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The Nature of Medical Obligations in The Light of Comparative Study

One finds out by scrutinizing in the nature of the obligations of medical professionals that although the jurists have not explicitly mentioned the performance obligation or best efforts obligation of the medical professionals, but this is obviously evident from the tenor of their words and statements. In the Shiite jurisprudence the majority of jurists hold that the obligations of the permitted proficient physician are performance obligations and the physician's responsibility might be waived only in case of obtaining clearance before the operation. In the Sunnite jurisprudence, however the majority of jurists oppose the opinion of Shiite jurists and they consider the physician's obligation as the best efforts obligation in principle. In the laws of Islamic Countries, France and Common Law the physician's obligation is basically regarded as the best efforts obligation too. It also seems in the statutory law of Iran that contrary to the legislature's view that has apparently deemed the physician's obligation a performance obligation following the majority of jurists, the physician's obligation is in principle the best efforts obligation in case of obtaining permission and enjoying proficiency; but in some particular cases and based on reasonable grounds, the nature of medical professions' obligations has been introduced as a performance obligation. Therefore, the nature of medical obligations and its manifestations are studied in this paper with a comparative view. For this purpose, the analytical discussion of the obligations of the medical professionals and affiliates in some of their disputed, common and involved applications such as prostheses, blood transfusion, medical trials, anesthesia process, guarantee of the patients' health and beauty surgeries have been addressed.

Keywords: nature of obligation; performance obligation; best efforts obligation; medical professionals

Introduction

After the delivery of the famous Mercier judgment by the Supreme Court of France on 20/05/1936, most lawyers unanimously agree that the relations between medicines and patients are in principle contractual (Panneau, 1996, p22). Following the issuance of the mentioned judgment, the contractual responsibility of medical professions was accepted in most countries (Verge et Nyc, 1997, p63; Ripert, 1953, p431). Under the common law system, although the responsibility of medical professions has been examined less in contractual terms (Markesinis et Deakin, 1999, p260) but many cases of medical responsibility are considered as resulted from the contract under that system too (Kennedy, Grubb, 1988, p288). In Iran, it also seems that the general principle in the responsibility of the physician is a contractual one (Abbasi, 2010, p60). The performance obligation is the basis in the contractual obligations, but abiding by this will have evil effects in treatment contracts and there are some questions to this effect that have not been addressed. Are the obligations of the medical practitioners are a performance obligations or best efforts obligations? Which is the root and which is the branch? Which are the most important exceptions to the root and for what reason? Do root and branch have a relation with the public policy and/or is it likely to be changed?

For the settlement of this question that what is the subject of obligation, the lawyers have divided it into two types of best effort obligations and performance obligations (Flour, Aubert, Savaux, 2002, pp 26-27) and some others have added the guarantee obligations to it (Malory & Ines, Obligations, No.472 cited by Katouzian, 2008, Vol.4, p151). Under this division, sometimes the debtor undertakes to provide the means to attain the favorite outcome and to apply all his qualifications, but in the best efforts obligations, the establishment of the fact that the contract has not achieved its final end is not sufficient to prove the nonperformance of the contract, since the obligor has not undertaken to achieve that end (Katouzian, 2008, Vol.4, pp.151-2). Although this division has been criticized by some lawyers (Shahidi, 2007, Vol.3, pp.151-213, Riper & Boulanger, Vol.2, No.783, cited by Katouzian, 2008, Vol.4, p.152) that is beyond the scope of this paper, nevertheless it is apparently sufficient for the separation of the nature of obligations, particularly the obligations of the medical professions and furthermore, the arguments of the opponents do not have a firm validity and basis (Salehi, Fallah, Abbasi, 2010). Now, since the advantages of this division have been clarified, we will deal with the comparative study of the nature of the obligations of the medical practitioners.

