be incompatible and thus injurious. The physician should not be late on his rounds or in visiting his patients at home. He should be punctual and reliable . . . avoiding wrangling about his fees with a patient who is very ill, but rather, he should be thankful no matter how much he is paid. "Contentment will make him more respected among his clients." The physician also should avoid prescribing potentially dangerous, strong potions or poisons, or even mentioning such prescriptions in front of simple people. He should not give drugs to a pregnant woman for abortion unless these are very necessary for the mother's health, and then no later than the fourth to sixth month of the pregnancy. When the physician prescribes a drug orally, he should make sure that his patient understands the name exactly, lest he ask for the wrong one and thus get worse instead of better. He should not trust uneducated, untrustworthy apothecaries (of whom there must have been many), but the honest and social minded. He should be careful about what he says and it should be right, and he should not hesitate to ask forgiveness if he has erred. Above all, he should never attempt to revenge himself but rather be always friendly and a peacemaker. If his servant or assistant does wrong, the physician should not rebuke him before others, but privately and cordially, and he should possess the following virtues: i) willingness to forgive wrongs; 2) willingness to

counsel all; 3) truthfulness and honesty; 4) mercifulness; and 5) uprightness and the aim to live uprightly.[387]

Likewise, his contemporary physician Ibn Abi al-Ash'ath too emphasized on the high standard of the medical services. He stressed on the physicians that they should be conscious while practicing medicine as they will be held accountable in front of Allah the Exalted on the Day of Judgment. He criticized the quacks that the art of medicine is the result of thousands of years of experiments, observations and learning of thousands of physicians and thus quacks are illiterate of this art and thus unfit to practice it.

Abu-Bakr Muhammad ibn Zakariyya al-Razī (865-925) a great physician and a very important figure of history of medicine wrote an important book "Akhlāq al-Tabīb" on the code of medical practice[388]. His model of ethics comprised of three concepts: physician's responsibility to himself, his responsibility to patients and his responsibilities to other physicians.

Physician's responsibility to himself is that he should never be contented with his knowledge and keep on learning and increasing his scientific education. He must attribute healing and cure towards Allah the Exalted and he should never claim or attribute to him, otherwise in the sight of al-Razī Allah will take away the cure from his treatments. He should have high morals and never deceive others. Apart from his inner virtue, his outlook should be decent too. He should wear neat clothes and his hair should be tidy.[389] His first obligation towards patient is that he should be soft spoken and kind to them. He

[387]Sami Hamarneh, "The Physician and the Health Professions in Medieval Islam". *Bull. N.Y. Acad.Med.*47. (1971): 1105-1106

[388]Hassan Chamsi-Pasha and Mohammed A. Albar, "Islamic Medical Ethics a Thousand Years ago", *Saudi Med J* 34, no. 7 (2013): 674.

[389]Pasha, "Islamic Medical Ethics a Thousand Years ago", 674.

must not treat them rudely. Likewise, patient too should be very polite with the physician. Secrecy is another responsibility that a physician ought to take care of. Whatever they reveal about themselves to the physician or he discovers during the course of treatment, he ought to conceal them.

Physician should inculcate positive attitude in patients, he should give him hope even if they have become hopeless about their recovery. Al-Rāzī stressed that the main aim of the doctor should be the cure of the disease of the patient and it shouldn't be done without any regard to the financial or social status of the patient.[390] He highly criticized those quacks that roam in the city and harm the patients with their quackery.

Perhaps the most comprehensive treatise on the topic of "*Adab al-Tabīb*" was written by Muslim Physician[391] Ishāq ibn 'Alī al-Ruhāwī[392]. He divided his work into twenty chapters. This remarkable book not only speaks about medical ethics but serves as a guideline for personal hygiene, doctor patient relationship and government's role in the profession of medicine too. He frequently quoted Metaphysicsof Aristotle, gave references of Socrates mentioned in Plato's Phaedo. Likewise, he referred to Galen's work on Ethics. Thus, giving due acknowledgment to their scholarly work on the topic of ethics. Chapters of Ruhāwī's remarkable work are listed down:

1. On the loyalty and faith in which a physician must believe and, on the ethics, he must follow

[390]Ibid.,

[391] Sahin Aksoy, "The Religious Tradition of Ishaq ibn Ali Ruhawi: The Author of the First Medical Ethics Book in Islamic Medicine", *JISHIM*, no.3 (2004): 10-11.

[392]Martin Levey, "Medical Ethics of Medieval Islam with Special Reference to Al-Ruhāwī's "Practical Ethics of the Physician"", *Transactions of the American Philosophical Society* 57, no. 3 (1967): 7.

2. On the means and measures by which a physician treats hisown body and limbs
3. On things of which a physician must beware
4. On the directions which a physician must give to patients andservants
5. On the behavior of the patient's visitors
6. On simple and compound drugs which a physician mustconsider and on his remedial directions which may becorrupted by the pharmacist and others
7. On matters of which a physician must question the patients orothers
8. On the necessity for ill and healthy people to have faith in thephysician in times of illness and health
9. On the agreement that the patient must follow the directionsof the physicians and the outcome when it is annulled
10. On the behavior of the patient with his people and servants
11. On the behavior of the patient in regard to his visitors
12. On the dignity of the medical profession
13. On that people must respect a physician according to his skillbut kings and other honorable men must respect him more
14. Peculiar incidents concerning physicians, that is, those already known, so that the physician may be forewarned. Some arefunny and may help him to discover uncooperative personsbefore the consultation lest he be held responsible for anyharm that may occur
15. On the subject that not everyone may practice the professionof medicine but that is must be practiced by those who havea suitable nature and moral character
16. On examination of physicians
17. On ways by which kings may remove corruption of physiciansand guide the people in regard to medicine, and how it wasin ancient times
18. On the necessity of warning against quacks who callthemselves physicians and the difference between theirdeceit and the true medical art
19. On faulty habits to which people are accustomed but whichmay injure both the sick and health and cause physicians tobe blamed

20. On matters which a physician must observe and be carefulabout during periods of health in order to prepare forperiods of illness, and at the time of youth for old age.[393]

Likewise, in mid eleventh century Ibn Bultān's works on professional ethics in Medicine and Sa'eed ibn al-Hassan's "Tashwīg al-Tibbī" presented a thorough research work on the said subject, thus adding to the precious treasure of knowledge on medical ethics[394].

### 4.3 Liability for Medical Malpractice in Sharī'ah

Medical malpractice is defined by the scholars of *Sharī'ah* 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 malpractice 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[395]."

The liability of Muslim Physicians in consequemce of medical malpractice was discussed and decided by *Fuqahā'* (Muslim Jurists). The subject of medical malpractice law in *Sharī'ah* started with the tradition of Prophet Muhammad (peace be upon him) when he said:

«مَنْ تَطَبَّبَ، وَلَمْ يُعْلَمْ مِنْهُ طِبٌّ قَبْلَ ذَلِكَ، فَهُوَ ضَامِنٌ»

[393] Asim I. Padela, "Islamic Medical Ethics: A Premier", *Bioethics* 2, no. 3 (2007): 173.
[394] Hamarneh, "The Physician and the Health Professions in Medieval Islam", 1107.

[395] Ahmed Hosniyah, Al-Mas'uliyyah al-Jazaiyah lil Akhṭā Ṭibbiyah, *Israa University Journal for Humanities*, no. 2 (2017): 185.

"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."[396]

This tradition and many other instances formed the basis of Islamic Law of medical practice. Muslim jurists dealt with this issue in either of the two ways: They presented the details about different types of doctors and determined their liability accordingly; or they listed certain conditions and concluded that the doctor, who fulfilled these conditions, will not be liable. Before going into details, it deems appropriate to first throw a glance over the general concept of liability in *Sharī'ah* before computing the liability of doctors.

### 4.3.1 Concept of Liability in *Sharī'ah*

The concept of "*ḍamān*" encompasses the details of liability in *Sharī'ah*. *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.

#### 4.3.1.1 Meaning of Ḍamān

The literal meanings of *ḍamān* are *Kafālah* (surety ship), *Iltizām* (obligation), and *Taghrīm* (monetary compensation).[397] As mentioned earlier, *ḍamān* covers multiple

[396]Ibn Mājah, *Sunan*, vol. 2, 1148. Ḥadīth no. 1148; Abū 'Abd al-Raḥmān Aḥmed ibn Shu'aib Ali Nasā'i, *Sunan*, vol. 8 (Maktaba al-Matbu'āt al-Islamiyyah, 1986), 52. Ḥadīth no. 4830; Abū Dawūd, al-Sunan, vol. 18, 107, Ḥadīth no. 4830, Ḥadīth declared as Hassan by al-Banī; al-Hākim al-Nīshāpūrī,*Al-Mustadrak 'alā al-Saḥīhayn*, vol. 4, 263, Ḥadīth no. 7484.Ḥadīth declared as *Sahīh* and al-Dhabī agreed with him; Abū al-Hassan 'Ali al-Dāra Quṭnī, Sunan (Beirut; Moassisa al-Risalāh, 2004), vol. 4, 264, Ḥadīth no. 3438.

[397] Aḥmed ibn Muḥammad 'Ali al-Fayūmī, *al-Misbāh al-munīr fī gharīb al-sharh al-kabīr*, vol. 2(Beirut: Al-Maktabah al-'Ilmiyyah, n.d), 364.

related but different concepts. For this reason, several definitions have been suggested by jurists for the true meaning of the term "*ḍamān*". Some of them are mentioned below:

*Ḍamān* is *iltizām* (obligation) to restore the damage caused to the owner by destruction of his property. Similar object must be returned if it is fungible and value must be paid off if it is non-fungible object[398].

الضَّمَانَ عِبَارَةٌ عَنْ رَدِّ مِثْلِ الْهَالِكِ إِنْ كَانَ مِثْلِيًا أَوْ قِيمَتِهِ إِنْ كَانَ قِيَمِيًّا

*Ḍamān is Taghrīm* (monetary compensation) of destroyed property[399].

وَالضَّمَانُ عِبَارَةٌ عَنْ غَرَامَةِ التَّالِفِ

*Ḍamān* is obligation reflecting the meaning of Surety shipto guarantee a debt or production of a person[400].

وَهُوَ فِي اللُّغَة الِالْتِزَام وَشرعا يُقَال لالتزام حق ثَابت فِي ذمَّة الْغَيْر أَو إِحْضَار عين مَضْمُونَة أَو بدن من يسْتَحق حُضُوره

*Ḍamān* is merging of one liability with another in respect of demand for performance of an obligation[401].

ضَمُّ ذِمَّةِ الضَّامِنِ إِلَى ذِمَّةِ الْمَضْمُونِ عَنْهُ فِي الْتِزَامِ الْحَقِّ.

[398]Aḥmed ibn Muḥammad Makkīal-Ḥamawī, *Ghamz 'Uyūn al-Baṣā'ir fī sharh Al-ashbāh wa al-Naẓā'ir*,vol. 2 ((Beirut: Dār al-Kutub al-'Ilmīyyah, 1985), 6.

[399]Muḥammad ibn 'Ali ibn Muḥammad Showkāni, *Nail al-Aowtār Sharh Muntaqa al-Akhbār*, vol. 5 (Egypt: Dār al-Ḥadīth, 1993), 357.

[400]Muḥammad ibn Aḥmed al-Khatīb al-Shirbīnī, *al-Iqna' fī ḥal alfāz abī Shuja'*, vol. 2 (Beirut: Dār al-Fikr, n.d), 312.

[401]Muwafffaq al- Dīn Abū Muḥammad 'Abd Allāh ibn Qudāmah al-Maqdisī, *Al-Mughnī*, vol. 4 (Cairo: Maktabah al-Qāhirah: 1968), 399.

*Ḍamān* is *iltizām* (obligation) to pay monetary compensation for destroyed, usurped, defected and damaged properties and items.[402]

وَيُطْلَقُ عَلَى غَرَامَةِ الْمُتْلَفَاتِ وَالْغُصُوبِ وَالتَّعْيِيبَاتِ وَالتَّغْيِيرَاتِ الطَّارِئَةِ.

*Ḍamān* is iltizām (obligation) to pay damages for injury to life or any bodily organ[403].

يُطْلَقُ عَلَى مَا يَجِبُ بِإِلْزَامِ الشَّارِعِ، بِسَبَبِ الإِعْتِدَاءَاتِ: كَالدِّيَاتِ ضَمَانًا لِلأَنْفُسِ، وَالأُرُوشِ

From above definitions, it is evident that multiple but related concepts are intertwined in the term *Ḍamān.* 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.

### 4.3.1.2 Justifications for the Liability of Ḍamān

Various Muslim *Sunni* juristic schools of thought put forward varying reasons for holding somebody liable for *ḍamān.* Here is an account of those reasons or justifications as explicated by them.

#### 4.3.1.2.1 Ḥanafī School of Law

According to Ḥanafī School, usurpation, transgression, direct and indirect destruction are the reasons for the liability of *ḍamān.*[404]Thus whoever commits such wrongs, he/she is liable in *ḍamān.*

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[402]Mausu'ah al-Fiqhiyyah al-Kuwaitiyyah s.v. Ḍamān

[403] Ibid.

[404]Abū Bakr ibn Mas'ūd al-Kāsānī, *Badā'i'al-Sanā'i'fi Tartīb al-Sharā'i'*, vol. 7(Beirut: Dār al-Kitab al-'Arabī, 1982), 143.

#### 4.3.1.2.2 Mālikī School of Law

Transgressions, usurpation, direct and indirect destruction leads to *ḍamān.*[405] Moreover, seller will be *ḍāmin* (liable) for the goods till it is handed over to the buyer.

#### 4.3.1.2.3 Shāfi'ī School of Law

Contract, transgression and destruction are main reasons for liability.[406]

#### 4.3.1.2.4 Ḥanbalī School of Law

Contract, destruction and possession are the reasons for *ḍamān* in the opinion of Ḥanbalīs.[407]

### 4.3.1.3 Conditions to Establish the Claim of Ḍamān

*Sharī'ah* requires two conditions to be fulfilled in order to establish *ḍamān.*[408] There must be *al- ta'addī* (transgression) or *taqsīr* (negligence); on the part of doer in order to consider him *ḍāmin* (liable) and as a result of that *al- ta'addī* (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.[409]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'tsupposed to do or he

[405]Abū al-walīd Muḥammad ibn Ahamad ibn Muḥammad ibn Rushd al-Ḥafīd, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtasid,* vol. 4 (Cairo: Dār al-Ḥadīth, 2004), 100.

[406] Abū al-Faḍl 'Abd al-Raḥmān ibn Abū Bakr ibn Muḥammad ibn Aḥmad Bakr Jalāl al-Dīn Suyūtī al-Khuḍayrī, *Al-Ashbāh wa al-Naẓ'ir*, vol. 1 (Beirut: Dār al-Kutub al-'Ilmīyyah, 1990), 461.

[407] Zain al-dīn Ibn Rajab, *al-Qaw'āid*, vol.1 (Dār al-Kutub al-'Ilmiyyah, n.d), 204.

[408]Dr. Wahbah al-Zuhayli, *Naẓaryah al-Ḍamān* (Damascus: Dār al-Fikr, 2012)18- 26.

[409]Ibid.

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

### 4.3.2 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.[410] 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.

#### 4.3.2.1 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. First question is about the ascertainment of the proficient doctor.

[410] Ibn al-Qayyim, *Zād al-Ma'ād*, vol. 4, 128.

#### 4.3.2.1.1 The Notion of Proficient Doctor

According to Ibn al-Qudāmah, a proficient doctor is the one who is knowledgeable and experienced in his field. If he is not that skillful, it will not be permissible for him to do incisions[411].

Ibn al-Qayyim himself responded to this query. He presented a list of tasks that a doctor must undergo in order to be considered as a proficient doctor.[412] He demanded following things:

I. First of all, he should diagnose the type of the disease from which the patient is suffering.
II. The doctor should investigate the reason which caused the disease.
III. He should decide whether patient's body is stronger than the disease or the disease is stronger than body, if former is the case then the doctor shouldn't prescribe any medicine.
IV. He should examine the natural course of patient's body.
V. He should check the changes in natural course of patient's body caused by the disease.
VI. He should ask about patient's age.
VII. He should inquire into patient's habits
VIII. He should take into account the weather during his disease and suggest which weather should be suitable for him.

[411] Ibn Qudāmah, *Al-Mughnī*, vol. 6, 120.
[412] Ibn al-Qayyim, *Zād al-Ma'ād*, 130-131.

Sarakhsī in *al-Mabsūt* said:

> If a barber-surgeon lets out blood, or incises an abscess, for consideration; or if a veterinary worker treats an animal, for a fee; then if that person or animal dies, the performer is not liable. This is in contradistinction to the work of a tailor who spoils a dress: because he was contracted to deliver a piece of work without defect, which is within human competence. Whereas in the case of living objects the intervention opens up a door for the soul a domain which is not under the control of the performer; as it unleashes elements of nature which may complicate the procedure. The contract of exchange is not applicable where there can be unforeseeable results to the intervention. So, in this situation the performer is not liable, if he did what he was asked to do, unless he transgresses or performs without consent butIf someone is asked to circumcise a child and he cuts off the glans, he is liable, as circumcision *(khatan)* should be limited to the prepuceonly. So, by cutting off the glans he has transgressed whereas If he confines himself to the limits of what is required, but the patientdies because of consequences not within his control *(sirāyah)* then heis not liable.[416]

#### *4.3.2.1.1.2 Jamhūr (Mālikī, Shāfi'ī, Ḥanbalī Schools of Law)*

According to them he is free of charge because he was permitted by his patient or his guardian. He intended to cure the patients, having the competency and did not transgress or treat negligently.[417]

**A) Mālikīs' Interpretation**

Ibn Rushd explicates the position of his school of thought as,

> The essence of the principle in Imam Mālik's school is that all craftsmen are liable for any damage that results from their handling of objects, whether it is

[416]Sarakhsi, *al-Mabsut*, 13-14; Yacoub, *The Fiqh of Medicine*, 129.

[417] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 4, 200; al-Shāfi'ī, *al-Umm*, vol. 6 (Beirut: Dār- al Ma'rifa: 1990), 190 ; Ibn Qudāmah al-Maqdisī, *Al-Mughnī*, vol. 5, 398.

> burning, breaking, or tearing: be it piercing pearls, engraving stones, making swords, or baking bread. But with the physician and the veterinarian if death follows their intervention, there is no liability unless they have transgressed. Fuqahā are unanimous that a practitioner is liable if he errs and cuts the glans with the prepuce. But it is attributed to Mālik that even then he is not liable if he is known to be proficient in his domain, otherwise he is liable.[418]

Further, Al-Bajī narrated from Ibn al-Qāsim,

> The medical practitioner, the barber-surgeon, and the veterinary worker, if their action results in death, then there are two possibilities: that they have done what is usually done, in that case they are not liable; the reason being that they are required to do such jobs and are permitted but if they err then they are liable.[419]

**B) Shāfi'īs' Interpretation**

It is narrated from Imam Shāfi'ī that if someone asks another to let his blood, or to circumcise his son, or to treat his horse, as a result of which loss occurred, then the situation is as follows: if the person did what is done by the people in the trade in such circumstances which is considered beneficial then there is no liability. But if his performance was at variance with what is the customary practice, then he is liable. As regards the fee, it is definitely payable if the performance was inaccordance with the methods adopted by those in the field even if there is loss of life or part. But it has been said that it is even payable to the one whose methods were not in accordance with what is accepted in the field, althoughhe is still liable. But the predominant view is that he deserves no fee. Al-Shāfi'ī said, "All fuqahā are unanimous that craftsmen are liable for all the losses incurred at their hands; but they are all also agreed that this does not apply,

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[418]Ibn Rushd, *Bidayah al-Kulliyah*, vol. 2, 255; Yacoub, *The Fiqh of Medicine*, 131.

[419]Abū al-Walīd Sulaymān ibn Khallāf Baji, *al-Muntaqa Sharḥ al-Muwaṭṭa*, vol. 7 (Cairo: Dāral-Kitāb al-Islamī), 77; Yacoub, *The Fiqh of Medicine*, 131.

in all cases, to those who deal with animate beings. I find no explanation for that other than that the living body has its own reaction to actions.[420]

### C) Ḥanbalīs' Interpretation

Ibn al-Qayyim as mentioned earlier maintains that a doctor, will not be held liable if he is proficient and competent and was neither negligent nor transgressor, even if the consequence of the treatment was loss of organ or life.[421]

### 4.3.2.2 Ignorant Medical Practitioner/Quack

There are multiple Verses in Glorious Quran and many Traditions of Prophet Muhammad (peace be upon him) that sanctioned the sanctity of human body and prohibition of causing any damage to it. For example, Allah the Exalted says:

{...وَلَا تَقْتُلُوا النَّفْسَ الَّتِي حَرَّمَ اللَّهُ إِلَّا بِالْحَقِّ ذَلِكُمْ وَصَّاكُمْ بِهِ لَعَلَّكُمْ تَعْقِلُونَ}

"...And do not kill the soul which Allah has forbidden [to be killed] except by [legal] right. This has He instructed you that you may use reason[422]."

Likewise, Prophet (peace be upon Him) said:

«فَإِنَّ دِمَاءَكُمْ، وَأَمْوَالَكُمْ، وَأَعْرَاضَكُمْ، بَيْنَكُمْ حَرَامٌ، كَحُرْمَةِ يَوْمِكُمْ هَذَا، فِي شَهْرِكُمْ هَذَا، فِي بَلَدِكُمْ هَذَا»

"No doubt! Your blood, your properties, and your honor are sacred to one another like the sanctity of this day of yours, in this (sacred) town (Mecca) of yours, in this month of yours."[423]

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[420]al-Shāfi'ī, *al-Umm*, vol. 6:186-187.
[421]Ibn al-Qayyim, *Zād al-Ma'ād*, 128.
[422]Al-Qur'ān 6:151.

And there are many Verses in Holy Quran that mandated the redress and compensation for the undue harm caused to the other person, be it bodily harm or monetary. For instance:

{وَجَزَاءُ سَيِّئَةٍ سَيِّئَةٌ مِثْلُهَا...}

"And the retribution for an evil act is an evil one like it...."[424]

{وَإِنْ عَاقَبْتُمْ فَعَاقِبُوا بِمِثْلِ مَا عُوقِبْتُمْ بِهِ...}

"And if you punish [an enemy, O believers], punish with an equivalent of that with which you were harmed..."[425]

If a quack or incompetent medical practitioner makes huge mistake in treating the patient, he should be punished with severe penalty as human body is sacred and he violated its sanctity. This Hadīth of Prophet Muhammad (peace be Upon Him) gave the sufficient indication to the matter.

«مَنْ تَطَبَّبَ، وَلَمْ يُعْلَمْ مِنْهُ طِبٌّ قَبْلَ ذَلِكَ، فَهُوَ ضَامِنٌ»

"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."[426]

Imam Ibn al-Qayyim said that the messenger of Allah SAW didn't use the word "**من طبَ**" rather he employed the word "**مَنْ تَطَبَّبَ**". Thus, pointing at the difficulty in doing something and the lack of capability.[427]

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[423]Bukhārī, *Sahīh,* vol.3, 573.
[424] Al-Qur'ān 42:40
[425] Al-Qur'ān 16: 126
[426]Ibn Mājah, *Sunan*, vol. 2, 1148. Ḥadīth no. 1148; Nasā'i, *Sunan,* vol. 8, 52. Ḥadīth no. 4830.

Therefore, any person who does not have the sufficient knowledge of the field of medicine comes under this category. Whether he is simply a quack meaning no regular learning from an accepted institution of medicine or any professional doctor who do not have the knowledge of that specific field. For instance, a dentist cannot treat cancer, or a dermatologist must not administer anesthesia.

Imam Ghazālī wrote that *Sharī'ah* only permitted the practice of medicine on the condition that the doctor is skillful and have the ability to treat the patients, if these conditions are not fulfilled by the practitioner, in this situation, the original rule of impermissibility will be applied.[428]

Rule enshrined in this Holy Tradition entails that the quack will be liable for the harm caused to the patient. Ibn Rushd declares that there is a consensus of scholars that quack will be liable.[429]

But Ibn al-Qayyim explicated the rule by dividing them in two types of categories. According to him, a medical practitioner will be held liable if he pretended himself to be a competent doctor and the patient, in this illusion, presented himself to be treated by him and was caused harm. Whereas if the patient knew that the doctor is a quack and not the competent one, yet he chose to be treated by him that the medical practitioner will not be held liable[430].

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[427]Ibn al-Qayyim, *Zād al-Ma'ād*, vol. 1, 103.
[428] al-Tūsī, *Iḥyā 'Ulūm al-dīn*, vol.2, 261.
[429] Ibn Rushd, *Bidāyat al-Mujtahid*, 1156.
[430]Ibn al-Qayyim, *Zād al-Ma'ād*, 129.

### 4.3.2.3 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[431].

Mistake is the opposite of the correct or right[432]. It is an unintended action[433]. 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[434]. 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....}

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[431] Ibid.
[432] Ibn Manzūr, Lisān al-'Arab, s.v. Khaṭā
[433] Jurjāni, Al-Ta'rīfāt, s.v. Khaṭā
[434] Ibn Humām, Sharḥ Fatḥ al-Qadīr, vol. 10, 203.

There is no blame upon you for that in which you have erred but [only for] what your hearts intended[435].

And he taught us the supplication:

{....رَبَّنَا لَا تُؤَاخِذْنَا إِنْ نَسِينَا أَوْ أَخْطَأْنَا....}

Prophet (peace be upon him) said:

« إِنَّ اللَّهَ قَدْ تَجَاوَزَ عَنْ أُمَّتِي الْخَطَأَ، وَالنِّسْيَانَ، وَمَا اسْتُكْرِهُوا عَلَيْهِ »

Indeed, Allah has excused my people from error, forgetting things, and what they wereforced or compelled to do.[436]

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.

#### 4.3.2.3.1 Ḥanafī School of Law

According to them, doctors will be held liable if they deviated from acknowledged method of medicine or if they commit such a grave mistake that no other doctor of his caliber would have made.[437]

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[435]Al-Qur'ān 33:5

[436]Ibn Mājah, *Sunan*, vol. 1, 659. Ḥadīth no. 2043.