Part 1: Study of the Nature of Medical Obligations in the Legal Systems

Chapter 1: Nature of Medical Obligations under Legal Systems of France and the UK

1. France

Before 1936, the physician's responsibility was studied within the frame of extra-contractual responsibility in the legal system of France, but after the delivery of the Mercier judgment the physician's responsibility was considered as to be contractual and a great development occurred in the law of this state (Verge, 1953, p.431). That judgment held that the physician's responsibility was a contractual one and their obligations were of the type of best efforts obligations save for exceptional cases (Flour, Aubert et Saveaux, 2002, pp. 26-Panneau, 1996, pp. 26-27) and terminated a century of the governance of the theory that was based on the obligatory responsibility of the physicians (Panneau, 1996, p.22). All the French lawyers hold that the obligations of the medical practitioners are in principle the best efforts obligations not the performance obligations (Savatier, 1956, p.244, Montador, 1979, p.42-Kornproobst, 1957, p.587).

Notwithstanding, they should apply all their efforts and resources to improve the patients, but they are not obliged to realize the outcome and to guarantee the patients' healing (Montador, 1979, p.42-Mazeau, 1931, p.48). Under these kinds of obligations, the claimant (the patient or his relatives) have to establish that the medical practitioners have committed fault. Some lawyers regard the mere infliction of damage as the indication of their fault and remove its burden of proof from the claimant and some others propose the theory of presumed fault reasoning that the patient is under the physician's control (Mazeau et Tunc, 1965, n.103-4- Drosner-Dolivet, 2003, p.121). The Supreme Court of France has explicitly declared the nature of medical professions obligations as to be the best efforts obligations in another judgment delivered on 18 December 1987 (Drosner-Dolivet, 2003, p.123). However, this has also been emphasized in the Articles 32 and 40 of the 1995 Medical Ethics Codes of that state (Flour, Aubert et Saveaux, 2002, pp.26-27). To justify this matter the French lawyers hold that the medical practitioners, aside from God, basically do not act under the control of anyone except their own conscience and honor and professional ethics and to hold them obliged to the performance obligation is a sort of injustice considering the relative defect of the medical science (Malicier, 1999, p.101). The famous phrase "je l'ai pansé, Dieu le guérit" in this country clearly shows the negation of performance obligation in respect of the obligations of medical practitioners (Salehi, 2010). The perspective of performance obligation for the obligations of the physicians has few proponents in France (Panneau, 1996, p.133) and the Patients and Health System Act approved on 04/03/2002 also has laid the physician's responsibility based on fault (Welsch, 2003, p.9 et suiv_Evin, 2003, p.9 et s-Guigue, 2006, p.82).

2. The UK

Although some common law lawyers maintain that the physician's responsibility does not result from the breach of contract and his obligation to compensate for damages and to cure and care is a result of the law's order (Markesinis and Deakin, 1999, p.260) but this does not mean the ignorance of contracts and in cases where the patient agrees privately with medical practitioners and the treatment process is carried out based on it, a contractual relation between the patient and the medical practitioners will be created the breach of which will cause the creation of responsibility for the medical practitioners (Kennedy and Grubb, 1998, p.288). In the UK, if a doctor undertakes a particular outcome, without considering the

guaranteed obligation by him, the courts will examine this point whether he has done the same desired and sufficient effort and skill that is done by a common individual holding the same extent of skill belonging to the same group? (Margaret, Brazier, 1992, 9137) and if the respondent (the physician, the surgeon, etc) cannot prove due care, then he will be considered in breach of his duty of care which is in fact a typical benchmark (Hunt, 2000, p.219). Also in the US, whenever the duty of care has been provided for the patient, the responsibility will be based on fault and their obligation will be the best efforts obligations (Jampion Junior, 2007, p.117).

Chapter 2: The Nature of Medical Obligations in the Legal System of the Islamic States

1. Jordan

Article 1 of the Jordanian Medical Act has provided that the physician's obligations are basically the best efforts obligations (Obligation of doing favor) not obtaining a certain outcome (performance obligation) (Salehi, Fallah, Abbasi, 2010). Also before that the Appeal Court of this state had introduced the obligations of medical practitioners as the best efforts obligations according to the principle during a case filed on 07/07/1980 (Neghaba-Al-Mohamin-Al-Ordoniah Journal, Appeal Court 90/1226, No.10 & 12, year 40, p.1709, cited by Al-Hyari, 1429, pp.46-47). The lawyers of this country also hold physicians only the guarantors for their errors by considering the physician's obligations as the best efforts obligations (Al-Samaadi, 2008, p.8).

2. Algeria

In Algeria, the physician's obligation is deemed the best efforts obligations pursuant to a judgment of the Supreme Administrative Tribunal issued on 13/01/1990 and in case the hospital personnel-including physicians, nurses, midwives, etc – do not completely perform their duties in respect of the process of treatment and do not make their best in this regard-without guaranteeing the patient's healing- the hospital will be responsible (al-Majalla al-Ghazaee Al-Jazaeryiah, 1429, p.46). The lawyers of this country also consider the physician's undertaking in the treatment contract in principle as the best efforts obligation (Ben chaabane, 1995, p. 771-Hannouz et Hakem, 1992, p.121). However, in case of infliction of damages to the patient or his relatives, the theory of presumed fault is applied and the burden of proof for the establishment of non-fault lies with the physician (Sahrawi, 2004, p.64ff.).

3. Syria

Although judgments delivered by the Syrian courts have deemed the physician's responsibility noncontractual and these decisions have been released following the judgment of the Egyptian Supreme Court in 1936 (as-Sanhuri, 1952, Vol.1, p.821) but most lawyers of this country believe that the physician's responsibility is principally resulted from the contract and therefore they regard the nature of the obligations of the medical practitioners and affiliates as the best efforts obligations following the Shafi'i Jurisprudence and new courts' judgments and the Egyptian lawyers (Saleh, 2006, p.136).

4. Kuwait

The Kuwaitian lawyers also believe that the nature of the obligations of the medical practitioners and affiliates is principally the best efforts obligation, although the nature of their obligation is the performance obligation in some medical actions due to the progress of medicine and other causes, but these cases are regarded as exceptions to the principle (Sharaf Al-Din, 1986, p.43).

5. Lebanon

After the issuance of the judgment by the Appeal Court of Beirut, a physician that treats a patient is not obliged to cure him completely and definitely, but he should try honestly based on the latest medical science in this way and observe the rules and principles of the medical professions in his own field of specialty. He is not liable in this respect; the nature of the obligations of the medical practitioners and affiliates has been principally considered as the best efforts obligation (Al-Hoseini, 1987, p.105).

6. Egypt

The Egyptian lawyers believe that the nature of the service provided by a physician to a patient in accordance with the treatment contract is the best efforts obligation (as-Sanhouri, 1952, Vol.1, p.101). The Supreme Court of this state also held on 22/03/1966 that the physician's responsibility is not principally based on the performance obligation i.e. the patient's healing. Nevertheless, he is obliged to try honestly for the patient's improvement and should not violate the established principles of medicine (Mansour, 1999, p.205, as-Seyyed Omran, 1992, p.8, Sharaf Al-Din, 1986, p.31). After the issuance of this judgment, various decisions were issued based on it (Judgments of the Egyptian Court of Appeal, 03/06/1969 and 21/12/1971 cited by al-Jamili, 1430, pp.223-4). Most the lawyers of this country maintain that unlike other contractual obligations, nature of the obligations of the medical practitioners and affiliates in the treatment contract is principally the best efforts obligation (Nadyieh, 2008, p.5, Jamal Al-Din Zaki, 1978, p.37).

Chapter 3: The Nature of Medical Obligations as Viewed by Muslim Jurists

1. Shiite Jurists

It seems that the division of obligations into the performance and the best efforts obligations has not been common among the jurists in the same way that is existent among the lawyers. Notwithstanding, great jurists though have not hinted explicitly to these titles, but they may be obtained from their statements (Salehi, 2009).