Imam Sarakhsī illustrates such a case in Al- Mabsūt, "If someone is asked to circumcise a child and he cuts off the glans, he is liable, as circumcision *(khatan)* should be limited to the prepuce only. So, by cutting off the glans he has transgressed."[438]

### 3.3.2.3.2 Mālikī School of Law

Doctors will be held liable if they deviated from guidelines of medicine in the opinion of Mālikī jurists. For instance, the liability would be invoked in given cases whereby:

1. he made the patient drink what was not suitable for him
2. he decreased the required quantity
3. he transgressed the limit
4. he had the authority for one treatment, but he treated for something else

Ibn Rushd said: "Fuqahā are agreed that a practitioner is liable if he errs and cuts the glans with the prepuce. But it is attributed to Malīk that even then he is not liable if he is known to be proficient in his domain, otherwise he is liable".[439]

### 4.3.2.3.3 Shāfi'ī School of Law

In the sight of Shāfi'ī jurists, doctors will be asked for those mistakes which other doctors wouldnothave committed if they wanted to cure the patient. For example, a doctor operated a patient who was so weak that he couldn't have borne surgery and ultimately died.

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[437] ibn Nujaim *Al- Baher al- Rā'iq*, vol. 8, 33.
[438] al-Sarakhasī, *Al- Mabsūt,* Vol. 16, 13.
[439] Ibn Rushd, *Bidāyah al- Mujtahid,* vol. 4, 200.

Imam Shāfi'ī said that if someone asks another to let his blood, or to circumcise his son, or to treat his horse, as a result of which loss occurred, then the situation is as follows: if the person did what is done by the people in the trade in such circumstances which is considered beneficial then there is no liability. But if his performance was at variance with what is the customary practice, then he is liable.[440]

#### 4.3.2.3.4 Ḥanbalī Schools of Law

Doctors will be asked if they transgress from the place where they were permitted or treated for which they were not authorized. According to them, if the practitioner operates without permission and death ensues, then he will be liable. If the practitioner removes a part (organ) without permission, and causes death, then he is liable.[441]

### 4.3.2.4 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[442]. 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

[440]al--Shāfi'ī, *al-Umm*, vol. 6, 190
[441]Ibn Qudāmah, *Al-Mughnī*, vol. 5, 398.
[442] Ibn 'Ābidīn, *Radd al-Muhtār 'Ala al-Dur al-Mukhtār* vol.6 (Beirut: Dār al-Fikr, 2006), 543

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.[443]

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.[444]

Imam Shāfi'ī 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*.[445]

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")*.[446]

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[443] Aḥmed Abdel Aziz Yacoub, *The Fiqh of Medicine*, 150.
[444] Zurqani, *Sharḥ 'alā Mukhtaṣar Khalil* vol. 8 (Cairo: Matba'at Mustafa Muḥammad), 117.
[445] al-Shāfi'ī, *al-Umm*, vol. 6, 82.
[446] Ibn Qudāmah, *Al-Mughnī*, vol. 3, 331-332.

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.

## 4.4 Damages in Sharī'ah

Islam strives to regulate human conduct with its creator and fellow human beings. It maps out the entire realm of rights and duties in order to maintain peace, stability and discipline in a society. Any legal system in the world can minimize the violation of these rights and duties but it is impossible to completely eliminate it. For maintaining discipline and avoiding chaos in society, it is mandatory to take punitive actions against violation of rights and non-performance of duties. Without a law, no society in the world can exist with stability and prosperity. For this reason *Sharī'ah* offers a complete legal structure of wrongs along with their punishments.

### 4.4.1 Offences and their Indemnification in Sharī'ah

*Sharī'ah* 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 *Sharī'ah* are classified by jurists in categories of *Ḥudūd* (fixed Punishments), *Qiṣāṣ and Diyah*

(Punishments for Killing and Hurt) and *Ta'zīr* (State Prescribed meaning)[447]. 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. *Sharī'ah* 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. If mindfully incorporated in country's law, not much is left for judges to brainstorm for the adequate compensation, thus preventing the entire topic of capping that is hot debate in many non-Muslim countries. Pakistan can formulate a law for medical malpractice by setting the tariff on the basis of *diyah* thus ending the huge disparity between the damages decreed by courts and will spare judges from the labor some task of estimation of reasonable amount for damages. As mentioned earlier[448], these concepts are not alien for Pakistan's legal system. But they are ineffective for medical malpractice for two reasons.

1. Clauses related to *diyah* are inserted in Pakistan Penal Code and courts don't allow trying and charging the medical practitioners under criminal law unless there is gross negligence.

[447] Abū Zahra, *Al-Uqūbah* (Cairo: Dār al-Fikr, n.d), 59.
[448] Please see para above 3.3.2

2. *Diyah* is calculated according to the rate of silver according to Pakistan's law and thus it is very less and doesn't fulfill the need.

Thus there is a dire need to revisit these concepts of *Sharī'ah* for the purpose of formulation of a law for medical malpractice for Pakistan.

Following is the brief summary of the concept of *diyah* and the compensation fixed by *Sharī'ah* in terms of camels, *dirham* and *dinār*. For explication, the amount is converted into Pakistani rupees as to give the clear picture of the appropriate amount for compensation. It is proposed that this model be adopted for monetary compensation for medical malpractice in Pakistan after briefly mentioning the modes of proof of medical negligence.

### 4.4.2 Modes of Proof

Same modes of proof are applicable on the claims of medical malpractice as they are applied in any other civil case. Islamic law of evidence provides confession, testimony, documentary and circumstantial evidences as prime modes of proof of the wrong committed. However, it is quite difficult to prove medical malpractice claim. It is one of the most challenging tasks for lawyers. Factual and legal issues are complicated and it is difficult to simplify them and win a case. It takes sometimes years to prove the claim sufficiently as to acquire a verdict against the medical practitioner.

Following is the brief introduction of these modes:

**a) Confession**

This is one of the strongest modes of proof in *Sharī'ah*. When a sane and adult person gives evidence against himself, it is termed as confession[449]. Thus when a medical practitioner himself admits that he has committed a mistake or he has been negligent in treating the patient, thus causing him damage, in this case a Judge must pass a judgment in favor of the patient. Confession has been recognized as mode of proof by *Qur'ān, Sunnah and Ijmā'*. Allah says in Glorious *Qur'ān:*

{وَإِذْ أَخَذَ اللَّهُ مِيثَاقَ النَّبِيِّينَ لَمَا آتَيْتُكُمْ مِنْ كِتَابٍ وَحِكْمَةٍ ثُمَّ جَاءَكُمْ رَسُولٌ مُصَدِّقٌ لِمَا مَعَكُمْ لَتُؤْمِنُنَّ بِهِ وَلَتَنْصُرُنَّهُ قَالَ أَأَقْرَرْتُمْ وَأَخَذْتُمْ عَلَى ذَلِكُمْ إِصْرِي قَالُوا أَقْرَرْنَا قَالَ فَاشْهَدُوا وَأَنَا مَعَكُمْ مِنَ الشَّاهِدِينَ}

(And [recall, O People of the Scripture], when Allah took the covenant of the prophets, [saying], "Whatever I give you of the Scripture and wisdom and then there comes to you a messenger confirming what is with you, you [must] believe in him and support him." [Allah] said, "Have you acknowledged and taken upon that My commitment?" They said, "We have acknowledged it." He said, "Then bear witness, and I am with you among the witnesses."[450])

{يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ بِالْقِسْطِ شُهَدَاءَ لِلَّهِ وَلَوْ عَلَى أَنْفُسِكُمْ}

(O you who have believed, be persistently standing firm in justice, witnesses for Allah, even if it be against yourselves .....)[451]

Likewise, Prophet (Peace Be Upon Him) gave the verdict of stoning to death to Mā'iz ibn Mālik[452] and Ghāmidiyah[453] solely on their own confession.

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[449]Al-Shawkānī, *Fath al-Qadīr*, vol.6, 280.
[450]Al-Qur'ān3:81
[451]Al-Qur'ān 4:135.

**b) Testimony**

Testimony or *shahādah* is to give the exact and true information that proves someone else's right in the court of law.[454] *Sharī'ah* gives ample importance to the testimony and put great emphasis on the Muslims to be true in giving testimony and that when they are required to give testimony, they must not refrain from giving it. Allah says:

{ يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ لِلَّهِ شُهَدَاءَ بِالْقِسْطِ وَلَا يَجْرِمَنَّكُمْ شَنَآنُ قَوْمٍ عَلَى أَلَّا تَعْدِلُوا اعْدِلُوا هُوَ أَقْرَبُ لِلتَّقْوَى وَاتَّقُوا اللَّهَ إِنَّ اللَّهَ خَبِيرٌ بِمَا تَعْمَلُونَ}

(O you who have believed, be persistently standing firm for Allah, witnesses in justice, and do not let the hatred of a people prevent you from being just. Be just; that is nearer to righteousness. And fear Allah; indeed, Allah is acquainted with what you do[455]. )

In the matters of *qiṣāṣ* and *ta'zīr,* two males[456] are required while in monetary matters one male with two females can fulfill the criteria. In the matters, which are exclusive to the women and they alone know them, in those cases the evidence of women alone is admissible. So much so that according to Imam Abū Hanīfah and Imām Aḥmad testimony of only one woman is sufficient to prove the matter in the court of law. Whereas according to Imām Shāfi'ī, four women are required to prove the matter. Therefore, if only female doctors have performed the procedures and they alone are

[452]Al- Bukhārī, *al-Ṣaḥīḥ*, vol. 8, 167, Ḥadīth no. 6824.
[453]Muslim, *Sahīh,* vol. 3, 1321, Ḥadīth no. 169
[454]Ibn Nujaim, *Al- Baḥer al- Rā'iq*, vol. 7, 55.
[455]Al-Qur'ān 5:8.
[456]Details of conditions of witnesses can be read in the books of *fiqh* in detail.

aware of the true facts, in this situation their evidence is enough to prove or disprove the matter in the court of law.[457]

**c) Documentary Evidences and Experts Opinion**

Medical records and all related documents that prove the treatment of the patient by the medical practitioners are the admissible mode of proof in the court of law in order to prove the negligence of medical practitioners. Likewise, expert opinion of senior consultants is also mode of proof be it in the form of oral evidence in the court of law or in the form of medical books or articles in the reputable journals.[458]

### 4.4.3 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.[459]

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

{.....وَمَنْ قَتَلَ مُؤْمِنًا خَطَأً فَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ وَدِيَةٌ مُسَلَّمَةٌ إِلَى أَهْلِهِ إِلا أَنْ يَصَّدَّقُوا.....}

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[457]Ibn Rushd, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtasid,* vol. 4, 248.

[458]Muḥammad ibn Muḥammad al-Mukhtār, *Āḥkām al-jarāḥah al-Ṭibbiyah* (Jeddah: Maktabah al-Ṣahābah, 1994), 491-92.

[459]al-Kāsānī, *Badā'i' al-Sanā'i'*, vol. 7, 252; Ibn Rushd, *Bidāyat al-Mujtahid,* vol. 4, 192; Shīrāzī, *Al-Muhadhdhab*, vol. 3, 211; Ibn Qudāmah, *Al-Mughnī,* vol. 8, 261.

"...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] ...."[460]

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

« قضَى رسول الله -صلي الله عليه وسلم- في دِية الخطأ عشرين بنت مَخاض، وعشرين ابنَ مَخاض، وعشرين ابنةَ لَبُون، وعشرين حقَّةً، وعشرين جَذعَةً»

"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."[461]

### 4.4.3.1 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.

### 1. First Opinion

According to Imam Abū Hanīfah[462], Imam Mālik[463] and old opinion of Imam al-Shāfi'ī[464], 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*

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[460] Al-Qur'ān 4:92.
[461] Ibn Hanbal, *Musnad*, vol. 4 (Cairo: Dār al-Ḥadīth, 1995), 210, Ḥadīth no. 4301.
[462] al-Kāsānī, *Badā'i' al-Sanā'i' fī Tartīb al-Sharā'ī'*, vol. 7, 253.
[463] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 4, 194.
[464] Shīrāzī, *Al-Muhadhdhab*, vol. 3, 212.

where Prophet (Peace Be upon Him) sent a letter to the people of Yemen and explained different matters andwrote:

وَإِنَّ فِي النَّفْسِ الدِّيَةُ مِائَةٌ مِنَ الْإِبِلِ

Indeed, the damages for the homicide is 100 camels and

وَعَلَى أَهْلِ الذَّهَبِ أَلْفُ دِينَارٍ

And for the people of gold, it is 1000 Dinar.[465]

**2. Second Opinion**

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:

« كَانَتْ قِيمَةُ الدِّيَةِ عَلَى عَهْدِ رَسُولِ اللَّهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ: ثَمَانَ مِائَةِ دِينَارٍ أَوْ ثَمَانِيَةَ آلَافِ دِرْهَمٍ، وَدِيَةُ أَهْلِ الْكِتَابِ يَوْمَئِذٍ النِّصْفُ مِنْ دِيَةِ الْمُسْلِمِينَ "، قَالَ: فَكَانَ ذَلِكَ كَذَلِكَ حَتَّى اسْتُخْلِفَ عُمَرُ رَحِمَهُ اللَّهُ، فَقَامَ خَطِيبًا فَقَالَ: أَلَا إِنَّ الْإِبِلَ قَدْ غَلَتْ، قَالَ: فَفَرَضَهَا عُمَرُ عَلَى أَهْلِ الذَّهَبِ أَلْفَ دِينَارٍ، وَعَلَى أَهْلِ الْوَرِقِ اثْنَيْ عَشَرَ أَلْفًا، وَعَلَى أَهْلِ الْبَقَرِ مِائَتَيْ بَقَرَةٍ، وَعَلَى أَهْلِ الشَّاءِ أَلْفَيْ شَاةٍ، وَعَلَى أَهْلِ الْحُلَلِ مِائَتَيْ حُلَّةٍ، قَالَ: وَتَرَكَ دِيَةَ أَهْلِ الذِّمَّةِ لَمْ يَرْفَعْهَا فِيمَا رَفَعَ مِنَ الدِّيَةِ»

"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 those who possessed gold at one thousand dinars, for those who

[465]al-Hākim, *Al-Mustadrak*, vol. 1, 552, Ḥadīth no. 1447.

> 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.[466]

Imam Abū Hanīfah responded to this *athār* and maintained that 'Umer only did it when they were the assets and wealth for people but when he introduced salaries for people; he retreated to the camels, gold and silver and declared them to be the property that will be used to pay blood money.[467]

**3. Third opinion**

Imam al-Shāfi'ī according to his later opinion maintained that original *Diyah* is 100 camels and it is mandatory on the person who accidentally killed other that he should deliver him 100 camels. If he does not own, then he should strive to acquire them. And if he doesn't find them, in this situation he will deliver their price to deceased's legal heirs. He too based his opinion on the *athār* of 'Umer mentioned earlier when he raised the amount of gold and silver coins to match with the amount of camels. Thus, camels are the original property that should be a standard for tariff.[468]

As mentioned earlier, *diyah* for accidental homicide is 100 camels. These camels must be of different age and sex as mentioned in the *Ḥadīth* of Prophet (Peace Be Upon Him). All jurists are unanimous that it should be of five types as it was narrated that Ibn Mas'ūd said: "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

[466]Abū Dāwūd, *Sunan*, vol. 4, 184, Ḥadīth no. 4542.

[467]Abū 'Abd Allah Muḥammad ibn Hassan Shaybānī, *Kitāb al-Aṣl,* vol. 4 (Karachi: Idārat al-Qur'ān wa al-'Ulūm al-Islāmiyyah), 452.

[468]Shīrāzī, *Al-Muhadhdhab,* vol. 3, 212.

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"[469]. This is the standard amount of *diyah* according to Abū Ḥanīfah. Imam Mālik and Imam al-Shāfi'ī[470] only differ with him about one type of camel. They preferred twenty he-camels in their third year instead of twenty he-camels in their second year as this is also mentioned in another *Ḥadīth* narrated from Ibn Mas'ūd.

This system of *diyah* is still prevalent in Arab countries and is redressing the financial loss caused by the accidental homicide. Their Supreme judicial authority announces the value of *diyah* of a particular time. In 2011, the Kingdom's supreme judicial authority announced the amount of *diyah* is raised to SR300, 000 ($81,000) in cases of accidental deaths[471]. Same amount was ordered to be given to the martyrs that lost their lives in unfortunate crane crash accident in Grand Mosque.[472] If converted into Pakistani rupees these days[473], it amounts to around 8.37 million Pakistani rupees. If we consider that average cost of living in Pakistan for a middle-class family is 50,000 rupees, then this amount will be sufficient for almost 14 years somewhat mitigating the financial loss caused by the accidental homicide.

As far as amount of *diyah* is concerned in other commodities like gold and silver, it is one thousand gold coins unanimously. The standard weight of gold coin in Islamic caliphate was 4.25 grams.[474] Thus, one thousand dinars will be equivalent to 4250 grams of gold.

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[469]Aḥmed ibn Hanbal, *Musnad,* vol. 4, 210, Ḥadīth no. 4301.

[470]Ibn Rushd, *Bidāyat al-Mujtahid,* vol. 4, 193.

[471]http://www.emirates247.com/news/region/saudi-arabia-triples-blood-money-to-sr300-000-2011-09-11-1.417796 (accessed March 7, 2016).

[472]http://www.arabnews.com/featured/news/806481(accessed March 7, 2016).

[473]Today is March 7, 2016.

[474]The Encyclopedia of Islam, s.v. "Dinār".

At current market rate of gold, it amounts to approximately 18.80 million Pakistani rupees. As mentioned earlier, if a middle-class family of Pakistan needs 50000 for a month, this amount will cater the financial needs of an average middle-class family for approximately 31 years.

Jurists are divided in exact amount of *diyah* in silver coins. Ḥanafī jurists consider the amount as 10,000 silver coins while *jamhūr* deem it to be 12,000 silver coins. One silver coin in Islamic caliphate was around 2.91 to 2.97 gram of silver.[475] At this weight, standard amount of *Diyah* will be around 2.0 to 2.5 million that is very less for the monetary compensation of loss of life.

When *qiṣāṣ* and *Diyah* Laws were promulgated in Pakistan, Silver was adopted as the standard for calculation of *diyah* that is extremely low.[476] Each year finance division (internal finance wing) of Government of Pakistan announces the amount of *diyah* for that particular year according to the rate of silver[477]. For the year 2016-2017, *diyah* amount is fixed to be Rs. 1,680,320/- (rupees one million six hundred eighty thousand, three hundred and twenty only).[478]

Silver is no more a market indicator and amount of *diyah* according to its rate defeats the very purpose of *diyah* that is to redress the financial loss of the family. Camel was adopted to evaluate the amount and those who wanted to pay through gold and silver, they had to pay according to the amount of camels. At present, gold is the market indicator; it is a wealth and always will be.

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[475]The Encyclopedia of Islam, s.v. "Dirham".
[476]Dr Mehmood Aḥmed Ghazi, *Mahazirat e fiqa* (Lahore: Al-Faisal Nashran, 2005), 421.
[477]http://www.finance.gov.pk/circulars.html
[478]http://www.finance.gov.pk/circulars/Diyat_2016_17.pdf

Therefore, gold should be adopted in Pakistan as *diyah* for the accidental homicide. Thus, doctors or hospital administrations should pay around 18.80 million rupees if a patient dies because of their mistake or negligence that will be sufficient for around 30 years.

Another important matter regarding this issue is the time of payment. All jurists have unanimous opinion regarding the time of payment. It can be delayed for three years[479]. Every year one third of the *Diyah* has to be paid.[480]

### 4.4.3.2 Diyah of Women

There is a difference of opinion regarding *diyah* of woman among classical jurists and contemporary jurists. Classical jurists were unanimous that the *diyah* of woman is half of the *diyah* of the man.[481] But some of the contemporary scholars are of the view that the *diyah* of woman is equal to the *diyah* of man. Both groups have their arguments to support their instance.

#### 4.4.3.1.1 First Group

According to this group, *diyah* of woman is half of the *diyah* of man. All of the classical jurists and schools of laws (Ḥanafī, Mālikī, Shāfi'īs and Ḥanbalīs) are unanimous on this point[482].

[479]al-Kāsānī, *Badā'i' al-Sanā'i'*, vol. 7, 256; Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 4, 196.
[480]Ibn Qudāmah, *Al-Mughnī*, vol. 8, 376.
[481]al-Kāsānī, *Badā'i' al-Sanā'i'*, vol. 7, 254; ibn Rushd, *Bidāyat al-Mujtahid*, vol. 4, 196; Shīrāzī, *Al-Muhadhdhab*, vol. 3, 213; Ibn Qudāmah, *Al-Mughnī*, vol. 8, 402.
[482]al-Kāsānī, *Badā'i' al-Sanā'i'*, vol. 7, 254; ibn Rushd, *Bidāyat al-Mujtahid*, vol. 4, 196; Shīrāzī, *Al-Muhadhdhab*, vol. 3, 213; ibn Qudāmah, *Al-Mughnī*, vol. 8, 402.

#### *4.4.3.1.1.1 Ḥanafī*

Ḥanafī books mandate that the *diyah* of women is half. For instance al-Kāsānī wrote in *Badā'i'al-Sanā'i'*[483]:

وَإِنْ كَانَ أُنْثَى فَدِيَةُ الْمَرْأَةِ عَلَى النِّصْفِ مِنْ دِيَةِ الرَّجُلِ

#### *4.4.3.1.1.2 Mālikī*

*Diyah* of woman is half according to Mālikī fiqh too. Ibn Rushd says[484]:

أَمَّا دِيَةُ الْمَرْأَةِ فَإِنَّهُمْ اتَّفَقُوا عَلَى أَنَّهَا عَلَى النِّصْفِ مِنْ دِيَةِ الرَّجُلِ

#### *4.4.3.1.1.3 Shāfi'īs*

Likewise, one can find this opinion explicitly mentioned in Shāfi'ī's texts that the *diyah* of woman is half of *diyah* of man[485].ودية المرأة نصف دية الرجل

#### *4.4.3.1.1.4 Ḥanbalīs*

Ibn Qudāmah said inAl-Mughnī[486]:دِيَةُ الْمَرْأَةِ نِصْفُ دِيَةِ الرَّجُلِ

#### *4.4.3.1.1.1 Arguments Presented by this Group*

This group present following arguments to prove their case:

Following verses of Qur'ān are employed as evidence for their viewpoint. Allah (swt) says:

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[483]al-Kāsānī, *Badā'i' al-Sanā'i'fi Tartīb al-Sharā'i'*, vol. 7, 254
[484]ibn Rushd, *Bidāyat al-Mujtahid*, vol. 4, 196
[485]Shīrāzī, *Al-Muhadhdhab*, vol. 3, 213
[486]Ibn Qudāmah, *Al-Mughnī*, vol. 8, 402.

{يَا أَيُّهَا الَّذِينَ آمَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلَى الْحُرُّ بِالْحُرِّ وَالْعَبْدُ بِالْعَبْدِ وَالأُنْثَى بِالأُنْثَى}

(O you who have believed, prescribed for you is legal retribution for those murdered - the free for the free, the slave for the slave, and the female for the female....)[487]

This group says that Allah swt mentioned man equal to man and woman equal to woman and not vice versa. Thus, in cases of diyah and other related matters, both are not equal.

{....وَلَيْسَ الذَّكَرُ كَالأُنْثَى...}

(...And the male is not like the female....[488])

A woman is not like man. She is different and thus has different rulings in several matters.

{الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَى بَعْضٍ وَبِمَا أَنْفَقُوا مِنْ أَمْوَالِهِمْ}

(Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth...)[489]

There are several matters in which Allah (swt) has given a rank higher to man than woman. Thus, it is not very surprising to fix their *diyah* higher than man. One of the reasons for their qawamiyyat mentioned here is that they spend from their income on woman and family. Same argument is for *diyah*. *Diyah* is merely a redress for financial loss borne by the family and state for losing a member of the family or state. It is not the alternative of a life that is lost, or it is not the equivalent to the blood of someone. In fact,

[487] Al-Qur'ān2:178.
[488] Al-Qur'ān3:36.
[489] Al-Qur'ān4:34

nothing can compensate the loss of a life. Therefore *Sharī'ah* considers that a family suffers more financial loss when a male life is lost. One can argue that women now bear equal financial burden in many parts of the Muslim world. Islamic Law deals with the matter according to the financial liability. On principle, Male is bound and will always be to take care and spend his money, women is not and will never be. Endeavors should be to lessen the burden from female and emphasizing on males to fulfill the financial responsibilities rather than sharing and shifting to females and demanding the change in laws that are well –settled for last fourteen centuries.

It is narrated from Mu'ādh ibn Jabl that Messenger of Allah (Peace Be Upon Him) said" *diyah* of women is half of the *diyah* of man.[490]"

« دِيَةُ الْمَرْأَةِ عَلَى النِّصْفِ مِنْ دِيَةِ الرَّجُلِ»

Likewise Athār of companions of Prophet Muhammad (PeaceBe Upon Him) proved that they were of the view that the *diyah* of Woman is half of *diyah* of man. For instance 'Umar, Uthmān, 'Ali and Zaid ibn Thābit are reported to have commanded *diyah* of woman to be half of the *diyah* of man[491].

Moreover, a number of classical fuqahā' have reported *Ijmā'* on the matter that the diyah of woman is half of the diyah of man. For instance Kāsānī wrote that the diyah of woman is half of the *diyah* of men because there is consensus of companions (may Allah be pleased with all of them). It is narrated from 'Umar, 'Ali, Ibn Mas'ud, Zaid ibn thābit

[490]Aḥmed ibn al-Husayn ibn 'Ali ibn 'Abd Allah ibn Musa, Abu Bakr al-Bayhaqi al-Naysaburi al-Khusrawjirdi al-Shafi'ī al-Ash'arī, *Al-Sunan al-Kubra,* vol. 8 (Beirut: Dār al-Kutub al-'Ilmiyyah, 2003), 166. Ḥadīth no. 16305.