The majority of Shiite jurists deem the physician obliged to the performance invoking Ijma' (consensus), Itlaf (to waste) rule and the Sokouni narration from Imam Ali (Peace Be Upon Him) (Motahari, 1403, p.59, Feyz Kashani, 1401, p.116; Najafi, 1402, Vol.43, p.46; Mohaghegh Ardebili, 1416, Vol.14, p.227, al-Ameli al-Fagha'ani, 1418, p.319; Tabatabaee, 1404, p. 533) and hold the physician liable for all damages to the patient by rejecting the Baraah (clearance) principle and the generality of the Ihsan (beneficence) rule, even though

he does not enjoy enough skill and proficiency in his work and has not obtained the permission to treat (al-'Ameli, vol.10, p.270 cited by Meqdadi, Bita, p.52; Shahid Thani 2004, Vol.2, p.118; Shahid Awwal, Bita, Vol.10, p.108; Khuee, 1428, Vol.42, p.273). Some jurists have claimed consensus on this issue by stating "without opposition" and "by consensus" (Najafi, 1402, Vol.42, p.44; Mohaghegh Hilli, 1403, p.1020).

Some other jurists who are minority believe that the skilled physicians and veterinarians who have permissions to cure and do not commit faults will not be responsible and in fact, have considered their obligations as best performance obligations (Ibn Idriss Hilli, 1411, Vol.3, p.273, Ibn Fahad Hilli, 1413, Vol.5, p.359; Hosein Rohani, 1414, Vol.26, p.201; Jawaheri, Bita, pp.45-48; Sharareh Bita, pp.98-104). Some latecomer jurists have showed tendency towards this theory and have held the physicians and veterinarians not responsible in case of the obtainment of permission and observance of scientific and technical standards (Almousavi al-Khomeini, Bita, Vol.2, p.289; Mousavi Bojnourdi, 1993, pp.41-44). However, there is no dispute concerning the responsibility of the unlearned and unskilled physicians and veterinarians and all hold them absolutely responsible.

2. Sunnite Jurists

A jurist among the preceding Sunnite jurists, Halwani has regarded as incorrect the obligation of a surgeon who had been committed to the performance and argued that since various elements involve in the treatment, therefore the physician may not guarantee the result of surgery (Abbasi, 2007, p.63). The majority of latecomer jurists also regard the obligations of the physicians and veterinarians as the best efforts obligations (as-Samawi, 2007, pp.4-5). Since the guarantee of the patient's health and the obligation of his cure is beyond the limits of power and authority of the physicians and veterinarians (Salehi, 2009) and if a physician acts within the limits of religion and custom and is skilled too, but causes damages to the patient incidentally, he will not be held responsible, since no error has occurred in his practice as usual (Aljazaeri, Vol.3, p.153, cited by Mousavi Bojnourdi, 1993, p.43). This group of jurists base their fatwa on the traditions related from the Prophet of Islam (Peace Be Upon Him) and to prevent the blocking of medicine in addition to the generality of the sacred verses "ما على المحسنين من سبيل" (beneficents will not be reproached-Holy Quran, 9:91) and "اذا مرضت فهو يشفين" (whenever I am sick, he heals me-Holy Quran, 36:80) (as-Samadi, 2008, pp. 5-7).

Chapter 4: The Nature of Medical Obligations in the Iranian Legal System

In the Iranian legal system, the writers are divided into several groups in respect of the nature of medical obligations by following the attitude of great jurists and the method for the interpretation of related legal texts that are described as follows:

Influenced by the famous opinion of the Shiite jurists and considering the appearance of Articles 319 and 321 of the Islamic Punishment Act, Some writers believe that the physicians' and veterinarians' obligations are the performance obligations (Ghasemzadeh, 2008, p.309; Abbasi, 2009, p.65; Taheri, 1998, p.116; Meghdadi, Bita, pp.61-62; Mirhashemi, 2004, first part, p.134; Malmir, 2002, p.34; Abbasi, 2004, p.23; Goldouzian, 1993, Vol.1, p.160;

Sadeghi, 2003, p.190; Goldouzian, 2004, p.106). By the enactment of this Act and following the majority opinion of the jurists, the legislator has provided the absolute responsibility for the physicians, whether the relation between the physician and the patient is a contractual one or extracontractual (Jafaritabar, 1998, p.77).