[491]Ibid.,166, 167.

regarding *diyah* of woman that it is half of *diyah* of man. And none refuted them in this matter, thus it became consensus.[492]

وَإِنْ كَانَ أُنْثَى فَدِيَةُ الْمَرْأَةِ عَلَى النِّصْفِ مِنْ دِيَةِ الرَّجُلِ لِإِجْمَاعِ الصَّحَابَةِ - رَضِيَ اللَّهُ عَنْهُمْ - فَإِنَّهُ رُوِيَ عَنْ سَيِّدِنَا عُمَرَ، وَسَيِّدِنَا عَلِيٍّ، وَابْنِ مَسْعُودٍ، وَزَيْدِ بْنِ ثَابِتٍ رِضْوَانُ اللهِ تَعَالَى عَلَيْهِمْ أَنَّهُمْ قَالُوا فِي دِيَةِ الْمَرْأَةِ: إنَّهَا عَلَى النِّصْفِ مِنْ دِيَةِ الرَّجُلِ، وَلَمْ يُنْقَلْ أَنَّهُ أَنْكَرَ عَلَيْهِمْ أَحَدٌ فَيَكُونَ إجْمَاعًا، وَلِأَنَّ الْمَرْأَةَ فِي مِيرَاثِهَا، وَشَهَادَتِهَا عَلَى النِّصْفِ مِنْ الرَّجُلِ فَكَذَلِكَ فِي دِيَتِهَا

Likewise, Ibn Rushd[493]recorded that they agreed that the *diyah* of woman is half of *diyah* of man.

أَمَّا دِيَةُ الْمَرْأَةِ فَإِنَّهُمْ اتَّفَقُوا عَلَى أَنَّهَا عَلَى النِّصْفِ مِنْ دِيَةِ الرَّجُلِ فِي النَّفْسِ فَقَطْ

Imam Shāfi'ī noted in al-Umm that he didn't know anyone among scholars; neither classical nor contemporary who had been opponent in this matter that the *diyah* of woman is half of *diyah* of man and that is fifty camels.

لَمْ أَعْلَمْ مُخَالِفًا مِنْ أَهْلِ الْعِلْمِ قَدِيمًا وَلَا حَدِيثًا فِي أَنَّ دِيَةَ الْمَرْأَةِ نِصْفُ دِيَةِ الرَّجُلِ وَذَلِكَ خَمْسُونَ مِنْ الْإِبِلِ

While Ibn Qudāmahmentions this *Ijmā'* in his book *Al-Mughnī*[494]and asserted that according to scholars, there is consensus that the *diyah* of woman is half of *diyah* of man. It is reported from Ibn 'Ulayyah and al-Aṣam that they both said that *diyah* of woman is equal to the *diyah* of man but there opinion is rejected as it is *Shāz.*[495]

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[492] al-Kāsānī, *Badā'i' al-Sanā'i'*, vol.7, 254.

[493]Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 4, 196.

[494] Ibn Qudāmah, *Al-Mughnī*, vol. 9, 3.

[495]It is that opinion in fiqh that is opposite to the famous, preferred or correct opinion or it can be said that it is non-preferred, weak and out of the way opinion. For details, please see Al- Mausu'ah al-Fiqhiyyah al-Kuwaitiyyah s.v. Shuzūz.

قَالَ: (وَدِيَةُ الْحُرَّةِ الْمُسْلِمَةِ، نِصْفُ دِيَةِ الْحُرِّ الْمُسْلِمِ) قَالَ ابْنُ الْمُنْذِرِ، وَابْنُ عَبْدِ الْبَرِّ: أَجْمَعَ أَهْلُ الْعِلْمِ عَلَى أَنَّ دِيَةَ الْمَرْأَةِ نِصْفُ دِيَةِ الرَّجُلِ. وَحَكَى غَيْرُهُمَا عَنْ ابْنِ عُلَيَّةَ، وَالْأَصَمِّ، أَنَّهُمَا قَالَا: دِيَتُهَا كَدِيَةِ الرَّجُلِ...وَهَذَا قَوْلٌ شَاذٌّ.

This group presents the ruling of testimony and inheritance where woman gets half of the share of man. It is asserted that *diyah* is not the alternative of the life lost. It can never be. It merely seeks to mitigate the financial loss incurred upon the family because of the loss of life. In case of man, this loss is greater than the woman as all financial responsibilities are imposed upon man and he has to fulfill it. Moreover, even if a woman contributes too in financial matter to a certain extent, still, the safeguard of country, protection of people and other such matters will always be the areas where men are irreplaceable with woman. Prime work will be done by them and without them; women can not be of much benefit. Thus, the financial loss to a society is greater in case of man than woman and to mitigate that loss, higher *diyah* must be paid in case of man.[496]

#### 4.4.3.1.2 Second Group

According to this group, *diyah* of woman is equal to the *diyah* of man. The proponents of this view are Ibn 'Ulayyah[497], al-Aṣam[498] among classical scholars while among

[496]Ibn Qayyim, *i'lām al- Muwaqqi'īn'un Rabb al-'Alamīn*, vol. 2 (Beirut: Dār al-Kutub al-Ilmiyyah, 1968), 114.

[497] His name is Ismā'īl ibn Ibrāhīm ibn Muqsim Abū Bashar al-Asadī (110 A.H-193 A.H). He is famous by the name of Ibn 'Ulayyah. He was celebrated jurist and *muhaddith*. He was given some official posts during the reign of Harūn al-Rashīd. It is attributed to him that he was of the opinion that Qur'ān was creature but later he retrieved from this view. He had a son by the name of Ibrāhīm. He too was called Ibn 'Ulayyah and too was of the opinion that Qur'ān was creature. Please see Al- Mausu'ah al-Fiqhiyyah al-Kuwaitiyyah

[498] His name is Abū Bakr al-Aṣam. He was sheikh of *Mu'tazilī* group. Please seeal-Dhabī, *Siyar A'lām al-Nablā*, vol. 8 (Cairo: Dār al-Ḥadīth, 2006), 123.

contemporary scholars are al-Ghazalī[499], Abū Zahra[500] and Yūsuf Qardawī[501] etc. Following are their arguments:

{وَمَا كَانَ لِمُؤْمِنٍ أَنْ يَقْتُلَ مُؤْمِنًا إِلَّا خَطَأً وَمَنْ قَتَلَ مُؤْمِنًا خَطَأً فَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ وَدِيَةٌ مُسَلَّمَةٌ إِلَى أَهْلِهِ إِلَّا أَنْ يَصَّدَّقُوا فَإِنْ كَانَ مِنْ قَوْمٍ عَدُوٍّ لَكُمْ وَهُوَ مُؤْمِنٌ فَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ وَإِنْ كَانَ مِنْ قَوْمٍ بَيْنَكُمْ وَبَيْنَهُمْ مِيثَاقٌ فَدِيَةٌ مُسَلَّمَةٌ إِلَى أَهْلِهِ وَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ فَمَنْ لَمْ يَجِدْ فَصِيَامُ شَهْرَيْنِ مُتَتَابِعَيْنِ تَوْبَةً مِنَ اللَّهِ وَكَانَ اللَّهُ عَلِيمًا حَكِيمًا}

"And never is it for a believer to kill a believer except by mistake. 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] unless they give [up their right as] charity. But if the deceased was from a people at war with you and he was a believer - then [only] the freeing of a believing slave; and if he was from a people with whom you have a treaty - then a compensation payment presented to his family and the freeing of a believing slave. And whoever does not find [one or cannot afford to buy one] - then [instead], a fast for two months consecutively, [seeking] acceptance of repentance from Allah. And Allah is ever Knowing and Wise".[502]

This group argues that in this verse Allah did not differentiate between *diyah* of man and woman and included all thus there is no difference between the *diyah* of them. Had there been a difference, Allah would have mentioned it. Prophet (Peace Be Upon Him) said:

«الْمُسْلِمُونَ تَتَكَافَأُ دِمَاؤُهُمْ. يَسْعَى بِذِمَّتِهِمْ أَدْنَاهُمْ، وَيُجِيرُ عَلَيْهِمْ أَقْصَاهُمْ، وَهُمْ يَدٌ عَلَى مَنْ سِوَاهُمْ يَرُدُّ مُشِدُّهُمْ عَلَى مُضْعِفِهِمْ ، وَمُتَسَرِّيهِمْ عَلَى قَاعِدِهِمْ لَا يُقْتَلُ مُؤْمِنٌ بِكَافِرٍ ، وَلَا ذُو عَهْدٍ فِي عَهْدِهِ»

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[499] Muḥammad al-Ghazali, *Al-Sunnah al-Nabawiyyah baina ahl al-Fiqh wa ahl al-Ḥadīth* (Dār al-Shurūq) 25.

[500] Abū Zahra, *Al-'Aqūbah*, (Cairo: Dār al-Fikr al-'Arabī, n.d), 506-509.

[501] http://www.qaradawi.net/new/Articles-4760#رأينا الذي اخترناه

[502] Al-Qur'ān4:92.

The Messenger of Allah (ﷺ) said: Muslims are equal in respect of blood. The lowest of them is entitled to give protection on behalf of them, and the one residing far away may give protection on behalf of them. They are like one hand over against all those who are outside the community. Those who have quick mounts should return to those who have slow mounts, and those who got out along with a detachment (should return) to those who are stationed. A believer shall not be killed for an unbeliever, nor a confederate within the term of confederation with him.[503]

This Hadīth has been presented as an argument by this group that it clearly declares the blood of all Muslims is equal. This *diyah* must be equal too.

This group declares that the Hadīth of Mu'ādh is weak and thus can not be relied upon on this important matter.[504]

*Ghurrah* (*diyah* of fetus) is same for both male and females irrespective of male child or female child. When there is no difference in that age group. Why would there be any when they are grown up?[505]

**Conclusion**

None of the groups have conclusive and strongest arguments. However, first group is at stronger position because of the strength of their arguments and that the practice has been continued for last fourteen centuries without any objection or discussion by main stream jurists. Thus, the opinion of first group is preferred that the *diyah* of women is half of the

[503] Abū Dāwūd, *Sunan*, vol. 3, 80, Ḥadīth no. 2751.
[504] http://www.qaradawi.net/new/Articles-4760
[505] Morad Odeh, Diyah al-Mara'h al-Muslimah baina al-Tasnīf wa al-Masāwah bi al-Diyah al-Rajul, *Mujallah Jami'ahal-Najāh*, 28, 3. 588.

*diyah* of man. Moreover, it signifies that the *diyah* is the compensation of monetary loss and thus the financial burden must be borne by man and not be shifted to woman.

### 4.4.3.2 Monetary Compensation for Bodily Harm

Financial compensation for bodily harm is known as *"arsh"*. Islamic Law has provided a tariff list for calculation of financial compensation of various wounds, faculties and organs. Jurists have divided the organs into four types for the purpose of estimation of damages for the loss of organ, faculties and wounds.[506]

#### A. Single Organs

Those 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.[507] Amount in Pakistani rupees will be: according to gold coins: PKR 18.80 million/- and according to silver coins: PKR 2.49 million/-

Same *Hadīth* mandates for full *Diyah* if tongue is amputated.[508] Same is decreed if the tongue of a child who doesn't talk is cut off according to *jamhūr*[509] while Imam Abū Hanīfah required judge to decide. If the tongue of a dumb person is amputated, Mālikī,

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[506] Al-Zuhaylī, *Al-Fiqh Al-Islīamī wa Adillatuh,* vol.7, 5749.

[507] al-Ḥākim, *Al-Mustadrak 'alā al-Saḥīḥayn*, vol. 1, 552, Ḥadīth no. 1447; al-Kāsānī, *Badā'i' al-Sanā'i'*, vol.7, 253 ; ibn Rushd, *Bidāyat al-Mujtahid*,,vol. 4, 205; ibn Qudāmah, *Al-Mughnī,* vol. 8, 446.

[508] al-Ḥākim, *Al-Mustadrak 'alā al-Saḥīḥayn,* vol. 1, 552, Ḥadīth no.; al-Kāsānī, *Badā'i' al-Sanā'i'*, vol. 7, 311; ibn Rushd, *Bidāyat al-Mujtahid,* vol. 4, 205; Shirbīnī, *Mughnī al-Muhtāj ilā Ma'ānī Alfāz al-Minhāj*, vol. 5, 309; ibn Qudāmah al-Maqdisī, *Al-Mughnī,* vol. 8, 447

[509] Ibn Qudāmah, *Al-Mughnī,* vol. 8, 450.

Shāfi'ī and Ḥanafī decide that the judge ought to estimate while Ḥanbalī prescribe one third *Diyah*[510].

If a person lost his penis or *hashfah* (head of penis) due to mistake of other, accused will be asked to pay full *diyah*[511]. 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.[512]

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.*[513]

**B. Organs that are in pair**

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[514]. If one hand or leg is lost, half of *diyah* will be paid as mentioned in the ḥadīth.[515]Amount in Pakistani rupees for full *diyah* will be: according to gold coins: PKR 18.80 million/-according to silver coins: PKR 2.49 million/- and for half *diyah:* according to gold coins: PKR 9.40 million and according to silver coins: PKR 1.25 million.

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[510]Al-Zuhaylī, *Al-Fiqh Al-Islīamī wa Adillatuh,* vol.7, 5750.
[511]ibn Rushd, *Bidāyat al-Mujtahid,* vol. 4, 205; ibn Qudāmah, *Al-Mughnī,* vol. 8, 461.
[512]al-Kāsānī, *Badā'i' al-Sanā'i',* vol.7, 311 ;Al-Zuhaylī, *Al-Fiqh Al-Islīamī wa Adillatuh,* vol.7, 5750.
[513]Shaybānī, *Kitāb al-Asl,* vol. 4, 467; ibn Qudāmah, *Al-Mughnī,* vol. 8, 443.
[514]ibn Qudāmah al-Maqdisī, *Al-Mughnī,* vol. 8, 457.
[515]al-Kāsānī, *Badā'i' al-Sanā'i',* vol.7, 314.

Medical practitioners will be liable to pay full *diyah* if both eyes are gorged out and half if one is lost.[516] 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*[517] whereas Imam Shāfi'ī still demands for half[518].

Full *diyah* will be mandated if both ears are lost due to the mistake or negligence of doctors and half if one is lost[519]. However, Imām Mālik conditioned the loss of hearing for the payment of full *diyah*.[520]

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[521].

Jurists do not hold a unanimous opinion regarding eyebrows. Ḥanafī and Ḥanbalī stipulate full *siyyah* if they are lost in a manner that made its regrowth impossible and half if one is lost.[522]Mālikī and Shāfi'ī jurists disagree with them and demand for a fair estimation by judge as eyebrows do notserve much purpose in a body except beauty and for the loss of little beauty, full *diyah* cannot be demanded.[523]

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

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[516]Shirbīnī, *Mughnī al-Muhtā*, vol. 5, 308; ibn Qudāmah, *Al-Mughnī*, vol. 8, 436.

[517]ibn Qudāmah, *Al-Mughnī*, vol. 8, 438.

[518]al-Kāsānī, *Badā'i' al-Sanā'i'*, vol.7, 311.

[519]Shirbīnī, *Mughnī al-Muhtāj*, vol. 5, 307; ibn Qudāmah, *Al-Mughnī*, vol. 8, 441; Ibn Rushd al-Hafīd, *Bidāyat al-Mujtahid*, vol. 4, 204.

[520]al-Kāsānī, *Badā'i' al-Sanā'i'*, vol.7, 311; ibn Rushd al-Hafīd, *Bidāyat al-Mujtahid*, vol. 4, 204; Shirbīnī, *Mughnī al-Muhtāj*, vol. 5, 309; ibn Qudāmah, *Al-Mughnī*, vol. 8, 309.

[521]al-Kāsānī, *Badā'i' al-Sanā'i'*, vol.7, 311; ibn Rushd *Bidāyat al-Mujtahid*, vol. 4, 205; Shirbīnī, *Mughnī al-Muhtāj*, vol. 5, 309.

[522]al-Kāsānī, *Badā'i' al-Sanā'i'*, vol.7, 311

[523] Ibn Rushd al-Hafīd, *Bidāyat al-Mujtahid*, vol. 4, 204.

amputated, half will be payable.[524] Imam Mālik conditioned drying up of milk if only nipple is severed.

Regarding testicles and labia minora[525], 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.[526] 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.[527] In the same way, Shāfi'ī and Ḥanbalī prescribed full *diyah* for loss of both jaws and half for one.

**C. Loss of organs that are four in body**

This category includes eyelids and eyelashes. Jurists are divided into two groups regarding eyelids. Jamhūr asked for full *diyah* if all fours are amputated and for one-fourth if one is lost but Imam Mālik disagree and suggest judges to decide.[528] Amount in Pakistani rupees for full *diyah*: According to gold coins: PKR 18.80 million/- and according to silver coins: PKR 2.49 million/- for Quarter *diyah:* According to gold coins: PKR 4.70 million/- and according to silver coins: PKR 0.62 million/-. Ḥanafīs and Ḥanbalīs prescribe full *diyah* for loss of all eye-lashes but Mālikī and Shāfi'ī asked for adequate estimation by judge.[529]

**D. Loss of Organs that are Ten in Body**

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[524]al-Kāsānī, *Badā'i' al-Sanā'i'*, vol.7, 311; Ibn Qudāmah, *Al-Mughnī*, vol. 8, 459.

[525] The two inner folds of the vulva.

[526]al-Kāsānī, *Badā'i' al-Sanā'i'*, vol.7, 311; Ibn Rushd, *Bidāyat al-Mujtahid*, ,vol. 4, 205; Shirbīnī, *Mughnī al-Muhtāj*, vol. 5, 314; Ibn Qudāmah, *Al-Mughnī*, vol. 8, 462.

[527] Ibn Rushd, *Bidāyat al-Mujtahid*,,vol. 4, 205.

[528]al-Kāsānī, *Badā'i' al-Sanā'i'*, vol.7, 311; Ibn Rushd, *Bidāyat al-Mujtahid*,vol. 4, 205; Shirbīnī, *Mughnī al-Muhtāj*, vol. 5, 308; Ibn Qudāmah, *Al-Mughnī*, vol. 8, 440.

[529]al-Kāsānī, *Badā'i' al-Sanā'i'*, vol.7, 311; Ibn Qudāmah, *Al-Mughnī*, vol. 8, 440.

Fingers of hands and toes of feet are included in this group. *Diyah* for each finger or toe is ten camels[530]. 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[531]. Amount in Pakistani rupees will be for ten camels. That means 100 gold coins: PKR 1.88 million/- and one third of ten camels means 33.33 gold coins: PKR 0.62 million/-

An average person has 32 teeth in his mouth. Five camels are the *diyah* of each tooth[532]. 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 Ḥanafī while jamhūr prescribe the estimation by judge. Amount in Pakistani rupees for Five camels mean 50 gold coins: PKR 0.94 million.

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.

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[530]al-Kāsānī, *Badā'i' al-Sanā'i'*, vol.7, 314; Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 4, 206; Shirbīnī, *Mughnī al-Muhtāj*, vol. 5, 314; Ibn Qudāmah, *Al-Mughnī*, vol. 8, 463.

[531]Ibn Qudāmah, *Al-Mughnī*, vol. 5, 314.

[532]al-Kāsānī, *Badā'i' al-Sanā'i'*, vol.7, 314; Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 4, 207; Shirbīnī, *Mughnī al-Muhtāj*, vol. 5, 310 ; Ibn Qudāmah, *Al-Mughnī*, vol. 8, 451.

Full *diyah* will be payable if loss of sight of both eyes is caused[533]. Likewise, loss of hearing will too be compensated with full *diyah.*[534] If a person lost his faculty of smelling, tasting or speech, he will be paid full *diyah.*[535] 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.

#### 4.4.3.3 Damages for Wounds

According to jurists, there are different types of head and face wounds. For some, they are ten and for some they are eleven. For first six types of the wounds, it is left on the judge to decide[536] while for rest, *arsh* is fixed.

1. ***Al-Hārişah***

It is a minor scratch that doesn't cause bleeding.

2. ***Al-Dāmi'ah***

It is a scratch that cut the skin. Blood can be seen but it doesn't bleed as in the case of eye.

3. ***Al-Dāmiyah***

It is a scratch that cut the skin to the extent that causes bleeding.

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[533] Shirbīnī, *Mughnī al-Muhtāj* vol. 5, 320.
[534]Ibn Qudāmah, *Al-Mughnī,* vol. 8, 442.
[535]Shirbīnī, *Mughnī al-Muhtāj,* vol. 5, 322; Ibn Qudāmah, *Al-Mughnī,* vol. 8, 447.
[536]Ibn Qudāmah, *Al-Mughnī,* vol. 8, 480.

### *4. Al-Bāḍi'ah*

It is a wound that cut the flesh.

### *5. Al-Mutlāḥmah*

It is a deep cut in the flesh but not that deeper to reach the bone.

### *6. Al-Simḥāq*

It is an even deeper cut that almost reached to the bone after cutting the flesh, but bone is not clearly exposed.

### *7. Al-Mūḍiḥah*

It is the head injury deep enough to cut the skin and flesh and reaches to bone and lays it bare. For this injury, *arsh* is five camels.[537] Amount in Pakistani rupees for five camels mean 50 gold coins: PKR 0.94 million.

### *8. Al-Hāshimāh*

It is an injury that causes fracture in bone. Ten camels are payable as arsh for this injury.[538] Amount in Pakistani rupees for ten camels mean 100 gold coins: PKR1.88 million.

### *9. Al-Munaqqila*

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[537]al-Kāsānī, *Badā'i' al-Sanā'i'*, vol.7, 316; Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 4, 202; Ibn Qudāmah, *Al-Mughnī*, vol. 8, 469.

[538]al-Kāsānī, *Badā'i' al-Sanā'i'*, vol.7, 314; Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 4, 203; ibn Qudāmah, *Al-Mughnī*, vol. 8, 472.

A bone is dislocated in this wound. Compensation is five camels[539]. Amount in Pakistani rupees for Five camels mean 50 gold coins: PKR 0.94 million.

### *10. Al-Ma'mūmah*

It is an injury that is so deep that it reaches to cerebral membrane and lays it bare. One third of *diyah* (thirty-three female camels) is payable in this kind of wound.[540] Amount in Pakistani rupees for one third of 100 camels mean 333.33 gold coins: PKR6.2 million.

### *11. Al-Dāmighah*

It is a head injury that is deeper enough to reaches to the brain. In this type of wound, one third (thirty-three female camels) will be paid.[541] Amount in Pakistani rupees for one third of 100 camels means 333.33 gold coins: PKR6.2 million.

## E. Injury in body parts other than head and face

There are two types of wounds in the body parts other than head and face:

### *1. Jā'ifah*

It is an injury that approaches to one of the inner cavities of the body from chest, abdomen, back or throat etc. For this type of wound, financial compensation will be one-

[539]al-Kāsānī, *Badā'i' al-Sanā'i'*, vol.7, 314 ; Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 4, 203;Shirbīnī, *Mughnī al-Muhtāj*, vol. 5, 303. Ibn Qudāmah, *Al-Mughnī*, vol. 8, 473.

[540]Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 4, 203; Shirbīnī, *Mughnī al-Muhtāj*, vol. 5, 303; Ibn Qudāmah, *Al-Mughnī*, vol. 8, 473.

[541]al-Kāsānī, *Badā'i' al-Sanā'i'*, vol.7, 314.

third (thirty-three female camels) of *diyah.*[542] Amount in Pakistani rupees for one third of 100 camels mean 333.33 gold coins: PKR6.2 million.

*2. Non-jā'ifah*

It is the wound that doesn't reach to inner cavity like in hands and legs. Judge will evaluate and give estimation for monetary compensation of this type of wound.

**4.4.3.3 Miscarriage**

If someone's mistake or negligence causes miscarriage, he will have to pay five camels[543] or whatever is equivalent to it in gold and silver like fifty gold coins or five hundred silver coins. There are many traditions of Prophet Muhammad (Peace Be Upon Him) in this regard. For example, the case of two women who fought with each other, one of them hit other by stone. It proved to be lethal killing her and terminating her pregnancy. Prophet (peace Be Upon Him) adjudicated full *diyah* for women and *ghurrah* (*diyah* for embryo).

But if fetus comes out alive and then died, full *diyah* will have to be paid.

In the light of above discussion, it is evident that Islamic system of indemnification has decided major portion of monetary compensation of all major injuries, wounds and loss of life very little has been left for judges to decide.

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[542]Ibn Rushd, *Bidāyat al-Mujtahid,* vol. 4, 203; Shirbīnī, *Mughnī al-Muhtāj*, vol. 5, 304; Ibn Qudāmah,, *Al-Mughnī,* vol. 8, 474.

[543]Ibn Qudāmah, *Al-Mughnī,* vol. 8, 408.

#### 4.4.3.4 Who will pay the *diyah*?

Islamic law incurs the liability of payment of *diyah* on *'āqilah*[544]. This system wasn't initiated by Islam; rather it dated back to the pre-Islamic era. Islam regulated and refined this system. In pre-Islamic era *'āqilah* was defined as adult sturdy males who used to be responsible for safeguarding the entire tribe. There is a difference of opinion among jurists regarding definition of this legal term.

##### 4.4.3.4.1 Ḥanafī and Mālikī

According to Ḥanafīs, those male, adult and free registered soldiers are *'āqilah* who are registered in same payroll (*dīwān*)[545].

الْعَقْلُ عَلَى أَهْلِ الدِّيوَانِ مِنْ الْعَاقِلَةِ.

(*Diyah* is upon the people of *dīwān* among *'āqilah)*[546]

فَلَمَّا كَانَ فِي زَمَنِ عُمَرَ - رَضِيَ اللَّهُ عَنْهُ - وَدَوَّنَ الدَّوَاوِينَ صَارَ التَّنَاصُرُ بَيْنَهُمْ بِالدِّيوَانِ فَكَانَ أَهْلُ دِيوَانٍ وَاحِدٍ يَنْصُرُ بَعْضُهُمْ بَعْضًا وَإِنْ كَانُوا مِنْ قَبَائِلَ شَتَّى فَجَعَلَ عُمَرُ الْعَاقِلَةَ أَهْلَ الدِّيوَانِ.

They rely for their definition on the practice of 'Umer (may Allah be pleased with him). During the time of Prophet (Peace be Upon Him), tribesmen used to pay the *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

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[544]Ibn Rushd, *Bidāyat* vol. 4, 209.

[545]Muḥammad ibn Aḥmed ibn 'Arafah al-Dusūqī, *Hāshiyat 'āla al-sharh al-Kabīr li- abī al-Barakāt sīdī Aḥmed al-Dardīr 'āla al-Khalīl*, vol. 4 (Dār al-Fikr), 282.

[546]al-Sarakhasī, *Al- Mabsūt,* Vol. 27, 125

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.*[547] An opinion of Mālikī *fiqh* is similar to the notion of Ḥanafīs. It is narrated in some of the classical books on Mālikī *fiqh*[548]

أَنَّ الْعَاقِلَةَ عِدَّةُ أُمُورٍ الْعَصَبَةُ 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.*[549] It says:

لَكِنْ أَهْلُ الدِّيوَانِ مُقَدَّمُونَ عَلَى الْعَصَبَةِ إنْ كَانَ لَهُمْ جَوَامِكُ تُصْرَفُ لَهُمْ

### 4.4.3.4.2 Shāfi'ī and Ḥanbalī

According to an opinion of Mālik[550], Shāfi'ī and Ḥanbalī, Agnatic male tribesmen are *'āqilah* and thus liable to pay for *diyah*[551]. Imam Shāfi'ī didn't accept *ahl al-dīwān* as *'āqilah* 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[552].

والعاقلة هم العصبات الذين يرثون بالنسب أو الولاء غير الأب والجد والابن وابن الابن

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[547] Ibid.

[548] Muḥammad ibn 'Abdullah al-Kharshī, *Sharḥ Mukhtasir khalīl li- al-Kharshī*, vol. 8, 45.

[549] Ibid.

[550] An opinion of Mālikī*fiqh* negates the stance of *'āqilah* being *ahl al-dīwān* and stresses upon the original rule of *'āqilah* being *'aṣabah.*

[551] Ibn Qudāmah al-Maqdisī, *Al-Mughnī*, vol. 8, 390.

[552] Shīrāzī, *Al-Muhadhdhab*, vol. 3, 239.

Imam Sarakhsī responding to this objection, remarked that the decision of 'Umer was made in front of the companion of Prophet (Peace be Upon Him) and none objected or rejected his decree. Thus, this decision has the sanction of *ijmā'*[553].

With respect to the medical negligence claims and its payments, the option of *'aṣabah* is not very practical. However, the example of *dīwān* can be followed. Associations of medical practitioners may mandate payment of premium in order to pay medical negligence claims. Likewise, PM & DC can run such programs on the basis of *Ta'mīn*.

## 4.5 Conclusion

Noble *Sharī'ah* has a tremendous capability to guide on the issue of medical malpractice. Law on this matter in *Sharī'ah* started with the tradition of Prophet (peace be upon him) and other general guidelines of Qur'ān and Sunnah.[554] *Fuqahā'* further expounded the concepts and demanded the 'negligence' or 'mistake' on the part of doctor to make him liable for the harm caused to the patient.[555]

The system of damages in *Sharī'ah* is very relevant in the matter of medical malpractice, although there is no direct reference in *Qur'ān* or *Sunnah* for monetary compensation for medical negligence, however the general law of *qiṣāṣ* and *diyah* encompasses *qatl al-khaṭā*.[556] This area 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

[553] al-Sarakhasī, *Al- Mabsūt*, Vol. 27, 125-126.
[554] Please see above para 4.3
[555] Please see above para 4.3.2
[556] Please see above para 4.4.3

homicide. *Sharī'ah* 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. If mindfully incorporated in country's law, not much is left for judges to brainstorm for the adequate compensation, thus preventing the entire topic of capping that is hot debate in many non-Muslim countries. Pakistan can formulate a law for medical malpractice by setting the tariff on the basis of *diyah* thus ending the huge disparity between the damages decreed by courts and will spare judges from the labor some task of estimation of reasonable amount for damages. As the damages are huge, the system of *āqilah* can be employed and the entire institution can take part in compensating the loss in order to lessen the burden of the defendant.[557]

[557] Please see above para 4.4.3.4

# CHAPTER 5

# APPLICATION OF QAWĀ'ID FIQHIYYAH (LEGAL MAXIMS) TO THE PRACTICE OF MEDICINE

It is extremely difficult for any system to specifically deal with every minute detail of all aspects of that field. For that reason, some general principles are formulatad that are applicable on most of the aspects and can guide in the time of need. Such general principles are 'Legal Maxims' in *Sharī'ah. Fuqahā'* generated the discourse regarding legal maxims[558] so that it could be torchbearer in different fields of *fiqh*. Therefore, these Legal Maxims are relevant for the practice of medicine too. These legal maxims and their application are significant for medical and legal cases. For instance the Federal Shariat Court (FSC) had to decide the question of permissibility of surrogacy on 16 February 2017, in case of *Farooq Siddiqui v Mst. Farzana Naheed* where the honourable court declared that surrogacy is impermissible in *Sharī'ah* and asked the government that it must too declare surrogacy agreements unenforceable and to make amendments in Pakistan Penal Code in order to add punishments in it for the parties involved in any such surrogacy arrangement[559]. Therefore, these legal maxims are very crucial for guidance of both medical and legal practitioners. They must know what is and what is not permissible in the field of medicine in *Sharī'ah* as they are the concise manifestation of objectives of *Sharī'ah*.

Legal Maxims have a very strong standing as they are either taken from *Qur'ān* and *Sunnah* or they are the result of hardwork of Jurists who condensed the detailed

[558] It can be defined as concise expression of theoretical abstractions of objectives and goals of *Sharī'ah* and emerged after contemplation on the rules of the *fiqh* on various themes.

[559] Sh. Petition No.2/I of 2015

discourse in a nutshell[560]. As these maxims are very significant for the *fiqh* related to the medicine, it is pertinent to have a brief overview of them before going into detail of their application on the *fiqh* of medicine. The present chapter discusses the discourse of legal maxims. First, legal maxims are defined, and its strong foundation is discussed. Next, their applicability on the field of medicine is analyzed and three contemporary issues like assisted aonception techniques, abortion and organ donation are decided in the light of legal maxims alongside other evidences.

## 5.1 Meaning and Purpose of Qawā'id Fiqhiyyah

The word *qawā'id* is plural form of the word *qā'idah* that lexically means foundation or stability[561]. Glorious *Qur'ān* used the word *qawā'id* thrice in this meaning. For instance:

{وَإِذْ يَرْفَعُ إِبْرَاهِيمُ الْقَوَاعِدَ مِنَ الْبَيْتِ وَإِسْمَاعِيلُ رَبَّنَا تَقَبَّلْ مِنَّا إِنَّكَ أَنْتَ السَّمِيعُ الْعَلِيمُ}

"...and [mention] when Abraham was raising the foundations of the House and [with him] Ishmael, [saying], "Our Lord, accept [this] from us. Indeed, You are the Hearing, the Knowing"[562].

In this verse Allah (SWT) used the exact word *qawā'id* in the meaning of foundation of house. In another occasion, Allah says:

{قَدْ مَكَرَ الَّذِينَ مِنْ قَبْلِهِمْ فَأَتَى اللَّهُ بُنْيَانَهُمْ مِنَ الْقَوَاعِدِ فَخَرَّ عَلَيْهِمُ السَّقْفُ مِنْ فَوْقِهِمْ وَأَتَاهُمُ الْعَذَابُ مِنْ حَيْثُ لَا يَشْعُرُونَ}

[560]Mohammad Hashim Kamali, Legal Maxims and other Genres of Literature in Islamic Jurisprudence, *Arab Law Quarterly,* vol.20, no. 1 (2006) 77-101.

[561]Jamāl al-Dīn Ibn Manẓūr, *Lisān al-'Arab* (Beirut: Dār al-Ṣādir, 1968), S.V: *qā'idah*

[562]Al-Qur'ān 2:127.

"Those before them had already plotted, but Allah came at their building from the foundations, so the roof fell upon them from above them, and the punishment came to them from where they did not perceive"[563].

Likewise, Allah said:

{وَالْقَوَاعِدُ مِنَ النِّسَاءِ اللَّاتِي لَا يَرْجُونَ نِكَاحًا فَلَيْسَ عَلَيْهِنَّ جُنَاحٌ أَنْ يَضَعْنَ ثِيَابَهُنَّ غَيْرَ مُتَبَرِّجَاتٍ بِزِينَةٍ وَأَنْ يَسْتَعْفِفْنَ خَيْرٌ لَهُنَّ وَاللَّهُ سَمِيعٌ عَلِيمٌ}

"And women of post-menstrual age who have no desire for marriage - there is no blame upon them for putting aside their outer garments [but] not displaying adornment. But to modestly refrain [from that] is better for them. And Allah is Hearing and Knowing."[564]

This verse employed this word to mention the mature woman who has crossed the age limit of pregnancy and child bearing. Thus, Glorious *Qur'ān* has mentioned this word to refer to foundations or woman who has passed child – bearing age.

### 5.1.1 Technical Meaning

The term *qawā'id* denotes the principles or maxims and are used to refer to legal, political or religious contexts. In legal context, Tāj al-dīn al-Subkī provided this definition for legal maxims (*qawā'id fiqhiyyah*):

الأمر الكلي الذي ينطبق عليه جزئيات كثيرة يفهم أحكامها منها

"It is a comprehensive rule which applies to many particulars, in order to comprehend the ruling of those particulars in the light of this rule."[565]

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[563] Al-Qur'ān 16: 26.
[564] Al-Qur'ān 24: 60.

Unlike the Maxims (*qawā'id)* of principles of Islamic Jurisprudence *(Uṣūl al-fiqh)* and grammar, these principles as mentioned in above definition are only applicable on majority of particulars or cases fall under it and not all as mentioned by al-Ḥamawī:

لِأَنَّ الْقَاعِدَةَ عِنْدَ الْفُقَهَاءِ غَيْرُهَا عِنْدَ النُّحَاةِ وَالْأُصُولِيِّينَ إِذْ هِيَ عِنْدَ الْفُقَهَاءِ حُكْمٌ أَكْثَرِيٌّ لَا كُلِّيٌّ يَنْطَبِقُ عَلَى أَكْثَرِ جُزْئِيَّاتِهِ لِتُعْرَفَ أَحْكَامُهَا مِنْهُ

"Legal Maxim is different for jurists from the concept of grammarians and theorists, for jurists, it is predominant rule and not the comprehensive one that is applicable on its many particulars for comprehension of *fiqhi* rulings of those particulars in the light of this rule."[566]

Muṣṭafa Aḥmed al-Zarqā[567] defined legal maxims in following words: "universal principles of *Fiqh* formulated in a concise legal form, embodying broad general rulings in cases that fall under this subject.[568]" This definition entails that legal maxims (*qawā'id fiqhiyyah*) are the principles that are extracted from rulings scattered in different areas of *fiqh*. These principles are then concisely expressed in a single sentence which are then applicable to majority of those cases that fall under the theme covered in that specific legal maxim. Thus they encapsulate the broader concepts of *Sharī'ah* in concise form like a bird eye view.

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[565]Abd al-Wahhāb ibn 'Alī Tāj al-Dīn ibn al-Subkī, *Al-Ashbāh wa al-Naẓā'ir*, vol. 1 (Beirut: Dār al-Kutub al-'Ilmīyah, 1991), 11.

[566]Aḥmed ibn Muḥammad Makkīal-Ḥamawī, *Ghamz 'Uyūn al-Baṣā'ir fī sharh Al-ashbāh wa al-Na*ظ*'ir*, vol. 2 ((Beirut: Dār al-Kutub al-'Ilmīyyah, 1985), 51.

[567] He is a renowned contemporary Muslim jurist.

[568]Muṣṭafa Aḥmed al-Zarqā, *al-Madkhal al-Fiqhī al-'Āmm*, vol. 2, (Damascus: Damascuss University Press,1959) 933.

Although *Qawā'id Fiqhiyyah* don't enjoy the status of legal texts, yet they are very significant as legal aids and guidelines for profound understanding of rulings of *fiqh.*[569] Moreover, they may be relied upon by a *muftī* in issuance of fatwa where there is no explicit text. Although they don't bind the judge or *muftī,* nevertheless they are persuasive source of influence.[570]

## 5.2 Sources of Qawā'id Fiqhiyyah

As mentioned earlier, *Qawā'id Fiqhiyyah* are concise theoretical abstraction of goals and objectives of *Sharī'ah* derived after detailed reading of *fiqh*, therefore they have the standing on *Sharī'ah*, either they are the exact words of *Qur'ān* and *Sunnah* or they are the expression of jurists who uttered them after contemplating on *fiqh* in detail[571]. Following are some glances of this exposition:

### 5.2.1 Qawā'id Fiqhiyyah Based on Qur'ān

These are some of the verses that became legal maxims or were expressed in legal maxims with different words:

{.... يُرِيدُ اللَّهُ بِكُمُ الْيُسْرَ وَلَا يُرِيدُ بِكُمُ الْعُسْرَ....}

(.... Allah intends for you ease and does not intend for you hardship...)[572]

{... وَلَهُنَّ مِثْلُ الَّذِي عَلَيْهِنَّ بِالْمَعْرُوفِ.....}

[569] Dr. Muḥammad Tahir Mansoori, *Sharī'ah Maxims: Modern Applications in Islamic Finance* (Islamabad; Shariah Academy, 2012), 5.
[570] Kamali, Legal Maxims and other Genres of Literature in Islamic Jurisprudence, 77-101.
[571] Dr. Mansoori, Sharī'ah Maxims: Modern Applications in Islamic Finance, 9.
[572] Al-Qur'ān 2:185.

(.... And due to the wives is similar to what is expected of them, according to what is reasonable....)[573]

{.....أَوْفُوا بِالْعُقُودِ....}

(.... fulfill [all] contracts....)[574]

### 5.2.2 Qawā'id Fiqhiyyah Based on Sunnah

There are some *aḥādīth* that formed the basis of *Qawā'id Fiqhiyyah* or were adopted verbatim: For instance, "Do not sell that you do not have[575]."

« لَا تَبِعْ مَا لَيْسَ عِنْدَكَ»

"Harm may neither be inflicted, nor reciprocated[576]."

« لَا ضَرَرَ وَلَا ضِرَار»

"Entitlement to profit depends upon liability for loss."[577]

« الْخَرَاجَ بِالضَّمَان»

### 5.2.3 Qawā'id Fiqhiyyah Based on Fiqh

Majority of the *qawā'id* falls in this category. These are the maxims that are extracted by Jurists through inductive survey methods. They pondered over the rulings of *fiqh* in detail

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[573] Al-Qur'ān 2:228.

[574] Al-Qur'ān 5:1.

[575] Abū Dāwūd Sulaymān ibn al-Ashas al- Sijistani, *Sunan,* trans. Aḥmed Hassan, vol.2 (Lahore, Sh. Muḥammad Ashraf, 1984), 995.Ḥadīth # 3496.

[576] Aḥmed ibn al- Hussain ibn Ali al-Bayhaqī, *Sunan al-Kubrā*, vol. 6 (Beirut: Dār-al-kutub al-'Ilmiyyah, 2003) 114. Ḥadīth # 11384.

[577] al-Bayhaqī, *Sunan al-Kubrā*, vol. 6, 18. Ḥadīth # 6037.

scattered over in different chapters and deduce the general principles in the form of concise statements[578].

But these *qawā'id* can't be attributed to some jurists or a group of jurists who worked on them at a certain period of time and formulated as it is done in contemporary world regarding modern legal texts. Rather it is the result of millennium of contemplation by uncountable jurists and legal experts of Islamic law. Thus, present form of legal maxims is formulated after the long process of refinement, editing and modification by scholars of different schools[579]. History of formulation of *qawā'id* is parallel with the history of *fiqh.*[580]Ḥanafī jurists took lead in compiling them. Abū Tāhir al-Dabbās is said to have first compiled seventeen *qawā'id.* Later on, his contemporary Abū al-Hassan al-Karkhī (d. 340) contributed in enriching this branch of knowledge and increased them to thirty-nine.[581] This proved itself to be the starting line for the scholars to embark on the new journey of discovery and refinements of *qawā'id.* Numerous scholars from various scholars contributed to this arena and the total number of *qawā'id* reached to twelve hundred. Most notable works of other schools include "*Qawā'id al-Aḥkām fī Maṣāliḥ al-Anām"* written by leading Shāfi'ī scholar 'Izz al-Dīn Ibn 'Abd al-Salām (d.660) and "*Taqrīr al-Qawā'id wa Taḥrīr al-Fawā'id* by eminent ḥanbalī scholar Abū al-Faraj 'Abd al-Raḥmān ibn Rajab al-Ḥanbalī (d.790)[582]. The importance of *qawā'id* can be comprehended by its articulation in *Majallah al-Aḥkām al-'Adliyyah* that was the first endeavor of codifying Islamic law. It was done by Turkish scholars under the supervision

[578] Dr. Mansoori, *Sharī'ah Maxims: Modern Applications in Islamic Finance*, 10.
[579]Dr. Mehmood Aḥmed Ghazi, *Qawā'id Kulliyah* (Islamabad; Shariah Academy, 2014), 12.
[580] Kamali, Legal Maxims and other Genres of Literature in Islamic Jurisprudence, 77-101.
[581]Dr. Mansoori, *Sharī'ah Maxims: Modern Applications in Islamic* Finance, 10.
[582]Kamali, Legal Maxims and other Genres of Literature in Islamic Jurisprudence, 77-101.

of Aḥmed Cevdet Pasha (d. 1895). To date, this process is still in progress. Scholars are writing on *qawā'id*, interpreting it and enriching the list. For instance, Sheikh Muṣṭafa Zarqā alongside interpretation, made addition to the list of *qawā'id.*[583]

At present, scholars ponder over the application of maxims and enlist the novel circumstances where they are germane. Same is the case with the field of medicine. Scholars continue to guide medical practitioners by applying them on the medical cases and provide them yardstick in the form of legal maxims. Following are some of the legal maxims that are relevant to practice of medicine. First part is related to *Al-qawā'id al-khams al-kubrā* (five universal maxims) and second part deals with the rest of maxims applicable on the practice of medicine.

## 5.3 Al-Qawā'id al-Khams al-Kubrā (Five Universal Maxims)

*Al-qawā'id al-khams al-kubrā* (five universal maxims) present entire realm of *Qawā'id Fiqhiyyah* in a nutshell. These five maxims illustrate the concise account of nature and objectives of *Sharī'ah*. It is considered that all other *qawā'id* are explanation or offshoot of these five universal maxims and their scope is so ample that they are applicable on many particulars of most chapters of *fiqh*. It is said that essence of the *Sharī'ah* is reflected through them[584]. Following are the five universal maxims

[583]Dr. Muḥammad Tahir Mansoori, *Sharī'ah Maxims: Modern Applications in Islamic Finance*, 10.

[584]Suyūtī, *Al-Ashbāh wa al-Naẓā''ir*, 8.

### 5.3.1 A matter is determined according to intention [585]الْأُمُورُ بِمَقَاصِدِهَا

Legal ruling encapsulated in this legal maxim entails that any deed, any transaction or any action, be it verbal or physical, must be evaluated according to the intention behind that. This maxim has its root in the tradition of Prophet (Peace be upon Him) where he says:

"Deeds (their correctness and rewards) depend upon intentions, and every person gets but what he hasintended. So, whoever emigrated for Allah and His Messenger, his emigration is for Allah and His Messenger, and whoever emigrated for worldly benefits or for a woman to marry, his emigration is forwhat he emigrated for[586]"

#### i. Application of Maxim on Medical Profession

Medical profession is one of the noblest professions in the world. A medical practitioner is rewarded if he treats the patient with the intention to please Allah the Exalted and to minimize the pain and sufferings of the patients. In this case, his entire practice is a ritual. On the contrary, if his intentions are otherwise, he will be rewarded accordingly.

If a patient endures the pain suffered due to illness with patience, he will be revered. However, if he is enraged due to his disease and shows his ill-temper to doctor, his reward will be reduced for that reason.

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[585]al-Subkī, *Al-Ashbāh wa al- Naẓā''ir*, vol. 1, 12; Suyūtī, *Al-Ashbāh wa al- Naẓā''ir*, vol. 1, 8.
[586]Al- Bukhārī, *al-Ṣaḥīḥ*, vol. 1, 6, Ḥadīth no. 1.

### 5.3.2 Certainty is not dispelled by doubt[587] الْيَقِينُ لَا يَزُولُ بِالشَّكِّ

Medical practitioner and patient should not dismiss the certain matter with mere suspicion.

#### i. Application

If a doctor is suspicious of death of the patient, he shouldn't proclaim it unless he has decisive evidence.

If a person is suffering from contagious disease, that requires him to stay at home and doesn't mingle with other people at work, in this situation a doctor shouldn't permit him to work or go for studies unless he is free from doubt and positive about complete restoration of his health so that he doesn't pose a risk to other people.

If a doctor is doubtful about the diagnosis he made about the patient, he shouldn't start heavy doses or procedures for treatment of that disease. Because there was not a certainty that he was suffering from that disease. Now a stronger sign must be there to assume otherwise.

### 5.3.3 Harm and retaliation by harm is not allowed. لَا ضَرَرَ وَلَا ضِرَارَ

As mentioned earlier, this maxim is based upon the *Ḥadīth* of Prohpeht Muhammad (peace be upon him).[588]

This tradition has been explained in two ways. First meaning entails that it is not permissible to cause harm, neither should it be initiated, nor it should be done in

[587] Ibn Nujaym, *Al-Ashbāh wa al- Naẓā''ir*, vol. 1, 47.
[588] al-Bayhaqī, *Sunan al-Kubrā*, vol. 6, 114. Ḥadīth # 11384.

response. Second meaning encapsulated in this beautiful *Ḥadīth* is that people should neither cause harm nor they should suffer it[589].

*Ḍarar* is the damage or deterioration in anything.[590] Thus *Ḍarar* in medicine is any action or omission by the medical practitioners that causes damage to the patient's mental or physical health or it causes him major financial loss.

**i. Application**

It is permissible to use an organ of a living person for transplantation to save another human's life if it doesn't cause harm to the donor. For instance, one kidney can be taken from a living person to save the patient whose both kidneys are failed. But if it causes harm to donor, then this organ donation will be prohibited because causing harm is impermissible.

It is obligatory on spouses to inform each other if anyone of them is suffering from contagious disease that may harm the other spouse because it is not permissible to cause harm.

**5.3,4 Hardship begets Ease الْمَشَقَّةُ تَجْلِبُ التَّيْسِيرَ**

This maxim entails that rulings of *sharī'ah* are based on removal of hardship and ease. In certain situations, taking into account the hardship and need of people, certain laws of *sharī'ah* are relaxed. It encapsulates all those rulings where original laws are relaxed and

[589]Dr. Mansoori, *Sharī'ah Maxims: Modern Applications in Islamic Finance*, 64.
[590]Ibn Manzūr, Lisān al-'Arab, S.V. Ḍarar

concession is mandated. Illness, travelling and ignorance are some examples where original rule is dropped and concession is granted[591]. Allah says in Glorious *Qur'ān:*

{.... يُرِيدُ اللَّهُ بِكُمُ الْيُسْرَ وَلَا يُرِيدُ بِكُمُ الْعُسْرَ....}

(....Allah intends for you ease and does not intend for you hardship...)[592]

'Āishah (May Allah be pleased with her) said: "whenever the choice was hit, it was the easier of the two things that he chose, unless, it would have been a sin, and then he was far from it[593]."

**i. Application**

Islam encourages procreation and having many children through lawful marriage but if it is detrimental for mother's health, in this case *sharī'ah* demands from her, not to have children to relieve her from the pain and hardship from her health.

It is prohibited for Muslims to sell or buy human blood but where a human being is dying and no blood is available except through buying, *sharī'ah* will allow to buy the human blood to save human life.

[591]Suyūtī, *Al-Ashbāh wa al- Naẓā''ir,* vol. 1,77
[592] Al-Qur'ān 2:185.
[593]Al- Bukhārī, *al-Ṣaḥīḥ* , vol. 4, 198, Ḥadīth no. 3560.

### 5.3.5 Custom is an arbitrator [594] الْعَادَةُ مُحَكَّمَةٌ

Custom refers to the practices of people of certain community. *Sharī'ah* gives due importance and acknowledges the custom as long as they aren't contradictory to *Sharī'ah*.

#### i. Application

If a doctor treats the patient and follows the guidelines prescribed in that field and choose a course of action that is done by majority of doctors of his ranks, in this case if it goes wrong, he will not be liable. He has done what he was supposed to do, that any other doctor would have done in this situation. Since custom is a determining factor, where no express guidelines are postulated.

If a doctor chooses a rare course of treatment that is not practiced by other medical practitioners of his status and qualification, in this situation if harm is caused to the patient, he will be liable.

## 5.4 General Maxims Applicable on the Practice of Medicine

Alongside application of major legal maxims, there are other maxims too that are very important for medical practitioners as these maxims have tremendous capability of guiding doctors. If they understand the depth and applicability of these maxims, it can be very frectifurious for them.

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[594] Ibn al-Subkī, *Al-Ashbāh wa al- Naẓā''ir*, vol. 1, 7; ibn Nujaym, *Al-Ashbāh wa al- Naẓā''ir*, vol. 1, 79.

### 5.4.1 Man is absolved from guilt, blame or responsibility for any wrong deed in principle.[595] الأَصْلُ بَرَاءَةُ الذِّمَّةِ

The original principle of *Sharī'ah* is that human beings are free from any sin, guilt or burden. Those who blame them for being guilty must bring evidence.

#### i. Application

If a patient blames a doctor for malpractice, he ought to prove doctor guilty of negligence by bringing solid evidence against him. If he fails to do so, original rule will apply that is the innocence of the medical practitioners.

### 5.4.2 Harm should be avoided as much as possible.[596] الضرر يدفع بقدر الامكان

Humans should make efforts to avoid evil. Muslims are not supposed to wait until storm comes to them. Rather they are required to make arrangements to avoid it by all means.

#### i. Application

Different vaccines are available to prevent certain diseases or mitigate their severity; such medicines should be used before affliction.

Certain epidemic and contagious diseases pose a risk for society at large; measures should be taken to stop transmission to other people.

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[595] Ibn al-Subkī, *Al-Ashbāh wa al- Naẓā''ir*, vol. 1, 37; Suyūtī, *Al-Ashbāh wa al-Naẓ'ir*, vol. 1, 53; ibn Nujaym, *Al-Ashbāh wa Naẓā''ir*, vol. 1, 50.

[596] Muḥammad Ṣidqī al-Būrnū, *al-Wajīz fi Īdāḥ al-Qawā'id al-Fiqhiyyah (*Beirut: Mu'assasat al-Risālah, 1996), 256.

Proper sterilization and disinfection of the apparatus and operation theatres should be done to block the spread of germs and infections.

### 5.4.3 Harm should be eliminated.[597] الضَّرَرُ يُزَال

If a society or a person is facing an evil or harm, they must strive to remove that.

#### i. Application

A doctor should make his utmost efforts to treat the patients in order to cure them as disease is harm and it should be removed.

Treatment of females by males and vice versa is harm. Thus Muslim society should endeavor to create substitute i.e. males for males and females for females.

If medical practitioners are charging undue fee for treatment and medicines and making in difficult for people to afford the treatment, in this situation government can enlist appropriate tariff rates and make it mandatory upon doctors and hospitals to follow that.

### 5.4.4 Harm should not be overruled by another similar harm.[598] الضَّرَرُ لَا يُزَالُ بِمِثْلِهِ

Harm should be removed entirely, or its severity should be mitigated but it shouldn't be substituted be another harm of any other type or same type.

#### i. Application

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[597] Ibn al-Subkī, *Al-Ashbāh wa Naẓā''ir*, vol. 1, 41; Suyūtī, *Al-Ashbāh wa al-Naẓ'ir*, vol. 1, 7; Ibn Nujaym, *Al-Ashbāh wa Naẓā''ir*, vol. 1, 72.

[598] Ibn Nujaym, *Al-Ashbāh wa al-Naẓ'ir*, vol. 1, 74.

If a doctor knows that his treatment will cause a greater harm to the patient instead of curing him, he must avoid the treatment. For instance, a doctor thinks that a medicine may cure the disease but will eventually cause the failure of a vital organ; he must not treat the patient with that disease.

Hospital should not remove crucial instruments from the serious patient to give it to the same kind of patient of similar age.

A person can't donate his major single organ to other person to save his life and give up his own.

### 5.4.5 Severe harm is removed by lesser harm.[599] الضَّرَرُ الْأَشَدُّ يُزَالُ بِالْأَخَفِّ

It entails that when a person is caught between the devil and the deep blue sea, then he must choose the lesser of two evils.

#### i. Application

Anesthetization is not permissible in ordinary circumstances but to save someone's life or cure his disease, *Sharī'ah* permits it.

It is permissible to cut the belly of dead pregnant mother and bring out the baby, if there are chances that the baby must be alive.

If a patient can't offer salāh while standing, he must pray while sitting. If he is unable to do say, he can pray while lying.

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[599]Suyūtī, *Al-Ashbāh wa al-Naẓ'ir*, vol. 1, 87; Ibn Nujaym, *Al-Ashbāh wa al-Naẓ'ir*, vol. 1, 76.

**5.4.6 Private harm is tolerated to remove public harm** يُتَحَمَّلُ الضَّرَرُ الْخَاصُّ؛ لِأَجْلِ دَفْعِ ضَرَرِ الْعَامِّ.

When a community is facing two harms, one is that will harm public at large while the other one will damage few men. *Sharī'ah* says that harm that will be inflicted to few people will be endured to remove tragedy or harm from the public at large.

**i. Application**

Patients with contagious diseases will be interdicted from mingling with other people or going to work or study where they pose a risk to the health of general public.

Dissection of a dead body is permissible if it, benefits humanity.

**5.4.7 Necessity renders prohibited matters permissible.**[600] الضَّرُورَاتُ تُبِيحُ الْمَحْظُورَاتِ

*Sharī'ah* has prohibited certain things but these impermissible things become permissible when there is dire need.

**i. Application**

It becomes permissible for a patient to uncover his *'aurah* (private parts) to medical practitioners for the purpose of treatment. However, it is prohibited otherwise.

If no female doctor is available, it becomes permissible for a lady to get treatment from male doctor. Likewise, use of anesthesia is permissible for the purpose of treatment.

[600] Ibn al-Subkī, *Al-Ashbāh wa al-Naẓ'ir*, vol. 1, 49; Ibn Nujaym, *Al-Ashbāh wa al-Naẓ'ir*, vol. 1, 73.

### 5.4.7 Necessities have limits that should not be exceeded.[601] مَا أُبِيحَ لِلضَّرُورَةِ يُقَدَّرُ بِقَدْرِهَا

When a prohibited action becomes permissible because of the necessity, it should not be taken as free pass. Rather it should be limited to that necessity only and this permissibility should not be used beyond that.

#### i. Application

Revealing one's body to doctor should be only according to the need and beyond need will be considered as sinful act.

Medical practitioners should only treat or operate the patient to the extent of dire need. He has no right to transgress that limit.

Use of anesthesia will be only according to the night. It is not allowed for medical practitioners to make the patients remain in the state of unconsciousness for the period longer than required.

### 5.4.8 Avoiding harm takes precedence over bringing about benefit.[602] دَرْءُ الْمَفَاسِدِ أَوْلَى مِنْ جَلْبِ الْمَصَالِحِ

If extracting benefit and suffering from harm will take place simultaneously from a matter. *Sharī'ah* demands to leave the matter altogether because avoiding harm takes precedence that deriving benefit.

#### i. Application

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[601] Ibn Nujaym, *Al-Ashbāh wa al-Naẓ'ir*, vol. 1, 73.

[602] Ibn al-Subkī, *Al-Ashbāh wa al-Naẓ'ir*, vol. 1, 105; Suyūtī, *Al-Ashbāh wa al-Naẓ'ir*, vol. 1, 87; Ibn Nujaym, *Al-Ashbāh wa al-Naẓ'ir*, vol. 1, 78.

Surgeries for beautification that modify the creation of Allah are impermissible because benefit of beauty is achieved at the cost of changing Allah's creation.

It is not permissible for a male doctor to remain alone with female patient or vice versa because avoiding harm is more important than getting benefit.

### 5.4.9 When a matter tightens, it will widen.[603] الأَمْرَ إِذَا ضَاقَ اتَّسَعَ

When there is hardship for the people in carrying out any matter of *Sharī'ah*, Allah almighty ease that matter for Muslims.

#### i. Application

If ablution with water, is detrimental for the health of a patient, then *Sharī'ah*permits him to purify by way of*tayyamum*[604] and offer his prayer.

It is permissible for the patient not to fast in the holy month of *Ramadān* if he feels difficulty.

It is permissible for doctor to join *zuhr* with' *asr* and *maghrib* and *'Isha* if he is busy with patients and doesn't get time to offer *salāh* separately at the time of each *salāh*.

It is permissible for the lady who is suffering from *Istihādah* that she can pray after doing ablution even if she bleeds during *salāh*.

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[603] Ibn al-Subkī, *Al-Ashbāh wa al-Naẓ'ir*, vol. 1, 49; Ibn Nujaym, *Al-Ashbāh wa al-Naẓ'ir*, vol. 1, 72.

[604] Ceremony of ablution performed with sand instead of water. *Mu'jam Lughat'l-Fuqahā'*, eds. Muḥammad Rawās Qala'jī and Dr. Hāmid Sādiq Qanībī, 2nd Ed. (Bairūt: Dār̄ Nafās, 1988), s.v. "tayammum".

It is permissible for the patient to offer *salāh* while standing; if he is unable he can do while sitting and he can even pray while lying if he is unable to do so.

### 5.4.10 When the original undertaking cannot be carried out, the equivalent thereof is carried out.[605] اذا تعذر الاصل يصار الى البدل

When a person cannot carry out the original ruling of *Sharī'ah*, then he is required to fulfill the alternative given by *Sharī'ah*.

#### i. Application

If a patient cannot offer *salah* on its appointed time separately that is the original ruling then he is allowed to adopt the alternative that is the joining of *salāh* i.e. he is allowed to join *salāhs*, *Zuhr* with *'Asr* and *Maghrib* and *'Isha*.

If a patient can't do ablution that is the original ruling, then he can employ the alternative that is *tayyamum*.

If a patient can't fast in the holy month of Ramadān that is the original ruling, he can go to alternative ruling that is *fidyah*.

## 5.5 Application of Legal Maxims upon Contemporary Medical Issues

Apart fom guiding the medical practitioners in general matters, legal maxims are quite significant for specific contemporary medical issues. It plays an important role in understanding the stance of *Sharī'ah* in such matters and what can be the possible fatwa

[605]Muḥammad Ṣidqī al-Būrnū, *al-Wajīz fi Īdāḥ al-Qawā'id al-Fiqhiyyah*, 246.

in such matters. Researcher has chosen following three important topics for scrutiny of application of legal maxims upon contemporary *fiqhi* issues:

1) Assisted Conception Techniques
2) Abortion
3) Organ Donation

### 5.5.1 Assisted Conception Techniques

Assisted Conception Techniques are a blessing of modern science that helps in achieving the best gift of nature 'children', when it is not possible for couples to conceive and deliver the baby naturally, due to any medical defect. Two modes of assisted conceptions are selected for critical evaluation in the light of *Sharī'ah*: Artificial Insemination and In Vitro Fertilization.

#### 5.5.1.1 Artificial Insemination

Artificial Insemination is also known as Intrauterine Insemination (IUI). Intrauterine insemination (IUI) involves a laboratory procedure to separate fast moving sperm from more sluggish or non-moving sperm. The fast-moving sperm are then placed into the woman's womb close to the time of ovulation when the egg is released from the ovary in the middle of the monthly cycle.[606]

[606] This definition has been taken from the website of HEFA. Human fertilization and Embryology Authority is first ever statutory body which was formed to regulate and inspect all ARTs Providers in United Kingdom. http://www.hfea.gov.uk/IUI.html. (accessed 24, February 2014)

It is not the gift of 20th century rather it has been in practice for almost two centuries[607]. First recorded experiment was carried out by Scottish surgeon John Hunter[608]. He injected the semen of a man in the vagina of his wife through injection which resulted in pregnancy in the late 1700s. While the first reported case of donor insemination took place in 1884 at Philadelphia by an American Physician William Pan coast.[609]

**Procedure**

For the purpose of artificial insemination, husband is asked to provide the sample of sperm at the clinic. Sperm is collected through the masturbation procedure. In order to achieve a concentrated sample of healthy sperm, sperm sample is filtered, so that dead and impure elements are eradicated. Sperm that are fast moving are retained while any slow-moving sperm will be removed. Catheter[610] is placed inside the vagina and guided into the womb. The sperm sample will then be passed through the catheter and into the womb.[611] This procedure is completed within 10 minutes.

This procedure can be carried out by using donor's sperms too[612]. Option of Sperm donation is exhausted where male partner cannot produce healthy sperm. In very few cases, couples take donated sperms from the people they know. Mostly, sperm is acquired, and treatment is done through a registered or licensed sperm bank.[613]

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[607] Samuel F. Marcus, "Intrauterine Insemination" in *Text Book of In Vitro Fertilization and Assisted Reproduction*, ed. Peter R. Brinsdon (United Kingdom: Taylor & Francis, 2005), 259.

[608] Ibid.

[609] Ibid.

[610] A thin, flexible tube called a catheter.

[611] http://www.hfea.gov.uk/IUI.html

[612] http://www.nhs.uk/Conditions/Artificial-insemination/Pages/How-is-it-performed.aspx

[613] Previously donors used to remain anonymous for the child and the couple who benefited from their sperm but in 2005, Law changed. Now any child who reached the age of majority and is born through

Success rate for artificial insemination varies depending upon multiple factors. Factors that lessen the chances of success may include older age of the woman, poor egg quality, poor sperm quality, severe endometriosis, severe damage to fallopian tubes, and blockage of fallopian tubes.[614]

### 5.5.1.2 Assisted Reproductive Techniques (ART)

According to the glossary of WHO, all treatments or procedures that include the in vitro handling of both human oocytes and sperm or of embryos for the purpose of establishing a pregnancy. This includes, but is not limited to, in vitro fertilization and embryo transfer, gamete intrafallopian transfer, zygote intrafallopian transfer, tubal embryo transfer, gamete and embryo cryopreservation, oocyte and embryo donation, and gestational surrogacy. ART include assisted insemination (artificial insemination) using sperm from either a woman's partner or a sperm donor.[615]

Most commonly used Technique is In Vitro Fertilization (IVF)[616]. It is defined as a

> Method of assisted reproduction, in which a man's sperm and the women's egg are combined in a laboratory dish, where fertilization occurs. The resulting embryo is then transferred to the woman's Uterus (womb) to implant and develop naturally. Usually 2-4 embryos are placed in the woman's uterus at one time. The

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this procedure can apply for donor's identification. http://www.nhs.uk/conditions/Artificial-insemination/Pages/Introduction.aspx

[614] http://www.webmd.com/infertility-and-reproduction/guide/artificial-insemination

[615] International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) Revised glossary of ART terminology, 2009.

[616] Vivian Lewis, *Reproductive Endocrinology and Infertility* (Texas, Landes Bioscience, 2007), 181.

term test tube baby is often used to refer to children conceived with this technique.[617]

The women may be given certain drugs {hormones} to stimulate her ovaries to produce several eggs before the procedure to remove them. Eggs are removed from women's ovary. The fluid removed is examined in the laboratory to make sure eggs are present. At the same time, the man provides a semen sample usually by masturbation. The active sperm are combined in the laboratory dish with eggs. After 18 hours, it is possible to determine if the eggs or eggs have been fertilized and have begun to grow as embryos. They are incubated and observed over the next 2-3 days or longer. The doctor then transfers the embryos into the woman's uterus. She is given certain hormones for the next two weeks. If implantation works, the pregnancy test result is positive.[618] Beside gametes of couples, donor's sperm, donor's egg and surrogates are also employed if needed and opted by couples. These are the most common situations when fertilization takes place between:

1. Sperm of husband and egg taken from a woman who is not his wife. Then the embryo is placed in his wife's womb.
2. Sperm taken from a man who is not the husband and an egg taken from the wife. Then the embryo is placed in the womb of wife.
3. When fertilization is done externally between the sperm and egg of the couple, then the embryo is placed in the womb of a woman who volunteers to carry it (surrogate mother).

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[617]Melissa Conrad Stöppler, MD, In Vitro Fertilization, http://www.emedicinehealth.com/in_vitro_fertilization/article_em.htm#in_vitro_fertilization_ivf_introduction (Accessed February 24, 2014).

[618]Melissa Conrad Stöppler, MD, *In Vitro Fertilization*, http://www.emedicinehealth.com/in_vitro_fertilization/page6_em.htm (Accessed February 24, 2014).

4. When fertilization is done externally between the sperm of a man who is not the husband and the egg of a woman who is not the wife, then the embryo is placed in the womb of wife.
5. When fertilization is done externally between the sperm and the egg of two spouses, than the embryo is placed in the womb of another wife of the husband.
6. When the sperm is taken from the husband and an egg is taken from the wife, fertilization is done externally, then the embryo is planted in the womb of the wife.

### 5.5.1.3 Legal Rulings on ACT in the Light of Sharī'ah

There is neither direct ruling in *Qur'ān* and *Sunnah* nor any kind of discussion in classical Islamic jurisprudence regarding Assisted Methods of Conception, but its fate can be easily deduced through *ijtihād*. But the reply to this problem is not a plain affirmation or negation rather it demands to be broken down into several sub issues. First query is: Is it really an impermissible procedure and Muslims should refrain from it even if only spouses are involved? Second question relates to the legality of third party's participation i.e. whether sperms of donor can be used in case of husband's weak or unhealthy sperm or egg of a woman other than wife can be utilized, or if the body of a woman other than wife can be employed? Last issue is regarding the fate of extra embryos. Can they be preserved for the future use or not?

#### *A. Where Husband and Wife are Involved only*

Childlessness is no merit in Islam as quoted earlier, Messenger of Allah (Peace Be Upon Him) said:

«تزوجوا الودود الولود فإني مكاثر بكم الأمم »

*"Marry women who are loving and very prolific (in producing children), for I shall outnumber the (other) nations by you."*[619]

*Hadīth* reflects that *Sharī'ah* demands procreation. And if infertility is hindering this instruction, it should be treated as *Hadīth* says:

«تداووا، فإنَّ الله عزَّ وجلَّ لم يضع داءً إلا وضع له دواءً »

*"Treat sickness, for Allah has not created any disease except He has also created the cure."*[620]

Infertility is a disease as noted by WHO: "Infertility (clinical definition): a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse."[621] Thus it should be cured with the effective way of treatment. Assisted Methods of Conception especially IVF has proved itself fruitful. One argument can be that Assisted Method of Conception is an unnatural way of conception, but the answer is that a Muslim couple can only conceive children through marriage, no other substitute available for him. As Allah the exalted as mentioned in Glorious *Qur'ān*:

{وَاللَّهُ جَعَلَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا وَجَعَلَ لَكُمْ مِنْ أَزْوَاجِكُمْ بَنِينَ وَحَفَدَةً وَرَزَقَكُمْ مِنَ الطَّيِّبَاتِ أَفَبِالْبَاطِلِ يُؤْمِنُونَ وَبِنِعْمَتِ اللَّهِ هُمْ يَكْفُرُونَ}

[619]Abū Dāwūd *Sunan* , vol.1, 625. Ḥadīth # 2050.
[620] Abū Dāwūd, *Sunan*, , vol.2, 396. Ḥadīth # 3855.
[621]International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) Revised glossary of ART terminology, 2009.

*"And Allah has given you wives of your own kind, and has given you, from your wives, sons and grandsons, and has made provisions of good things for you. Is it then in vanity that they believe and in the grace of Allah that they disbelieve?"*[622]

The infertile couples, if left childless then it will create great hardship for them and especially when permissible methods are available. Assisted Methods of Conception are not interfering in this natural way; they merely assist in the conception. Rather it is helping in accomplishment of one of a very important objective of *Sharī'ah* that is Preservation of progeny[623].

Another argument can be given that Assisted Methods of Conception needs the exposure of private parts to medical practitioners while exposing ones private parts is prohibited except in extreme need or in emergency situation where life of a person is in danger. Indeed it does need, childlessness is a state of necessity. Not only common men but Prophets of Allah too craved for it and supplicated earnestly[624]. Mentioning of their stories in Glorious *Qur'ān* indicates that Allah does acknowledge the hardship of infertility. Almighty Allah says in Holy *Qur'ān*:

{.... يُرِيدُ اللَّهُ بِكُمُ الْيُسْرَ وَلَا يُرِيدُ بِكُمُ الْعُسْرَ....}

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[622]Al-Qur'ān 16:72

[623]Shātibī, *al- Muwāfaqāt*, vol 2 (Dār Ibn 'Afan, 1997), 20.

[624]Al- Qur'ān tells the story of the Prophet Zakaria (A.S) how he was surprised to see provisions with Maryam (A.S) and supplicated for an offspring. In the words of al-Qur'ān: *"Then Zachariah prayed unto his Lord and said: My Lord! Bestow upon me of Thy bounty goodly offspring. Lo! Thou art the Hearer of Prayer. (38) And the angels called to him as he stood praying in the sanctuary: Allah giveth thee glad tidings of (a son whose name is) John, (who cometh) to confirm a word from Allah lordly, chaste, a prophet of the righteous. (39) He said: My Lord! How can I have a son when age hath overtaken me already and my wife is barren? (The angel) answered: So (it will be). Allah doeth what He will. (40)" (Al-Qur'ān 3: 38-40).* Likewise, Al- Qur'ān narrates the story of Ibrahim (A.S) in these words: *Then he conceived a fear of them. They said: Fear not! and gave him tidings of (the birth of) a wise son. (28) Then his wife came forward, making moan, and smote her face, and cried: A barren old woman! (29) They said: Even so saith thy Lord. Lo! He is the Wise, the Knower. (30) (Al-Qur'ān 51: 28-30)*

*"God intends for you ease and He does not intend to put you in hardship*[625]*"*.

Someone may think that assisted Methods of Conception involves masturbation that is impermissible but then it can be easily responded as masturbation for seeking pleasure is *harām* whereas masturbation for curing a disease will be permitted as an important *Sharī'ah* maxims says:

الضَّرَرُ الْأَشَدُّ يُزَالُ بِالْأَخَفِّ

*"In the presence of two evils, the one whose injury is greater is avoided by the commission of the lesser*[626]*"*.

According to some scholars, there is a danger of mixing of lineage even if assisted method of conception is used between spouses as all matter will be in the hands of medical staff. They may change or exchange it with someone else. This is so but even for natural birth of babies, one has to find the trustworthy medical staff and credible hospital. The cases of mixing lineage already occur in many hospitals in developing countries including Pakistan where nurses change children. The procedures which are curing millions of people can't be declared impermissible merely on the ground that some corrupt people can exploit it.

### *B. Involvement of Third Party*

As far as, the involvement of donor in procedure of Assisted Method of Conception is concerned, the sperm of donor who is stranger for the wife are used in situations, where

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[625]Al-Qur'ān 2:185

[626]Ibn Nujaym. *Al-Ashbāh wa al- Nazā'ir*, 75.

husband is having weak or unhealthy sperm, is completely prohibited as Messenger of Allah (Peace Be Upon Him) said;

« لاَ يَحِلُّ لِامْرِئٍ يُؤْمِنُ بِاللهِ وَالْيَوْمِ الآخِرِ أَنْ يَسْقِيَ مَاءَهُ زَرْعَ غَيْرِه»

"*It is unlawful for a man who believes in Allah and the last day that he waters the plant of another.*"[627]

Similarly, it is not permissible for a woman to bear the sperm of a man other than her husband whether she is using a donor's sperm, or she is acting as a surrogate. The one, who does it, falls under the category of transgressor according to these verses of Glorious *Qur'ān*:

{وَالَّذِينَ هُمْ لِفُرُوجِهِمْ حَافِظُونَ (5) إِلَّا عَلَى أَزْوَاجِهِمْ أَوْ مَا مَلَكَتْ أَيْمَانُهُمْ فَإِنَّهُمْ غَيْرُ مَلُومِينَ (6) فَمَنِ ابْتَغَى وَرَاءَ ذَلِكَ فَأُولَئِكَ هُمُ الْعَادُونَ (7)}

"Those who guard their private parts except from their spouses ..." [628] "Whosoever goes beyond that are indeed transgressors"[629]

*Dr. 'Abd al-'Azeem al-Mat'ani, al-Azhaar University* writes:

> The womb is a part of a woman's private parts and the private parts (i.e., sexual relations) are not permissible except through the shar'i contract whose conditions are fully met. So the womb is exclusively for the husband who is married to that woman according to a valid marriage contract, and no one else has any right to use it for an alien pregnancy. If the woman who rents out her womb is not married to that husband, then she is permitting her private parts and her womb to a man who is a stranger to her; she is not permissible for him and he is not

[627]Abū Dāwūd, *Sunan*, vol.2, 214. Ḥadīth # 2160.
[628]Al-Qur'ān23:5-7.
[629]Al-Qur'ān23:7

permissible for her. Even if this is not full-scale zinā (adultery), it is still definitely harām because it is enabling a man who is a stranger to her (i.e., not married to her) to put his semen in her womb[630].

Protection of posterity is one of the objectives of *Sharī'ah* and rules related to marriage have been formulated to protect lineages. Third party's involvement will lead to confusion of it. Where a couple face a necessity of third party's involvement, they have two evils in front of them i.e. infertility and mixing of lineage. It is obvious who is to be given preference as a famous *Sharī'ah* maxim says:

إِذَا تَعَارَضَ مَفْسَدَتَانِ رُوعِيَ أَعْظَمُهُمَا ضَرَرًا بِارْتِكَابِ أَخَفِّهِمَا

*"A greater harm may be avoided enduring the lessor harm."*[631] And

دَرْءُ الْمَفَاسِدِ أَوْلَى مِنْ جَلْبِ الْمَصَالِحِ

*"Repelling an evil will be preferred than securing a benefit"*[632]

Therefore, protection of posterity must be given preference.

### *C. Fate of Extra Embryos*

The ART centers are providing facility of frozen embryos for future use. If these embryos are used by the couple during the continuation of their marriage contract then there is no harm in it from perspective of *Sharī'ah* but these cannot be transferred to any third party or to the same party after the termination of marriage contract. Under the doctrine of *Sad*

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[630]Dr. 'Abd Al-'Azeem Al-Mat'ani, "Renting Womb is Haram," http://islamqa.info/en/22126 (accessed March 1, 2014)

[631]Ibn Nujaym. *Al-Ashbāh wa al- Nazā'ir*, 76.

[632]Ibid., 78.

*al-zariyah* (closing the door), it should only be used for immediate purposes and should be discarded after getting appropriate results.

The issue of ART has been discussed by Muslim scholars on various platforms; The *fatwa*[633]issued by Al-Azhar[634], Cairo (1980) (7), The *fatwa* issued by the Islamic *Fiqh* Council, Mecca (1984)[635], The Organization of Islamic Medicine in Kuwait (1991), Qatar University, (1993), The Islamic Education, Science and Culture Organization in Rabaat (2002), The United Arab Emirates (2002), The International Islamic Center for Population Studies and Research and Al Azhar University (14-19).

In May 1983 the Islamic Organization for Medical Sciences (IOMS), first addressed this issue of human reproduction.[636] Certain fundamental rules related to the procedure of ART, have been formulated in the seminar; like the procedure of ART must be performed between legal spouses. Sperm and ovum must be strictly belonging to the husband and wife. Thus, the sanctity of marriage contract must not be infringed at any stage[637], the involvement of any third party/donor is not permissible, donation of sperm, ovum and embryo are against Islamic principles. Death or divorce of spouse terminates the marriage contract, now they are strangers for each other, ART cannot be performed by using previously stored embryos of the husband.[638] Preservation of embryos by using technique

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[633]A formal legal opinion given by an expert on Islamic law.

[634]Gad El-Hak AGH. In Vitro Fertilization and Test Tube Baby.*Dar El Iftaa, Cairo*: Egypt.1980; 1225:3213-3228

[635]Gamal I. Serour, Religious perspective of ethical issues in ART 1. Islamic perspectives of ethical issues in ART.Proceedings of the 7th meeting of the Islamic Fikh council in IVF and ET and AIH; Mecca, Kuwait Siasa Daily Newspaper; March 1984.

[636]Nordin MM. "An Islamic Perspective of Assisted Reproductive Technologies," *Bangladesh Journal of Medical Science Vol. 11 No. 04 Oct'12*: 252-257

[637]Fedel HE., "Assisted Reproductive Technologies -An Islamic Perspective," *Journal Islamic Medical Association*. 1953; 25: 14-19

[638]Serour GI, et al. In vitro Fertilization and Embryo Transfer Ethical Aspects in Techniques in the Muslim World. *Population Sciences IICPSR*1990; 9:45-53

of cryopreservation is allowed only if it transferred to the wife during the validity of marriage contract, all the necessary steps should be taken to ensure the protection of lineages, and embryos must be kept in safe custody with proper documentation[639]. The centers or clinics providing such facilities must be highly professional, responsible and trust worthy.

*Sheikh Abdullah al- Jibreen, Dār-ul-Ifta, Dār-ul- Uloom Deoband*[640] and some other scholars consider it impermissible on the grounds already discussed above.

After comprehensive study of the procedure of Assisted Methods of Conception and arguments and opinions of different Jurists over it, it may be concluded that Assisted Methods of Conception are not per say *Harām*. It is permissible under necessity and public good, when it only involves spouses while any method will be prohibited if it includes any third party. During the procedure, sperm and ovum must belong to husband and wife during the continuation of valid marriage contract. The process of injecting sperm into the vagina or womb of the wife must be performed by female medical practitioner and staff. All the necessary steps should be taken to ensure the privacy and confidentiality of the procedure. The exposure of private parts in front of other person is prohibited under Islam but in case of necessity it is permissible and seeking cure for any disease come under necessity. Moreover, the trustworthiness of the medical staff is very important because they will ultimately ensure the safe transfer of sperms and eggs and responsible for protecting lineages. Embryos are property of particular spouses. It must not be transferred to any other person and even must not be used by the same coupe after

[639]Consensus Workshop on Assisted Reproductive Technologies; Hospital Kuala Lumpur, Oct 1997

[640]http://darulifta-deoband.org/showuserview.do?function=answerView&all=en&id=9788

the termination of marriage contract e.g., by death or divorce. Under the doctrine of *Sad al-zariyah* (closing the door), it should only be used for immediate purposes and should be discarded after getting appropriate results.

It may be concluded that medical centers providing Assisted Methods of Conception play very important role in it. These centers must be administered and run under the rules and regulation issued by the government.

### 5.5.2 Abortion

Abortion may be defined as, Expulsion or Extraction of fetus or product of conception from the mother at the age less than that of viability (Independent survival from mother) that is 24 weeks of gestation (pregnancy) or a fetus weighing 500 grams or less. In other words, the Expulsion or extraction from its mother of a fetus before 24 completed weeks of pregnancy or an embryo weighing 500 gm or less. There may be many reasons for abortion. Some reasons are:

1. Continuing the pregnancy would involve risk to the life of pregnant woman greater than if the pregnancy were terminated for example severe cardiac or respiratory diseases.
2. A substantial risk of the baby being born suffering from a mental or physical abnormality or to be seriously handicapped.
3. Continuing the pregnancy would involve risk of injury to the mental and physical health of the existing child greater than if the pregnancy were terminated.

4. Continuing the pregnancy would involve risk of injury to the mental and physical health of the existing child greater than if the pregnancy were terminated[641].
5. Pregnancy resulting from rape or fornication.
6. Parents not wanting children either due to poverty or careers etc,

### 5.5.2.1 Methods of Abortions[642]

The methods of abortion are either legally mandated or otherwise. In case the fetus is less than 8 weeks the following methods are prevelant.

**A. Legal Methods of Abortion**

**i) Medical Method**

Drugs are used like Mifepristone (RU486), Methotrexate Sodium.

Prostaglandins commonly available by the name of arthotec. Arthotec can be given both orally and per vaginal for abortion.

**ii) Surgical Method**

It is an outdoor procedure relatively painless to the patient, not causing any serious complications, in which the product of conception is sucked through catheter attached to a Syringe introduced into the cervix (Low segment of uterus).

**(Between 8 to 12 weeks)**

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[641] http://www.nhs.uk/conditions/Abortion/Pages/Introduction.aspx (accessed August 21, 2016)

[642] http://www.nhs.uk/Conditions/Abortion/Pages/How-is-it-performed.aspx(accessed August 21, 2016)

Surgical method can be used at this level too.

**iii) Suction Curettage**

It is done by suction curette attached to an electrically powered vacuum canister.

**(Greater than 12 weeks)**

**iv) Medical Termination**

The goal is to administer medications that cause uterine contractions and lead to the expulsion of products of conception through different means like High dose Oxytocin (given intravenously i.e through blood vessels) or different preparations of vaginally administered prostaglandins for example, prostine E2, Misoprostol (cytotec) etc.

**B. Methods of Illegal abortion**

These are done by mid wives in villages. Wood sticks, stones, cotton swabs and chemical including acids, and, in few cases, coal had been used for termination of pregnancy.

**5.5.2.2 Sharī'ah Ruling on Abortion**

Verdict on this issue is not in black and white. Rather it is different according to the intentions behind abortion. Matter is determined according to intention الامور بمقاصدها. This research will not cover all intentions but where the family doesn't want the child because of family planning, harm to the figure of mother or out of fear of poverty or careers.

It is completely impermissible after 120 days of pregnancy.

The clearest Qur'ānic command on the issue says:

{وَالْمُطَلَّقَاتُ يَتَرَبَّصْنَ بِأَنْفُسِهِنَّ ثَلَاثَةَ قُرُوءٍ وَلَا يَحِلُّ لَهُنَّ أَنْ يَكْتُمْنَ مَا خَلَقَ اللَّهُ فِي أَرْحَامِهِنَّ إِنْ كُنَّ يُؤْمِنَّ بِاللَّهِ وَالْيَوْمِ الْآخِرِ....}

(If they believe in God and the Final Day, it is not permissible for them to suppress what God has created in their wombs...)[643]

On the basis of this verse, among other evidence, most Muslim scholars concluded that abortion is unlawful except in some very narrow exceptions. A clear majority of the scholars considered abortion to be a destruction of life and a serious offense against life, and therefore, a major sin.

{مِنْ أَجْلِ ذَلِكَ كَتَبْنَا عَلَى بَنِي إِسْرَائِيلَ أَنَّهُ مَنْ قَتَلَ نَفْسًا بِغَيْرِ نَفْسٍ أَوْ فَسَادٍ فِي الْأَرْضِ فَكَأَنَّمَا قَتَلَ النَّاسَ جَمِيعًا وَمَنْ أَحْيَاهَا فَكَأَنَّمَا أَحْيَا النَّاسَ جَمِيعًا.....}

"If any one saved a life, it would be as if he saved the life of the whole people[644]"

{ وَلَا تَقْتُلُوا النَّفْسَ الَّتِي حَرَّمَ اللَّهُ إِلَّا بِالْحَقِّ وَمَنْ قُتِلَ مَظْلُومًا فَقَدْ جَعَلْنَا لِوَلِيِّهِ سُلْطَانًا فَلَا يُسْرِفْ فِي الْقَتْلِ إِنَّهُ كَانَ مَنْصُورًا}

"Nor take life – which God has made sacred – except for just cause. And if anyone is slain wrongfully, We have given his heir authority (to demand *Qisas* or to forgive): but let him not exceed bounds in the matter of taking life; for he is helped (by the Law)[645]"

{ وَلَا تَقْتُلُوا أَوْلَادَكُمْ خَشْيَةَ إِمْلَاقٍ نَحْنُ نَرْزُقُهُمْ وَإِيَّاكُمْ إِنَّ قَتْلَهُمْ كَانَ خِطْئًا كَبِيرًا}

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[643] Al-Qur'ān 2:228
[644] Al-Qur'ān 5:32
[645] Al-Qur'ān17:33

"Kill not your children for fear of want: We shall provide sustenance for them as well as for you. Verily the killing of them is a great sin[646]", see also 81.8; 4.29; 5.36

لا يجوز لاحد ان يتصرف في ملك الغير بلا اذنه

No person may deal with the property of another withoutsuch person's permission. Fetus is a human being. It is not permissible for anyone to take away his right of life merely because it is against their careers, family planning or elegance.

الأصل في الأنفس والأطراف الحرمة

The original rule about souls and limbs is that of impermissibility[647]. Thus, according to this legal maxim, parent doesn't have the right to abort the fetus.

Therefore according to legal maxims of *Sharī'ah*, it is not permissible to abort a fetus at any stage specially after 120 days for fear of the difficulty of raising children or incapability of bearing the expenses of raising and educating them, or for apprehension of their future or because the parent believes that they have sufficient number of children.

### 5.5.3 Organ Donation

Although the history of transplantation dates back to the time of ancient Greeks, Roman and Chinese[648], last century has been remarkable in tremendous development in the said field of medicine. Medical science successfully reached even to full face transplant in this

[646]Al-Qur'ān 17:31

[647]Dr. Aḥmad ibn 'Abdullāh al-Ḍuwaihī, al-Qawā'id al-Fiqhiyyah al-Hākimah li Ijhāḍ, 9

[648]David Hamilton, *A History of Organ Transplantation: Ancient Legends to Modern Practice* (Pittsburgh: University of Pittsburgh Pre, 2012), 1-30.

era.[649] A major hurdle in transplantation is scarcity of organ from donors. More than five hundred patients in United Kingdom are currently waiting for an organ for transplantation for more than five years. Thirty percent of the total number of seven thousand people on the waiting list are in need for two years while six thousand people including two seventy children died in last ten years waiting for the organ donation for transplantation[650].

### 5.5.3.1 Sharī'ah Ruling on Organ Donation

Organ donation is main source for the transplantations. Naturally, this issue initiated a debate among *shariah* scholars. Scholars are divided in two camps in this matter. Majority of the scholars are of the opinion that organ donation is permissible subject to certain conditions.

Arguments for the permissibility of organ donation is given in the light of the following legal maxims that says necessity makes unlawful permissible.

الضَّرُورَاتُ تُبِيحُ الْمَحْظُورَاتِ

*(Al-darurāt tubīh al-mahzūrāt)*

So many humans' lives are being lost for the want of organ for transplantation. It is a dire need to provide for the organs. Thus, it is a necessity that mandates the prohibition replaced by permission. As Glorious Qur'ān says:

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[649]First full face transplantation was conducted in Spain in 2010. For details please see: http://edition.cnn.com/2010/HEALTH/04/24/spain.face.transplant/ (accessed August 20th, 2016)

[650]https://www.organdonation.nhs.uk/news-and-campaigns/news/nhs-blood-and-transplant-reveals-nearly-49-000-people-in-the-uk-have-had-to-wait-for-a-transplant-in-the-last-decade/(accessed August 20th, 2016)

{مِنْ أَجْلِ ذَلِكَ كَتَبْنَا عَلَى بَنِي إِسْرَائِيلَ أَنَّهُ مَنْ قَتَلَ نَفْسًا بِغَيْرِ نَفْسٍ أَوْ فَسَادٍ فِي الْأَرْضِ فَكَأَنَّمَا قَتَلَ النَّاسَ جَمِيعًا وَمَنْ أَحْيَاهَا فَكَأَنَّمَا أَحْيَا النَّاسَ جَمِيعًا.....}

"If any one saved a life, it would be as if he saved the life of the whole people[651]"

It is harm for the deceased to take out organs from it because it deforms the dead body but to let the patient die and loose his life is a greater harm. Thus, legal maxims say: Severe harm is removed by lesser harm

الضَّرَرُ الْأَشَدُّ يُزَالُ بِالْأَخَفِّ

(Al-darar al-ashadd yuzāl bī al-darar al-akhaff)

There have been such examples in the writing of jurists which bear the same stance for instance, Ibn Qudāmah quoted this example in his book "Al- Mughnī" that *Sharī'ah will* allow the cutting of the abdomen of the dead pregnant woman so that the fetus can be removed if his life is confirmed through the detection of any movement.[652] It wasn't allowed to cut the belly of dead person as mutilation is not allowed but it becomes permissible because the life of fetus is greater interest and his safety superseded the dead.

Multiple Dār al-Ifta and *Fiqh* academies have allowed the donation of human organs from an alive person to other. Some declaration and resolutions are mentioned below:

[651] Al-Qur'ān 5:32
[652] Ibn Qudāmah, *Al- Mughnī,* vol. 2, p. 551.

The Supreme Council of *Ulama* in Riyadh has allowed organ donation in case of necessity.[653]

The council of Islamic *Fiqh* Academy of the Muslim world league, Makkah in its 8th session permitted organ donation and transplantation and resolved that it is permissible to remove the organ from the body of one person and transplant into the body of another in order to save his life or to assist in stabilizing the normal functioning of the basic organs of that person[654]. It has prescribed some conditions for the donation which are as follows:

Organ removal will not harm the donor's life in any way, as legal maxim says: Harm should not be overruled by harm or by the same harm.

الضَّرَرُ لَا يُزَالُ بِمِثْلِه

**(Al-darar lā yuzāl bī mithlihī)**

Donor is donating organ voluntarily and there is no coercion behind it.Transplantation is the only solution to improve the condition of patient. Success rate of transplantation is quite high.

The *fiqh* academy of the organization of the Islamic conference, Jeddah[655] and the Mufti of Egypt dr. Sayyed At- Tantawi permitted the use of body organs of a person that has

[653]Supreme Council of Ulema in Riyadh in their Resolution no. 99 dated 6 dhilqadah 1402 see http://en.allexperts.com/q/Islam-947/islamic-rule.htm.

[654]The Fiqh Academy of the Muslim World League, Makkah permitted the donation of organs and transplantation in its 8th session held between 28 Rabi'ul Thani - 7 Jumadal Ula, 1405. See for details: http://en.allexperts.com/q/Islam-947/islamic-rule.htm.

[655]It was decided in the fourth conference of Islamic Fiqh Council: Organisation of Islamic Conference held between 6-11 February 1988 in Jeddah, for details http://www.islam-qa.com/en/ref/107690.

died in an accident if there is a dire need to save a patients' life provided that a competent Muslim physician is the one who took this decision of transplantation.

The Islamic *Fiqh* Academy of India, at its first *Fiqh* seminar (Delhi, March 1989), passed the resolutions that it is allowed for a healthy person, in the light of medical experts, to donate one of his/ her kidneys to an ailing relative.[656]

Thus it is allowed for a person to donate his body organ if: transplantation is the only form of treatment possible. There is no danger to the life of the donor because of this donation.[657]

So much so that person can do *waṣīyah* as well for this as declared by the resolutions of the council. These resolutions are given below:

> The council of the Islamic Fiqh Academy of the Muslim world league, Makah at its eighth working sessions (1405 AH/1985), resolved that it is permissible in *Sharī'ah* to remove an organ from a dead person and transplant it into a living recipient, on the condition that the donor was sane and had wished it so.[658]

The Islamic Fiqh Academy of the Organization of the Islamic conference (OIC) , during its fourth session held in Jeddah, (1988) resolves that it is permissible from the *Sharī'ah* point of view to transplant an organ from the body of a dead person if it is essential to keep the beneficiary alive, or of it restores a basic function to his body, provided it has

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[656]Second Fiqh Seminar was held between 8th to 11th December, 1989 in New Dehli in India on the topic of organ Transplantation. For detailed Fatwa see http://www.iol.ie/~afifi/Articles/organ2.htm.

[657]Muḥammad Naeem Yaseen, "The Rulings for the Donation of Human Organ in the Light of Sharī'ah Rules and Medical Facts," p. 49-87.

[658]Qararāt Majma' al-Fiqh al-Islamī, http://www.islam-qa.com/en/ref/2117/organ%20donation.

been authorized by the deceased or by his heirs after his death or with the permission of concerned authorities if the deceased has not been identified or has no heirs.[659]

## 5.6 Conclusion

Legal Maxims are fundamental to guide the medical practitioners about what is the standard of practice in relevant matters. They have the force of strong roots in *Qur'ān* and *Sunnah.*[660] These maxims guide the doctors regarding what they ought and what they ought not to do. Above mentioned examples are illustrations of importance of legal maxims in the field of medicine. This is a brief work rendered in a chapter. Researcher urges that there should be a detailed work on the subject of application of Legal Maxims on the field of medicine and it should be taught to Muslim physicians as a course book in their medical colleges so that they have a deeper understanding of the general approach of *Sharī'ah* in dealing with such matters.

[659] Resolutions and recommendations of the fourth session of the council of the Islamic Fiqh Academy (1408 AH/ 1988) p 52-53:[659] Islamic Fiqh Academy of India has differed in this matter with other two FiqhCouncils, which stated in its second Fiqh seminar That if a person directed that after his death, his organ should be used for the purpose of transplantation, it would not be considered as will according to Shariah. (Islamic Fiqh Academy of India, 8-11 dec, 1989, New Dehli) see for details: http://www.iol.ie/~afifi/Articles/organ2.htm

[660] Please see above para 5.2

# CHAPTER 6

## 6.1 CONCLUSION

Being a former British colony, Pakistan's basic structure of healthcare system is very similar to NHS that is one of the world's top healthcare systems, but this extensive infrastructure has not been translated in delivery of good healthcare due to the lack of political will, supervision, poor legislation and worst implementation. There are some good indicators but still a lot have to be done to have an efficient healthcare system. Healthcare system is weak, so is the legal redress.

Following English law, Pakistan's legal system provides law of torts to be invoked in case of medical negligence[661]English Law of torts mandates the claimant to prove that there was a duty of care and doctor breached that duty that resulted in harm caused to the patient[662]. Apparently, it seems plain but proving breach of duty and causation is toilsome. Islamic Law is neck and neck in this regard to the extent that it also demands negligence or mistake on the part of doctor to make him liable for the harm caused to the patient[663]. Thus in this regard, English law and *Sharī'ah* both are being applied in Pakistan as the notion of 'negligence' gives rise to the cause of action. Unfortunately, law of torts is not a developed area in Pakistan. Consequently, there are not many cases in the legal history of Pakistan, let alone in medical negligence. However, there are some good indicators in recent past. Doctors can be tried under *Qiṣāṣ* and *Diyah* clauses of Pakistan Penal code too but it is discouraged by the higher courts to prosecute medical practitioners in court under Pakistan Penal Code. Following Indian precedent, consumer

[661] Please see above para 3.3.1
[662] Please see above para 2.2.2.1
[663] Please see above para 4.3.2

courts in Pakistan are dealing with the cases of medical services too under Consumer Protection Acts.

Till date, consumer courts in Punjab (Pakistan) have been the most efficient, speedy and fruitful medium for the cases against medical negligence.[664] However, it is highly detestable to include medical services within the scope of consumer laws. It is contested that this addition will give an acceptance to the element of consumerism in the field of medicine while it is a noble profession to serve humanity and not a business for the purpose of maximization of profit.

Pakistan can develop a law in the light of the medical liability under Islamic law. It can also learn from the England in the area of negligence as English law has developed a criterion to judge whether to call an action 'negligence' or not and which will be negligent enough to be compensated.

Basic principle in tort for the assessment of damages is to reinstate the claimant to the place where he would have been, had the negligence not been committed. Thus, he should be fully compensated as far as possible in terms of money. He may be granted reasonable and fair monetary compensation for the injury caused. Small amount of damages can be granted under the head of pain and suffering. Loss of amenity can be demanded to be compensated. It is the loss of ability to participate in the activities which the claimant used to participate before the injury caused due to the medical negligence. Medical expenses, loss of earnings and future pecuniary losses can be claimed.[665]

[664] Please see above para 3.3.3
[665] Please see above para 2.2.3

Majority of the claimants are dissatisfied with the system of compensation in England. There have been multiple proposals for the reform in the system. One such proposal is NHS Redress Act, 2006. The main proposition of the idea is to settle the claims under £20,000 out of court in a separate tribunal. It doesn't intend to replace the current court system, rather an alternative for the minor claims which would require explanation, apology or payment so that the litigation is speedy at both forums and bears low cost. This Act has not yet been translated into implementation.

Regarding damages for medical malpractice in *Sharī'ah*, there is no direct reference in *Qur'ān* or *Sunnah* for monetary compensation for medical negligence, however the general law of *Qiṣāṣ* and *Diyah* encompasses *Qatl al-Khatā*[666]. This area 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. *Sharī'ah* 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. If mindfully incorporated in country's law, not much is left for judges to brainstorm for the adequate compensation, thus preventing the entire topic of capping that is hot debate in many non-Muslim countries. Pakistan can formulate a law for medical malpractice by setting the tariff on the basis of *Diyah* thus ending the huge disparity between the damages decreed by courts and will spare judges from the labor some task of estimation of reasonable amount for

[666] Please see above para 4.4.3

damages. Pakistan's Law is way behind in this regard. Although there are some good indicators but that are far from being appropriate. Doctors are not tried under Pakistan Penal Code as courts discourage this practice[667], thus *qiṣāṣ* and *diyah* clauses of P.P.C are not invoked to compensate the patients suffered due to the medical malpractice. Secondly, *diyah* is linked with the silver rate that makes it very disproportionate to the harm caused to the patients. Compensation decreed by the learned courts of Pakistan under law of torts varies but not befitting according to the suffering of the patients. Same is the case with the consumer courts. Therefore, Pakistan needs massive improvement in the law of medical malpractcie.

## 6.2 Recommendations

In the Light of above facts, following recommendations are suggested for Pakistan:

1. A special "Medical Law" regarding malpractice should be developed in which the the concept of "negligence" and resulting "liability" should be eloborated. For compensation, system of *diyah* and *arsh* must be employed that is almost a complete tariff for estimation of the damages for medical malpractice. Pakistan should include the entire list of damages in that "Medical Law" so that medical practitioners know how much is to be paid by them for different harms. It will help patients for the awareness of their rights in cases of medical malpractice. Islamic law incurs the liability of payment of *diyah* on *'āqilah.* As 'Umer (may Allah be pleased with him) had launched the system of *dīwān* that made the entire unit contribute to pay the *diyah* if anyone mistakenly killed anyone or caused injury, likewise a system should be established for the payment of large sum

[667] Please see above para 3.3.2

mandated by *Sharī'ah*. This can be done in multiple ways. Every hospital can set up a fund and collect money like it is done in insurance on permanent basis. According to this model, every hospital will itself be liable to make payments. It can learn from the litagating authority of England. That department can collect the money as insurance like model and make payments during litigation. Doctors may form their own association for the said purpose.

2. Medical practitioners should be tried in special health courts instead of consumer courts or same should be declared as health courts too. Trying medical malpractice cases in consumer court is like accepting it a 'business'. It is obnoxious to accept medical profession as a business and give them a free ticket to apply consumerism in it. It is a noble profession meant to serve humanity. Its sacredness should remain unviolated. Consumerism should be highly discouraged in this field. There should be strict criteria for setting up of private hospitals and strict actions should be taken if malpractice is noticed.
3. Legal Maxims are fundamental to guide the medical practitioners and judges regarding the standard of practice in relevant matters. They have the force of strong roots in *Qur'ān* and *Sunnah*. These maxims guide the doctors regarding what they ought and what they ought not to do. This is a brief work rendered in a chapter. Researcher urges that there should be a detailed work on the subject of application of Legal Maxims on the field of medicine and it should be taught to Muslim physicians as a course book in their medical colleges so that they have a deeper understanding of the general approach of *Sharī'ah* in dealing with such matters.

Researcher concludes her thesis here.

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# APPENDIX I: LIST OF QUR'ĀNIC VERSES

| S. No. | Qur'ānic Verses | Verse No. | P. No. |
|---|---|---|---|
| 1. | {وَإِذْ يَرْفَعُ إِبْرَاهِيمُ الْقَوَاعِدَ مِنَ الْبَيْتِ وَإِسْمَاعِيلُ رَبَّنَا تَقَبَّلْ مِنَّا إِنَّكَ أَنْتَ السَّمِيعُ الْعَلِيمُ} | 2:127 | 175 |
| 2. | { يَا أَيُّهَا الَّذِينَ آمَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلَى.....} | 2:178 | 154 |
| 3. | {.... يُرِيدُ اللَّهُ بِكُمُ الْيُسْرَ وَلَا يُرِيدُ بِكُمُ الْعُسْرَ....} | 2:185 | 178 |
| 4. | {وَالْمُطَلَّقَاتُ يَتَرَبَّصْنَ بِأَنْفُسِهِنَّ ثَلَاثَةَ قُرُوءٍ وَلَا يَحِلُّ لَهُنَّ أَنْ يَكْتُمْنَ مَا خَلَقَ اللَّهُ فِي أَرْحَامِهِنَّ إِنْ كُنَّ يُؤْمِنَّ بِاللَّهِ وَالْيَوْمِ الْآخِرِ....} | 2:228 | 209 |
| 5. | {... وَلَهُنَّ مِثْلُ الَّذِي عَلَيْهِنَّ بِالْمَعْرُوفِ.....} | 2:228 | 179 |
| 6. | {....رَبَّنَا لَا تُؤَاخِذْنَا إِنْ نَسِينَا أَوْ أَخْطَأْنَا....} | 2:286 | 137 |
| 7. | {....وَلَيْسَ الذَّكَرُ كَالْأُنْثَى...} | 3:36 | 155 |
| 8. | {وَإِذْ أَخَذَ اللَّهُ مِيثَاقَ النَّبِيِّينَ لَمَا آتَيْتُكُمْ مِنْ كِتَابٍ وَحِكْمَةٍ ثُمَّ جَاءَكُمْ رَسُولٌ مُصَدِّقٌ لِمَا مَعَكُمْ لَتُؤْمِنُنَّ بِهِ وَلَتَنْصُرُنَّهُ قَالَ أَأَقْرَرْتُمْ وَأَخَذْتُمْ عَلَى ذَلِكُمْ إِصْرِي قَالُوا أَقْرَرْنَا قَالَ فَاشْهَدُوا | 3:81 | 145 |

| | | | |
|---|---|---|---|
| | وَأَنَا مَعَكُمْ مِنَ الشَّاهِدِينَ} | | |
| 9. | {الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَى بَعْضٍ وَبِمَا أَنْفَقُوا مِنْ أَمْوَالِهِمْ} | 4:34 | 155 |
| 10. | {وَمَا كَانَ لِمُؤْمِنٍ أَنْ يَقْتُلَ مُؤْمِنًا إِلَّا خَطَأً وَمَنْ قَتَلَ مُؤْمِنًا خَطَأً فَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ وَدِيَةٌ مُسَلَّمَةٌ إِلَى أَهْلِهِ إِلَّا أَنْ يَصَّدَّقُوا فَإِنْ كَانَ مِنْ قَوْمٍ عَدُوٍّ لَكُمْ وَهُوَ مُؤْمِنٌ فَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ وَإِنْ كَانَ مِنْ قَوْمٍ بَيْنَكُمْ وَبَيْنَهُمْ مِيثَاقٌ فَدِيَةٌ مُسَلَّمَةٌ إِلَى أَهْلِهِ وَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ فَمَنْ لَمْ يَجِدْ فَصِيَامُ شَهْرَيْنِ مُتَتَابِعَيْنِ تَوْبَةً مِنَ اللَّهِ وَكَانَ اللَّهُ عَلِيمًا حَكِيمًا} | 4:92 | 159 |
| 11. | {.....وَمَنْ قَتَلَ مُؤْمِنًا خَطَأً فَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ وَدِيَةٌ مُسَلَّمَةٌ إِلَى أَهْلِهِ إلا أَنْ يَصَّدَّقُوا.....} | 4:92 | 147 |
| 12. | {يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ بِالْقِسْطِ شُهَدَاءَ لِلَّهِ وَلَوْ عَلَى أَنْفُسِكُمْ} | 4:135. | 145 |
| 13. | {.... أَوْفُوا بِالْعُقُودِ.....} | 5:1 | 179 |
| 14. | { يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ لِلَّهِ شُهَدَاءَ بِالْقِسْطِ وَلَا يَجْرِمَنَّكُمْ شَنَآنُ قَوْمٍ عَلَى أَلَّا تَعْدِلُوا اعْدِلُوا هُوَ أَقْرَبُ لِلتَّقْوَى وَاتَّقُوا اللَّهَ إِنَّ اللَّهَ خَبِيرٌ بِمَا تَعْمَلُونَ} | 5:8 | 146 |
| 15. | { مِنْ أَجْلِ ذَلِكَ كَتَبْنَا عَلَى بَنِي إِسْرَائِيلَ أَنَّهُ مَنْ قَتَلَ نَفْسًا بِغَيْرِ نَفْسٍ أَوْ فَسَادٍ فِي الْأَرْضِ فَكَأَنَّمَا قَتَلَ النَّاسَ جَمِيعًا وَمَنْ أَحْيَاهَا فَكَأَنَّمَا أَحْيَا النَّاسَ جَمِيعًا.....} | 5:32 | 209 |

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|---|---|---|---|
| 16. | {....وَلَا تَقْتُلُوا النَّفْسَ الَّتِي حَرَّمَ اللَّهُ إِلَّا بِالْحَقِّ ذَلِكُمْ وَصَّاكُمْ بِهِ لَعَلَّكُمْ تَعْقِلُونَ} | 6:151 | 134 |
| 17. | {يَا بَنِي آدَمَ قَدْ أَنْزَلْنَا عَلَيْكُمْ لِبَاسًا يُوَارِي سَوْآتِكُمْ وَرِيشًا وَلِبَاسُ التَّقْوَى ذَلِكَ خَيْرٌ ذَلِكَ مِنْ آيَاتِ اللَّهِ لَعَلَّهُمْ يَذَّكَّرُونَ} | 7: 26 | 114 |
| 18. | {قَدْ مَكَرَ الَّذِينَ مِنْ قَبْلِهِمْ فَأَتَى اللَّهُ بُنْيَانَهُمْ مِنَ الْقَوَاعِدِ فَخَرَّ عَلَيْهِمُ السَّقْفُ مِنْ فَوْقِهِمْ وَأَتَاهُمُ الْعَذَابُ مِنْ حَيْثُ لَا يَشْعُرُونَ} | 16: 26 | 176 |
| 19. | {وَاللَّهُ جَعَلَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا وَجَعَلَ لَكُمْ مِنْ أَزْوَاجِكُمْ بَنِينَ وَحَفَدَةً وَرَزَقَكُمْ مِنَ الطَّيِّبَاتِ أَفَبِالْبَاطِلِ يُؤْمِنُونَ وَبِنِعْمَتِ اللَّهِ هُمْ يَكْفُرُونَ} | 16:72 | 200 |
| 20. | {وَإِنْ عَاقَبْتُمْ فَعَاقِبُوا بِمِثْلِ مَا عُوقِبْتُمْ بِهِ...} | 16:126 | 135 |
| 21. | { وَلَا تَقْتُلُوا أَوْلَادَكُمْ خَشْيَةَ إِمْلَاقٍ نَحْنُ نَرْزُقُهُمْ وَإِيَّاكُمْ إِنَّ قَتْلَهُمْ كَانَ خِطْئًا كَبِيرًا} | 17:31 | 210 |
| 22. | { وَلَا تَقْتُلُوا النَّفْسَ الَّتِي حَرَّمَ اللَّهُ إِلَّا بِالْحَقِّ وَمَنْ قُتِلَ مَظْلُومًا فَقَدْ جَعَلْنَا لِوَلِيِّهِ سُلْطَانًا فَلَا يُسْرِفْ فِي الْقَتْلِ إِنَّهُ كَانَ مَنْصُورًا } | 17:33 | 209 |
| 23. | {وَالَّذِينَ هُمْ لِفُرُوجِهِمْ حَافِظُونَ (5) إِلَّا عَلَى أَزْوَاجِهِمْ أَوْ مَا مَلَكَتْ أَيْمَانُهُمْ فَإِنَّهُمْ غَيْرُ مَلُومِينَ (6) فَمَنِ ابْتَغَى وَرَاءَ ذَلِكَ فَأُولَئِكَ هُمُ الْعَادُونَ (7)} | 23:5-7. | 202 |

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| 24. | {وَالْقَوَاعِدُ مِنَ النِّسَاءِ اللَّاتِي لَا يَرْجُونَ نِكَاحًا فَلَيْسَ عَلَيْهِنَّ جُنَاحٌ أَنْ يَضَعْنَ ثِيَابَهُنَّ غَيْرَ مُتَبَرِّجَاتٍ بِزِينَةٍ وَأَنْ يَسْتَعْفِفْنَ خَيْرٌ لَهُنَّ وَاللَّهُ سَمِيعٌ عَلِيمٌ} | 24: 60 | 176 |
| 25. | {....وَلَيْسَ عَلَيْكُمْ جُنَاحٌ فِيمَا أَخْطَأْتُمْ بِهِ وَلَكِنْ مَا تَعَمَّدَتْ قُلُوبُكُمْ....} | 33:5 | 137 |
| 26. | {وَجَزَاءُ سَيِّئَةٍ سَيِّئَةٌ مِثْلُهَا...} | 42:40 | 134 |

# APPENDIX II: LIST OF AḤADĪTH

| S. No. | Aḥadīth | P. No. |
|---|---|---|
| 1. | «إِنَّ اللَّهَ أَنْزَلَ الدَّاءَ وَالدَّوَاءَ، وَجَعَلَ لِكُلِّ دَاءٍ دَوَاءً فَتَدَاوَوْا وَلَا تَدَاوَوْا بِحَرَامٍ»<br>"Allah created sickness and cures. There is a cure for every sickness. Seek treatment, but do not use forbidden procedures | 116 |
| 2. | « إِنَّ اللَّهَ قَدْ تَجَاوَزَ عَنْ أُمَّتِي الْخَطَأَ، وَالنِّسْيَانَ، وَمَا اسْتُكْرِهُوا عَلَيْهِ »<br>Indeed Allah has excused my people from error, forgetting things, and what they were forced or compelled to do | 137 |
| 3. | «إِنَّمَا الأَعْمَالُ بِالنِّيَّاتِ، وَإِنَّمَا لِكُلِّ امْرِئٍ مَا نَوَى، فَمَنْ كَانَتْ هِجْرَتُهُ إِلَى دُنْيَا يُصِيبُهَا، أَوْ إِلَى امْرَأَةٍ يَنْكِحُهَا، فَهِجْرَتُهُ إِلَى مَا هَاجَرَ إِلَيْهِ»<br>Deeds (their correctness and rewards) depend upon intentions, and every person gets but what he has intended. So, whoever emigrated for Allah and His Messenger, his emigration is for Allah and His Messenger, and whoever emigrated for worldly benefits or for a woman to marry, his emigration is for what he emigrated for | 182 |
| 4. | « تَدَاوَوْا، فَإِنَّ اللَّهَ لَمْ يَضَعْ دَاءً إِلاَّ وَضَعَ لَهُ شِفَاءً، أَوْ قَالَ: دَوَاءً إِلاَّ دَاءً وَاحِدًا قَالُوا: يَا رَسُولَ اللَّهِ، وَمَا هُوَ؟ قَالَ: الهَرَمُ. »<br>"Seek medical treatment, for Allah has not created any | 115 |

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| | disease but He also created a remedy for it, except for one disease: old age | |
| 5. | «تَدَاوَوْا، فإنَّ الله عزَّ وجلَّ لم يَضَعْ دَاءً إلا وضع له دَوَاءً »<br>"Treat sickness, for Allah has not created any disease except He has also created the cure | 199 |
| 6. | «تزوجوا الوَدُودَ الوَلُودَ فإني مكاثِرٌ بِكُمُ الأمم »<br>Marry women who are loving and very prolific (in producing children), for I shall outnumber the (other) nations by you." | 199 |
| 7. | « دِيَةُ الْمَرْأَةِ عَلَى النِّصْفِ مِنْ دِيَةِ الرَّجُلِ »<br>It is narrated from Mu'ādh ibn Jabl that Messenger of Allah (Peace Be Upon Him) said" *diyyah* of women is half of the *diyyah* of man | 156 |
| 8. | «الْخَرَاجَ بِالضَّمَانِ» »<br>"Entitlement to profit depends upon liability for loss. | 179 |
| 9. | «فَإِنَّ دِمَاءَكُمْ، وَأَمْوَالَكُمْ، وَأَعْرَاضَكُمْ، بَيْنَكُمْ حَرَامٌ، كَحُرْمَةِ يَوْمِكُمْ هَذَا، فِي شَهْرِكُمْ هَذَا، فِي بَلَدِكُمْ هَذَا»<br>"No doubt! Your blood, your properties, and your honor are sacred to one another like the sanctity of this day of | 134 |

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| | yours, in this (sacred) town (Mecca) of yours, in this month of yours | |
| 10. | « قضَى رسول الله -صلي الله عليه وسلم- في دِية الخطأ عشرين بنت مَخاضٍ، وعشرين ابنَ مَخاض، وعشرين ابنةَ لبُون، وعشرين حقَّةً، وعشرين جَذعَةً»<br><br>"The messenger of Allah (Peace Be Upon Him) ruled that the *diyyah* 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 | 147 |
| 11. | « كَانَتْ قِيمَةُ الدِّيَةِ عَلَى عَهْدِ رَسُولِ اللهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ: ثَمَانَ مِائَةِ دِينَارٍ أَوْ ثَمَانِيَةَ آلَافِ دِرْهَمٍ، وَدِيَةُ أَهْلِ الْكِتَابِ يَوْمَئِذٍ النِّصْفُ مِنْ دِيَةِ الْمُسْلِمِينَ "، قَالَ: فَكَانَ ذَلِكَ كَذَلِكَ حَتَّى اسْتُخْلِفَ عُمَرُ رَحِمَهُ اللهُ، فَقَامَ خَطِيبًا فَقَالَ: أَلَا إِنَّ الْإِبِلَ قَدْ غَلَتْ، قَالَ: فَفَرَضَهَا عُمَرُ عَلَى أَهْلِ الذَّهَبِ أَلْفَ دِينَارٍ، وَعَلَى أَهْلِ الْوَرِقِ اثْنَيْ عَشَرَ أَلْفًا، وَعَلَى أَهْلِ الْبَقَرِ مِائَتَيْ بَقَرَةٍ، وَعَلَى أَهْلِ الشَّاءِ أَلْفَيْ شَاةٍ، وَعَلَى أَهْلِ الْحُلَلِ مِائَتَيْ حُلَّةٍ، قَالَ: وَتَرَكَ دِيَةَ أَهْلِ الذِّمَّةِ لَمْ يَرْفَعْهَا فِيمَا رَفَعَ مِنَ الدِّيَةِ»<br><br>"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 | 149 |

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| | 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 those who possessed gold at one thousand dinars, for those who 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 | |
| 12. | « لَا تَبِعْ مَا لَيْسَ عِنْدَكَ»<br>Do not sell that you do not have | 179 |
| 13. | «لِكُلِّ دَاءٍ دَوَاءٌ، فَإِذَا أُصِيبَ دَوَاءُ الدَّاءِ بَرَأَ بِإِذْنِ اللهِ عَزَّ وَجَلَّ»<br>For every disease, there is a remedy, so if you find the right remedy for the disease, you will be healed by the leave of Allah." | 116 |
| 14. | « لاَ يَحِلُّ لِامْرِئٍ يُؤْمِنُ بِاللهِ وَالْيَوْمِ الآخِرِ أَنْ يَسْقِيَ مَاءَهُ زَرْعَ غَيْرِهِ» | 202 |

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| | "It is unlawful for a man who believes in Allah and the last day that he waters the plant of another." | |
| 15. | «" مَا أَنْزَلَ اللهُ دَاءً، إِلَّا قَدْ أَنْزَلَ لَهُ شِفَاءً، عَلِمَهُ مَنْ عَلِمَهُ، وَجَهِلَهُ مَنْ جَهِلَهُ "»<br>"Allah has not sent down any disease but He has also sent down its cure. Those who know it, know it and those who do not know it, do not know it." | 115 |
| 16. | «مَنْ تَطَبَّبَ، وَلَمْ يُعْلَمْ مِنْهُ طِبٌّ قَبْلَ ذَلِكَ، فَهُوَ ضَامِنٌ»<br>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 | 123 |
| 17. | « نِعْمَتَانِ مَغْبُونٌ فِيهِمَا كَثِيرٌ مِنَ النَّاسِ: الصِّحَّةُ وَالفَرَاغُ»<br>**"There are two blessings which many people waste: health and free time** | 114 |

# APPENDIX III: SECTIONS OF PPC RELATED TO QASAS AND DIYAT

## OF OFFENCES AFFECTING THE HUMAN BODY

### Of Offences Affecting Life

**299. Definitions:**

In this Chapter, unless there is anything repugnant in the subject or context:

(a) "adult" means a person who has attained the age of eighteen years;

(b) "arsh" means the compensation specified in this Chapter to be paid to the victim or his heirs under this Chapter;

(c) "authorised medical officer" means a medical officer or a Medical board, howsoever designated, authorised by the Provincial Government;

(d) "daman" means the compensation determined by the Court to be paid by the offender to the victim for causing hurt not liable to arsh;

(e) "diyat" means the compensation specified in Section 323 payable to the heirs of the victim;

(f) "Government" means the Provincial Government;

(g) "ikrah-e-tam" means putting any person, his spouse or any of his blood relations within the prohibited degree of marriage in fear of instant death or instant, permanent impairing of any organ of the body or instant fear of being subjected to sodomy or zihabil-jabr;

(h) "ikrah-e-naqis" means any form of duress which does not amount to ikrah-i-tam;

(i) "minor" means a person who is not an adult;

(ii) "offence committed in the name or on the pretext of honour" means an offence committed in the name or on the pretext of karo kari, siyah kari or similar other customs or practices;

(j) "qatl" means causing death of a person;

(k) "qisas" means punishment by causing similar hurt at the same part of the body of the convict as he has caused to the victim or by causing his death if he has committed qatliamd in exercise Of the right of the victim or a Wali;

(l) "ta'zir" means purushment other than qisas, diyat, arsh , or daman; and

(m) "wali" means a person entitled to claim qisas.

**300. Qatl-e-Amd:**

Whoever, with the intention of causing death or with the intention of causing bodily injury to a person, by doing an act which in the ordinary course of nature is likely to

cause death, or with-the knowledge that his act is so imminently dangerous that it must in all probability cause death, causes the death of such person, is said to commit qatl-e-amd.

**301. Causing death of person other than the person whose death was intended:**

Where a person, by doing anything which he intends or knows to be likely to cause death, causes death of any person whose death he neither intends nor knows himself to be likely to cause, such an act committed by the offender shall be liable for qatl-i-amd.

**302. Punishment of qatl-i-amd:**

Whoever commits qatl-e-amd shall, subject to the provisions of this Chapter be:

(a) punished with death as qisas;

(b) punished with death or imprisonment for life as ta'zir having regard to the facts and circumstances of the case, if the proof in either of the forms specified in Section 304 is not available; or

(c) punished with imprisonment of either description for a term which may extend to twenty-five years, where according to the injunctions of Islam the punishment of qisas is not applicable

Provided that nothing in this clause shall apply to the offence of qatl-i-amd if committed in the name or on the pretext of honour and the same shall fall within the ambit of (a) and (b), as the case may be.

**303. Qatl committed under ikrah-i-tam or ikrah-i-naqis:**

Whoever commits qatl:

(a) under Ikrah-i-tam shall be punished with imprisonment for a term which may extend to twenty-five years but shall not be less than ten years and the person causing 'ikrah-itam' shall be punished for the kind of Qatl committed as a consequence of ikrah-i-tam; or

(b) under 'ikrah-i-naqis' shall be punished for the kind of Qatl committed by him and the person, causing 'ikrah-i-naqis, shall be punished with imprisonment for a term which may extend to ten years.

**304. Proof of qatl-i-amd liable to qisas, etc.:**

(1) Proof of qatl-i-amd shall be in any of the following forms, namely: -

(a) the accused makes before a Court competent to try the offence a voluntary and true confession of the commission of the offence; or

(b) by the evidence as provided in Article 17 of the Qanun-e-Shahadat, 1984 (P.O. No. 10 of 1984).

(2) The provisions of sub-section (1) shall, mutatis, mutandis, apply to a hurt liable to qisas.

**305. Wali:**

In case of qatl, the wali shall be--

(a) the heirs of the victim, according to his personal law [but shall not include the accused or the convict in case of qatl-i-amd if committed in the name or on the pretext of honour] ; and

(b) the Government, if there is no heir.

**306. Qatl-e-amd not liable to qisas:**

Qatl-i-Amd shall not be liable to qisas in the following cases, namely:--

(a) when an offender is a minor or insane:

Provided that, where a person liable to qisas associates himself in the commission of the offence with a person not liable to qisas, with the intention of saving himself from qisas, he shall not be exempted from qisas;

(b) when an offender causes death of his child or grand-child, how low-so-ever; and

(c) when any wali of the victim is a direct descendant, how low-so-ever, of the offender.

**307. Cases in which Qisas for qatl-i-amd shall not be enforced:**

(1) Qisas for qatl-i-amd shall not be enforced in the following cases, namely:--

(a) when the offender dies before the enforcement of qisas;

(b) when any wali voluntarily and without duress, to the satisfaction of the Court,

waives the right of qisas under Section 309 or compounds under Section 310 and

(c) when the right of qisas devolves on the offender as a result of the death of the wali of the victim, or on, the person who has no right of qisas against the offender.

(2) To satisfy itself that the wali has waived the right of qisas under Section 309 or compounded the right of qisas under Section 310 voluntarily and without duress the Court shall take down the statement of the wali and such other persons as it may deem necessary on oath and record an opinion that it is satisfied that the Waiver or, as the case may be, the composition, was voluntary and not the result of any duress.

Illustrations

(i) A kills Z, the maternal uncle of his son B. Z has no other wali except D the wife of A. D has the right of qisas from A but if D dies, the right of qisas shall devolve on her son B who is also the son of the offender A. B cannot claim qisas against his father. Therefore, the qisas cannot be enforced.

(ii) B kills Z, the brother of their husband A. Z has no heir except A. Here A can claim qisas from his wife B. But if A dies, the right of qisas shall devolve on his son D who is also son of B, the qisas cannot be enforced against B.

**308. Punishment in qatl-i-amd not liable to qisas, etc.:**

(1) Where an offender guilty of qatl-i-amd is not liable to qisas under Section 306 or the gisas is not enforceable under clause (c) of Section 307, he shall be liable to diyat:

Provided that, where the offender is minor or insane, diyat shall be payable either from his property or, by such person as may be determined by the Court:

Provided further that where at the time of committing qatl-i-amd the offender being a minor, had attained sufficient maturity of being insane, had a lucid interval, so as to be able to realize the consequences of his act, he may also be punished with imprisonment of either description for a term which may extend to 116[twenty-five years] 116 as ta'zir.

Provided further that, where the qisas is not enforceable under clause (c) of Section 307, the offender shall be liable to diyat only if there is any wali other than offender and if there is no wali other than the offender, he shall be punished with imprisonment of either description for a term which may extend to 117[twenty-five years] 117 years as ta'zir.

(2) Notwithstanding anything contained in sub-section (i), the Court, having regard to the facts and circumstances of the case in addition to the punishment of diyat, may punish the offender with imprisonment of either description for a term which may extend to 118 [twenty-five years] 118 years, as ta'zir.

**309. Waiver (Afw) of qisas in qatl-i-amd:**

(1) In the case of qatl-i-amd, an adult sane wali may, at any time and without any compensation, waive his right of qisas:

Provided that the right of qisas shall not be waived;

(a) where the Government is the wali, or

(b) where the right of qisas vests in a minor or insane.

(2) Where a victim has more than one Wali any one of them may waive his right of qisas:

Provided that the wali who does not waive the right of qisas shall be entitled to his share of diyat.

(3) Where there are more than one victim, the waiver of the right of qisas by the wali of one victim shall not affect the right of qisas of the wali of the other victim.

(4) Where there are more than one offenders, the waiver of the right of qisas against one offender shall not affect the right of qisas against the other offender.

**310. Compounding of qisas (Sulh) in qatl-i-amd:**

(1) In the case of qatl-i-amd, an adult sane wali may, at any time on accepting badl-i-sulh, compound his right of qisas:

[ Provided that a female shall not be given in marriage or otherwise in badal-i-sulh.]

(2) Where a wali is a minor or an insane, the wali of such minor or insane wali may compound the right of qisas on behalf of such minor or insane wali:

Provided that the value of badf-i-sufh shall not be less than the value of diyat.

(3) Where the Government is the wali, it may compound the right of qisas:

Provided that fee value of badi-i-sulh shall not be less than the value of diyat.

(4) Where the badl-i-sulh is not determined or is a property or a right the value of which cannot be determined in terms of money under Shari'ah, the right of qisas shall be deemed to have been compounded and the offender shall be liable to diyat.

(5) Badl-i-sulh may be paid or given on demand or on a deferred date as may be agreed upon between the offender and the wali.

Explanation: In this section, Badl-i-sulh means the mutually agreed compensation according to Shari'ah to be paid or given by the offender to a wali in cash or in kind or in the form of movable or immovable property.

**310A. Punishment for giving a female in marriage or otherwise in badal-i-sulh:**

Whoever gives a female in marriage or otherwise in badal-i-sulh shall be punished with rigorous imprisonment which may extend to ten years but shall not be less than three years.

**311. Ta'zir after waiver or compounding of right of qisas in qatl-i-amd:**

Notwithstanding anything contained in Section 309 or Section 310, where all the wali do not waive or compound the right of qisas, or if the principle of fasad-fil-arz the Court may, having regard to the facts and circumstances of the case, punish an offender against whom the right of qisas has been waived or compounded with death or imprisonment for life or imprisonment of either description for a term of which may extend to fourteen years as ta'zir

Provided that if the offence has been committed in the name or on the pretext of honour, the imprisonment shall not be less than ten years.

Explanation: For the purpose of this section, the expression fasad-fil-arz shall include the past conduct of the offender, or whether he has any previous convictions, or the brutal or shocking manner in which the offence has been committed which is outrageous to the public conscience, or if the offender is considered a potential danger to the community or if the offence has been committed in the name or on the pretext of honour.

**312. Qatl-i-amd after waiver or compounding of qisas:**

Where a wali commits qatl-iamd of a convict against whom the right of qisas has been waived under Section 309 or compounded under Section 310, such wali shall be punished

with-

(a) qisas, if he had himself, waived or compounded the right of qisas against the convict or had knowledge of such waiver of-composition by another wali, or

(b) diyat, if he had no knowledge of such waiver or composition.

**313. Right of qisas in qatl-i-amd:**

(1) Where there is only one wali, he alone has the right of qisas in qatl-i-amd but, if there are more than one, the right of qisas vests in each of them.

(2) If the victim-

(a) has no wali, the Government shall have the right of qisas; or

(b) has no wali other than a minor or insane or one of the wali is a minor or insane, the father or if he is not alive the paternal grandfather of such wali shall have the right of qisas on his behalf:

Provided that, if the minor or insane wali has no father or paternal grandfather, how high-so-ever, alive and no guardian has been appointed by the Court, the Government shall have the right of qisas on his behalf.

**314. Execution of qisas in qatl-i-amd:**

(1) Qisas in Qatll-i-amd shall be executed by a functionary of the Government by causing

death of the convict as the Court may direct.

(2) Qisas shall not be executed until all the wali are present at the time of execution, either personally or through their representatives authorised by them in writing in this behalf:

Provided that where a wali or his representative fails to present himself on the date, time and place of execution of qisas after having been informed of the date, time and place as certified by the Court, an officer authorised by the Court shall give permission for the execution of qisas and the Government shall cause execution of qisas in the absence of such wali.

(3) If the convict is a woman who is pregnant, the Court may, in consultation with an authorised medical officer, postpone the execution of qisas up to a period of two years after the birth of the child and during this period she may be released on bail on furnishing of security to the satisfaction of the Court, or, if she is not so released she shall, be dealt with as if sentenced to simple imprisonment.

**315. Qatl shibh-i-amd:**

Whoever, with intent to cause harm to the body or mind of any person, causes the death of that or of any other person by means of a weapon or an act which in the ordinary course of nature is not likely to cause death is said to commit qatl shibh-i-amd.

Illustration

A in order to cause hurt strikes Z with a stick or stone which in the ordinary course of nature is not likely to cause death. Z dies as a result of such hurt. A shall be guilty of Qatl shibh-i-amd.

**316. Punishment for Qatl shibh-i-amd:**

Whoever commits qatl shibh-i-amd shall be liable to diyat and may also be punished with imprisonment of either description for a term which may extend to 127[twenty-five years] 127 years as ta'zir.

**317. Person committing qatl debarred from succession:**

Where a person committing qatl-i-amd or Qatl shibh-i-amd is an heir or a beneficiary under a will, he shall be debarred from succeeding to the estate of the victim as an heir or a beneficiary.

**318. Qatl-i-khata:**

Whoever, without any intention to cause death of, or cause harm to, a person causes death of such person, either by mistake of act or by mistake of fact, is said to commit qatl-ikhata.

Illustrations

(a) A aims at a deer but misses the target and kills Z who is standing by, A is guilty of qatl-i-khata.

(b) A shoots at an object to be a boar but it turns out to be a human being. A is guilty of qatl-i-khata.

**319. Punishment for qatl-i-khata:**

Whoever commits qatl-i-khata shall be liable to diyat:

Provided that, where qatl-i-khata is committed by a rash or negligent act, other than rash or negligent driving, the offender may, in addition to diyat, also be punished with imprisonment of either description for a term which may extend to five years as ta'zir.

**320. Punishment for qatl-i-khata by rash or negligent driving:**

Whoever commits qatl-ikhata by rash or negligent driving shall, having regard to the facts and circumstances the case, in addition to diyat, be punished with imprisonment of either description for a term which may extend to ten years.

**321. Qatl-bis-sabab:**

Whoever, without any intention, cause death of, or cause harm to, any person, does any unlawful act which becomes a cause for the death of another person, is said to commit qatlbis-sabab.

Illustration

A unlawfully digs a pit in the thoroughfare, but without any intention to cause death of, or harm to, any person, B while passing from there falls in it and is killed. A has committed qatl-bis-sabab.

**322. Punishment for qatl-bis-sabab:**

Whoever commit qatl bis-sabab shall be liable to diyat.

**323. Value of diyat:**

(1) The Court shall, subject to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah and keeping in view the financial position of the convict and the heirs of the victim, fix the value of diyat which shall not be less than the value of thirty thousand six hundred and thirty grams of silver.

(2) For the purpose of sub-section (1), the Federal Government shall, by notification in the official Gazette, declare the value of Silver, on the first day of July each year or on such date as it may deem fit, which shall be the value payable during a financial year.

**324. Attempt to commit qatl-i-amd:**

Whoever does any act with such intention or knowledge, and under such circumstances, that, if he by that act caused qatl, he would be guilty of qatl-i-amd, shall be punished with

imprisonment for either description for a term which may extend to ten years 128[but shall not be less than five years if the offence has been committed in the name or on the pretext of honour] 128, and shall also be liable to fine, and, if hurt is caused to any person by such act, the offender shall, in addition to the imprisonment and fine as aforesaid, be liable to the punishment provided for the hurt caused:

Provided that where the punishment for the hurt is qisas which is not executable, the offender shall be liable to arsh and may also be punished with imprisonment of either description for a term which may extend to seven years.

**325. Attempt to commit suicide:**

Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

**326. Thug:**

Whoever shall have been habitually associated with any other or others for the purpose of committing robbery or child-stealing by means of or accompanied with Qatl, is a thug.

**327. Punishment:**

Whoever is a thug, shall be punished with imprisonment for life and shall also be liable to fine.

**328. Exposure and abandonment of child under twelve years by parent or person having care of it:**

Whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment' of either description for- a term which may extend to seven years, or with fine, or with both.

Explanation: This section is not intended to prevent the trial of the offender for qatl-i-amd or qatl-i-shibh-i-amd or qatl-bis-sabab, as the case may be, if the child dies in consequence of the exposure.

**329. Concealment of birth by secret disposal of dead body:**

Whoever, by secretly burying or otherwise disposing of the dead body of a child whether such child dies before or after or during its birth, intentionally conceals or endeavours to conceal the birth shall be punishable with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

**330. Disbursement of diyat:**

The diyat shall be disbursed among the heirs of the victim according to their respective shares in inheritance: Provided that, where an heir foregoes his share, the diyat shall not be recovered to the extent of his share.

**331. Payment of Diyat:**

(1) The diyat may be made payable in lumpsum or in instalments spread over a period of three years from the date of the final judgment.

(2) Where a convict fails to pay diyat or any part thereof within the period specified in subsection (1), the convict may be kept in jail and dealt with in the same manner as if sentenced to simple imprisonment until the diyat is paid full or may be released on bail If he furnishes security equivalent to the amount of diyat to the satisfaction of the Court.

(3) Where a convict dies before the payment of diyat or any part thereof, it shall be recovered from his estate.

**332 Hurt:**

(1) Whoever causes pain, harm, disease, infianity or injury to any person or impairs, disables or dismembers any organ of the body or part thereof of any person without causing his death, is said to cause hurt.

(2) The following are the kinds of hurt:

(a) Itlaf-i-udw

(b) Itlaf-i-salahiyyat-i-udw

(c) shajjah

(d) jurh and

(e) all kinds of other hurts.

**333. Itlaf-i-udw:**

Whoever dismembers, amputates, severs any limb or organ of the body of another person is said to cause Itlaf-i-udw.

**334. Punishment for Itlaf-udw:**

Whoever by doing any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person causes Itlaf-i-udw of any person, shall, in consultation with the authorised medical officer, be punished with qisas, and if the qisas is not executable keeping in view the principles of equality in accordance with the Injunctions of Islam, the offender shall be liable to arsh and may also be punished with imprisonment of either description for a term which may extend to ten years as ta'zir.

**335. Itlaf-i-salahiyyat-i-udw:**

Whoever destroys or permanently impairs the functioning, power or capacity of an organ

of the body of another person, or causes permanent disfigurement is said to cause itlaf-isalahiyyat-i-udw.

**336. Punishment for itlaf-i-salahiyyat-i-udw:**

Whoever, by doing any act with the intention of causing hurt to any person, or with the knowledge that he is likely to cause hurt to any person, causes itlaf-i-salahiyyat-i-udw of any person, shall, in consultation with the authorised medical officer, be punished with qisas and if the qisas is not executable, keeping in view the principles of equality in accordance with the Injunctions of Islam, the offender shall be liable to arsh and may also be punished with imprisonment of either description for a term which may extend to ten years as taz'ir.

**337. Shajjah:**

(1) Whoever causes, on the head or face of any person, any hurt which does not amount to

itlaf-i-udw or itlaf-i-salahiyyat-i-udw, is said to cause shajjah.

(2) The following are the kinds of shajjah namely:-

(a) Shajjah-i-Khafifah

(b) Shajjah-i-mudihah

(c) Shajjah-i-hashimah

(d) Shajjah-i-munaqqilah

(e) Shaijah-i-ammah and

(f) Shajjah-i-damighah

(3) Whoever causes shajjah:-

(i) without exposing bone of the victim, is said to cause shajjah-i-khafifah;

(ii) by exposing any bone of the victim without causing fracture, is said to cause shajjah-imudihah;

(iii) by fracturing the bone of the victim, without dislocating it, is said to cause shajjah-ihashimah;

(iv) by causing fracture of the bone of the victim and thereby the bone is dislocated, is said to cause shajfah-i-munaqqilah;

(v) by causing fracture of the skull of the victim so that the wound touches the membrane of the brain, is said to cause shajjah-i-ammah;

(vi) by causing fracture of the skull of the victim and the wound ruptures the membrane of the brain is said to cause shajjah-i-damighah.

**337-A. Punishment of shajjah:**

Whoever, by doing any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, causes-

(i) shajjah-i-khafifah to any person, shall be liable to daman and may also be punished with imprisonment of either description for a term which may extend to two years as ta'zir,

(ii) shajjah-i-mudihah to any person, shall, in consultation with the authorised medical officer, be punished with qisas, and if the, qisas is not executable keeping in view the principles of equality, in accordance with the Injunctions of Islam, the convict shall be liable to arsh which shall be five percent of the diyat and may also be punished with imprisonment of either description for a term which may extend to five years as ta'zir,

(iii) shajjah-i-hashimah to any person, shall be liable to arsh which shall be ten per cent of the diyat and may also be punished with imprisonment of either description for a term which may extend to ten years as ta'zir,

(iv) shajiah-i-munaqqilah to any person, shall be liable to arsh which shall be fifteen per cent of the diyat and may also be punished with imprisonment of either description for a term which may extend to ten years as ta 'zir,

(v) shajjah-i-ammah to any person, shall be liable to arsh which shall be one-third of the diyat and may also be punished with imprisonment of either description for a term which may extend to ten years as ta'zir, and

(vi) shajjah-i-damighah to any person shall be liable to arsh which shall be one-half of diyat and may also be punished with imprisonment of either description for a term which may extend to fourteen years as ta'zir.

**337- B. Jurh:**

(1) Whoever causes on any part of the body of a person, other than the head or face, a hurt which leaves a mark of the wound, whether temporary or permanent, is said to cause jurh.

(2) Jurh is of two kinds, namely:-

(a) Jaifah ; and

(b) Ghayr-jaifah.

**337-C. Jaifah:**

Whoever causes jurh in which the injury extends to the body cavity of the trunk, is said to cause jaifah.

**337-D.Punishment for jaifah:**

Whoever by doing any act with the intention of causing hurt to a person or with the knowledge that he is likely to cause hurt to such person, causes jaifah to such person, shall be liable to arsh which shall be one-third of the diyat and may also be punished with imprisonment of either description for a term which may extend to ten years as ta'zir.

**337-E. Ghayr-jaifah:**

(1) Whoever causes jurh which does not amount to jaifah, is said to cause ghayr-jaifah.

(2) The following are the kinds of ghayr-faifah, namely:-

(a) damihah

(b) badi'ah

(c) mutalahimah

(d) mudihah

(e) hashimah; and

(f) munaqqilah

(3) Whoever causes ghayr-jaifah—

(i) in which the skin is ruptured and bleeding occurs, is said to cause damiyah;

(ii) by cutting or incising the flesh without exposing the bone, is said to cause

badi'ah;

(iii) by lacerating the flesh, is said to cause mutalahimah;

(iv) by exposing the bone, is said to cause mudihah;

(v) by causing fracture of a bone without dislocating it, is said to cause hashimah;

and

(vi) by fracturing and dislocating the bone, is said to cause munaqqilah.

**337-F. Punishment of ghayr-jaifah:**

Whoever by doing any act with the intention of causing hurt to any person, or with the knowledge that he is likely to cause hurt to any person, causes:-

(i) damihah to any person, shall be liable to daman and may also be punished with imprisonment of either description for a term which may extend to one year as ta'zir;

(ii) badi'ah to any person, shall be liable to daman and may also be punished with imprisonment of either description for a term which may extend to three years as ta'zir;

(iii) mutafahimah to any person, shall be liable to daman and may also be punished with imprisonment of either description for a term which may extend to three years as ta'zir;

(iv) mudihah to any person, shall be liable to daman and may also be punished with imprisonment of either description for a term which may extend to five years as ta'zir;

(v) hashimah to any person, shall be liable to daman and may also be punished with imprisonment of either description for a term which may extend to five years as ta'zir, and

(vi) munaqqilah to any person, shall be liable to daman and may also be punished with imprisonment of either description for a term which may extend to seven years as ta'zir.

**337-G. Punishment for hurt by rash or negligent driving:**

Whoever causes hurt by rash or negligent driving shall be liable to arsh or daman specified for the kind of hurt caused and may also be punished with imprisonment of either description for a term which may extend to five years as ta'zir.

**337-H.Punishment for hurt by rash or negligent act:**

(1) Whoever causes hurt by rash or negligent act, other than rash or negligent driving, shall be liable to arsh or daman specified for the kind of hurt caused and may also be punished with imprisonment of either description for a term which may extend to three years as ta'zir.

(2) Whoever does any act so rashly or negligently as to endanger human life or the personal safety of other, shall be punished with imprisonment of either-description for a term which may extend to three months, or with fine, or with both.

**337-I. Punishment for causing hurt by mistake (khata):**

Whoever causes hurt by mistake (khata) shall be liable to arsh or daman specified for the kind of hurt caused.

**337-J. Causing hurt by mean of a poison:**

Whoever administers to or causes to be taken by, any person, any poison or any stupefying, intoxicating or unwholesome drug, or such other thing with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence, or knowing it to be likely that he will thereby cause hurt may, in addition to the punishment of arsh or daman provided for the kind of hurt caused, be punished, having regard to the nature of the hurt caused, with imprisonment of either description for a term which may extend to ten years.

**337-K. Causing hurt to extort confession, or to compel restoration of property:**

Whoever causes hurt for the purpose of extorting from the sufferer or any person interested in the sufferer any confession or any information which may lead to the detection of any offence or misconduct, or for the purpose of constraining the sufferer, or any person interested in the sufferer, to restore, or to cause the restoration of, any property or valuable security or to satisfy any claim or demand, or to give information

which may lead to the restoration of any property, or valuable security shall, in addition to the punishment of qisas, arsh or daman, as the case may be, provided for the kind of hurt caused, be punished, having regard to the nature of the hurt caused, with imprisonment of either description for a term which may extend to ten years as ta'zir.

**337-L.Punishment for other hurt:**

(1) Whoever causes hurt, not mentioned hereinbefore, which endangers life or which causes the sufferer to remain in severe bodily pain for twenty days or more or renders him unable to follow his ordinary pursuits for twenty days or more, shall be liable to daman and also be punished with imprisonment of either description for a term which may extend to seven years.

(2) Whoever causes hurt not covered by sub-section (1) shall be punished with imprisonment of either description for a term which may extend to two years, or with daman, or with both.

**337-M. Hurt not liable to qisas:**

Hurt shall not be liable to qisas in the following cases, namely:-

(a) when the offender is a minor or insane:

Provided that he shall be liable to arsh and also to ta'zir to be determined by the Court

having regard to the age of offender, circumstances of the case and the nature of hurt caused;

(b) when an offender at the instance of the victim causes hurt to him:

Provided that the offender may be liable to ta'zir provided for the kind of hurt caused by him;

(c) when the offender has caused itlaf-i-udw of a physically imperfect organ of the victim and the convict does not suffer from similar physical imperfection of such organ:

Provided that the offender shall be liable to arsh and may also be liable to ta'zir provided for the kind of hurt caused by him; and

(d) when the organ of the offender liable to qisas is missing:

Provided that the offender shall be liable to arsh and may also be liable to ta'zir provided for the kind of hurt caused by him.

Illustrations

(i) A amputates the right ear of Z, the half of which was already missing. If A's right ear is perfect, he shall be liable to arsh and not qisas.

(ii) If in (he above illustration, Z's ear is physically perfect but without power of hearing, A shall be liable to qlsas because the defect in Z's ear is not physical.

(iii) If in illustration (i) Z's ear is pierced, A shall be liable to qisas because such minor defect is not physical imperfection.

**337-N. Cases in which qisas for hurt shall not be enforced:**

(1) The qisas for a hurt shall not be enforced in the following cases, namely:-

(a) when the offender dies before execution of qisas;

(b) when the organ of the offender liable to qisas is lost before the execution of qisas:

Provided that offender shall be liable to arsh, and may also be liable to ta'zir provided for the kind of hurt caused by him;

(c) when the victim waives the qisas or compounds the offence with badl-i-sufh; or

(d) when the right of qisas devolves on the person who cannot claim qisas against the offender under this Chapter:

Provided that the offender shall be liable to arsh, if there is any wali other than the offender, and if there is no wali other than the offender he shall be liable to ta'zir provided for the kind of hurt caused by him.

(2) Notwithstanding anything contained in this Chapter, in all cases of hurt, the Court may, having regard to the kind of hurt caused by him, in addition to payment of arsh, award ta'zir to an offender who is a previous convict, habitual or hardened, desperate

or dangerous criminal or the offence has been committed by him in the name or on the pretext of honour

Provided that the ta'zir shall not be less than one-third of the maximum imprisonment provided for the hurt caused if the offender is a previous convict, habitual, hardened, desperate or dangerous criminal or if the offence has been committed by him in the name or on the pretext of honour.

**337-O.Wali in case of hurt:**

In the case of hurt: The wali shall be-

(a) the victim:

Provided that, if the victim is a minor or insane, his right of qisas shall be exercised by his father or paternal grandfather, how high-so-ever;

(b) the heirs of the victim, if the later dies before the execution of qisas; and

(c) the Government, in the absence of the victim or the heirs of the victim.

**337-P. Execution of qisas for hurt:**

(1) Qisas shall be executed in public by an authorised medical officer who shall before such execution examine the offender and take due care so as to ensure that the execution of qisas does not cause the death of the offender or exceed the hurt caused

by him to the victim.

(2) The wali shall be present at the time of execution and if the wali or his representative is not present, after having been informed of the date, time and place by the Court an officer authorised by the Court in this behalf shall give permission for the execution of qisas.

(3) If the convict is a woman who is pregnant, the Court may, in consultation with an authorised medical officer, postpone the execution of qisas upto a period of two years after the birth of the child and during this period she may be released on bail on furnishing of security to the satisfaction of the Court or, if she is not so released, shall be dealt with as if sentenced to simple' imprisonment.

**337-Q. Arsh for single organs:**

The arsh for causing itlaf of an organ which is found singly in a human body shall be equivalent to the value of diyat.

Explanation: Nose and tongue are included in the organs which are found singly in a human body.

**337-R. Arsh for organs in pairs:**

The arsh for causing itlaf of organs found in a human body in pairs shall be equivalent to

the value of diyat and if itlaf is caused to one of such organs the amount of arsh shall be one-half of the diyat:

Provided that, where the victim has only one such organ or his other organ is missing or has already become incapacitated the arsh for causing itlaf of the existing or capable organ shall be equal to the value of diyat.

Explanation: Hands, feet, eyes, lips and breasts are included in the organs which are found in a human body in pairs.

**337- S. Arsh for the organs in quadruplicate:**

The arsh for causing itlaf of organs found in a human body in a set of four shall be equal to-

(a) one-fourth of the diyat, if the itlaf is one of such organs;

(b) one-half of the diyat, if the itlaf is of two of such organs;

(c) three-fourth of the diyat, if the itlaf is of three such organs; and

(d) full diyat, if the itlaf is of all the four organs.

Explanation: Eyelids are organs which are found in a human body in a set of four.

**337-T. Arsh for fingers:**

(1) The arsh for causing itlaf of a finger of a hand or foot shall be one-tenth of the diyat.

(2) The arsh for causing itlaf of a joint of a finger shall be one-thirteenth of the diyat:

Provided that where the itlaf is of a joint of a thumb, the arsh shall be one-twentieth of the diyat.

**337-U. Arsh for teeth:**

(1) The arsh for causing itlaf of a tooth, other than a milk tooth, shall be one-twentieth of the diyat.

Explanation: The impairment of the portion of a tooth outside the gum amounts to causing itlaf of a tooth.

(2) The arsh for causing itlaf of twenty or more teeth shall be equal to the value of diyat.

(3) Where the itlaf is of a milk tooth, the accused shall be liable to daman and may, also be punished with imprisonment of either description for a term which may extend to one year:

Provided that, where itlaf of a milk tooth impedes the growth of. a new tooth, the accused shall be liable to arsh specified in sub-section (1).

**337-V. Arsh for hair:**

(1) Whoever uproots:-

(a) all the hair of the head, beard, moustaches eyebrow, eyelashes or any other part of

the body shall be liable to arsh equal to diyat and may also be punished with imprisonment of either description for a term which may extend to three years as ta'zir;

(b) one eyebrow shall be liable to arsh equal to one- half of the diyat; and

(c) one eyelash, shall be liable to arsh equal to one fourth of the diyat.

(2) Where the hair of any part of the body of the victim are forcibly removed by any process not covered under sub section (1), the accused shall be liable to daman and imprisonment of either description which may extend to one year.

**337-W. Merger of arsh:**

(1) Where an accused more than one hurt, he shall be liable to arsh specified for each hurt separately:

Provided that, where:-

(a) hurt is caused to an organ, the accused shall be liable to arsh for causing hurt to such organ and not for arsh for causing hurt to any part of such organ; and

(b) the wounds join together and form a single wound, the accused shall be liable to arsh for one wound.

Illustrations

(i) A amputates Z's fingers of the right hand and then at the same time amputates that hand from the joint of his writs. There is separate arsh for hand and for fingers. A shall, however, be liable to arsh specified for hand only.

(ii) A twice stabs Z on his thigh. Both the wounds are so close to each other that they form into one wound. A shall be liable to arsh for one wound only.

(2) Where, after causing hurt to a person, the offender causes death of such person by committing qatl liable to diyat, arsh shall merge into such diyat.

Provided that the death is caused before the healing of the wound caused by such hurt.

**337-X. Payment of arsh:**

(1) The arsh may be made payable in a lump sum or in instalments spread over a period of three years from the date of the final judgment.

(2) Where a convict fails to pay arsh or any part thereof within the period specified in subsection (1), the convict may be kept in jail and dealt with in the same manner as if sentenced to simple imprisonment until arsh is paid in full may be released on bail if he furnishes security equal to amount of arsh to the satisfaction of the Court.

(3) Where a convict dies before the payment of arsh any part thereof, it shall be recovered from his estate.

**337-Y. Value of daman:**

(1) The value of daman may be determined by the Court keeping in view:-

(a) the expenses incurred on the treatment of victim;

(b) loss or disability caused in the functioning or power of any organ; and

(c) the compensation for the anguish suffered by the victim.

(2) In case of non-payment of daman, it shall be recovered from the convict and until daman is paid in full to the extent of his liability, the convict may be kept in jail and dealt with in the same manner as if sentenced to simple imprisonment or may be released on bail if he furnishes security equal to the amount of daman to the satisfaction of the Court.

**337-Z. Disbursement of arsh or daman:**

The arsh or daman shall be payable to the victim or, if the victim dies, to his heirs according to their respective shares in inheritance.

**338. Isqat-i-Hamal:**

Whoever causes woman with child whose organs have not been formed, to miscarry, if such miscarriage is not caused in good faith for the purpose of saving the life of the woman, or providing necessary treatment to her, is said to cause isqat-i-hamal.

Explanation: A woman who causes herself to miscarry is within the meaning of this section.

**338-A. Punishment for Isqat-i-haml:**

Whoever cause isqat-i-haml shall be liable to punishment as ta'zir-

(a) with imprisonment of either description for a term which may extend to three years, if isqat-i-haml is caused with the consent of the woman; or

(b) with imprisonment of either description for a term which may extend to ten years, if isqat-i-haml is caused without the consent of the woman:

Provided that, if as a result of isqat-i-haml, any hurt is caused to woman or she dies, the convict shall also be liable to the punishment provided for such hurt or death as the case may be.

**338-B. Isqat-i-janin:**

Whoever causes a woman with child some of whose limbs or organs have been formed to miscarry, if such miscarriage is not caused in good faith for the purpose of saving the life of the woman, is said to cause Isqat-i-janin

Explanation: A woman who causes herself to miscarry is within the meaning of this section.

**338-C. Punishment for Isqat-i-janin:**

Whoever causes isqat-i-ianin shall be liable to:-

(a) one-twentieth of the diyat if the child is born dead;

(b) full diyat if the child is born alive but dies as a result of any act of the offender; and

(c) imprisonment of either description for a term which may extend to seven years as ta'zir:

Provided that, if there are more than one child in the womb of the woman, the offender shall be liable to separate diyat or ta'zir, as the case may be/for every such child:

Provided further that if, as a result of isqat-i-fanin, any hurt is caused to the woman or she dies, the offender shall also be liable to the punishment provided for such hurt or death, as the case may be.

**338-D. Confirmation of sentence of death by way of qisas or tazir, etc.:**

A sentence of death awarded by way of qisas or ta'zir, or a sentence of qisas awarded for causing hurt, shall not be executed, unless it is confirmed by the High Court.

**338-E. Waiver or compounding of offences:**

(1) Subject to the provisions of this Chapter and Section 345 of the Code of. Criminal Procedure, 1898 (V of 1898), all offences under this Chapter may be waived or

compounded and the provisions of Sections 309 and 310 shall, mutatis mutandis, apply to the waiver or compounding of such offences:

Provided that, where an offence has been waived or compounded, the Court may, in its discretion having regard to the facts and circumstances of the case, acquit or award ta'zir to the offender according to the nature of the offence.

Provided further that where an offence under this Chapter has been committed in the name or on the pretext of honour, such offence may be waived or compounded subject to such conditions as the Court may deem fit to impose with the consent of the parties having regard to the facts and circumstances of the case.

(2) All questions relating to waiver or compounding of an offence or awarding of punishment under Section 310, whether before or after the passing of any sentence, shall be determined by trial Court:

Provided that where the sentence of qisas or any other sentence is waived or compounded during the pendency of an appeal, such questions may be determined by the trial Court.

**338-F. Interpretation:**

In the interpretation and application of the provisions of this Chapter, and in respect of

matter ancillary or akin thereto, the Court shall be guided by the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah.

**338-G. Rules:**

The Government may, in consultation with the Council of Islamic ideology, by notification in the official Gazette, make such rules as it may consider necessary for carrying out the purposes of this Chapter.

**338-H. Saving:**

Nothing in this Chapter, except Sections 309. 310 and 338-E. shall apply to cases pending before any Court immediately before the commencement of the Criminal Law (Second Amendment) Ordinance, 1990 (VII of 1990), or to the offences committed before such commencement.