Another group regards the physician's obligation as the best effort obligation contrary to other contractual obligations (Katouzian, 2008, Vol.1, p.71; Mousavi Bojnourdi, 2004, p.15; Goldouzian, 2008, p.90; Mousavi Bojnourdi, Hagh Mohammadifard, 2007, p.38; Katouzian, 2008, Vol.2, p.161; Shojapourian, 1994, p.21; Amouzgar, 2006, p.106).

Also some others have not explicitly suggested the physicians' and veterinarians' obligations as the best efforts obligations, but this concept may be easily deduced from their wordings (Darabpour, 2008, pp.193-4). For the purpose of evading this going to extremes, another group of lawyers have deemed it permissible to invoke the opposite sense of Article 320 of the Islamic Punishment Act , since it leads us to the principle (Katouzian, 2007, p.28) and have stated that the opposite sense of this Article is that if the performer of circumcision does not cut more than the necessary extent but a damage is caused, he will not be responsible and by the aid of some jurists' opinions and the tradition of Imam Ali (Peace Be Upon Him) they have tried to present a logical analysis of the whole Articles of the Islamic Punishment Act by joining the related Articles and therefore they have stated that also in this Act, the physicians' and veterinarians' obligations are the best efforts obligations. Notwithstanding, the religious legislator and following it, the Iranian legislator have presumed the physician's fault so as to protect the patient (who is usually weaker), but the establishment of its contrary is possible by the physicians and veterinarians (Shojapourian, 2010, pp.181-3).

Although the Iranian legislator apparently considers the physician's obligation as the performance obligation following the majority opinion of the jurists, but it seems that this opinion that is also acceptable and applied in the foreign law complies more with the legislator's end in passing laws i.e. the realization of justice and the regulation of the relations among the society's members. Nevertheless, if medical practitioners prove that they have applied all due cares and what the latest medical science has provided for them, then the discerning judges may modify this precept and prevent from the blockade of medicine and obtainment of disliked and urgent clearances from the patients or their relatives by doubting or denying the causal relation between the practice of the physician and the damage inflicted on the patients and his relatives or its attribution to the defect of medical science and that the healing is in the hands of the unique savant, God (و اذا مرضت فهو یشفین) (Salehi, 2011, p.107). Because, the topic of medical responsibility that is the puzzle of our era is like a double-edged blade that if not applied skillfully, it will cause irreparable damages (Katouzian, 2008, Vol.4, p.170) and in this respect it is like the consumers' rights (Katouzian, 2005, p.41ff.).

To further explain, if the physicians are treated harshly and in an excessive way, while the medicine will be blocked, they will resort to the shortchange of obtaining clearances from the patients granted to the physicians by the Islamic Punishment Act following the Shiite jurisprudence and practically, they will not take action for the treatment unless they obtain

clearances from the patients or their relatives. However, many jurists regard the clearance condition imposed on the patients due to the misuse of the emergency as invalid (Karimi, 2007, p.67; Jafaritabar, 1998, p.56), but it is clear that the establishment of emergency is too difficult.

Therefore, a statute whose aim is to protect the patients' rights, turns into their misfortune and leads to a phenomenon called defensive medicine which is in the shape of a statue whose soul is the medical ethics (Salehi, 2011; Binnet, 2005, p.103; Sharma, Gupta, 2004, p.109).

In case of the best efforts obligation and the presumption of fault for the medical practitioners, the burden of proof of non-fault is placed upon the physician; but this burden of proof is reversed by the obtainment of clearance and this is the patient who has to prove the fault of medical practitioners so as to force him to compensate for damages incurred. However, the establishment of the physician's mistake is too difficult for technical reasons and by this means, medical practitioners evade many obligations using the obtained clearance which is the result of going to extremes by the enactor of the Islamic Punishment Act who deems the physician's obligation the best efforts obligation on one hand and quenches fire with water by the possibility of the obtainment of clearance on the other hand (Salehi, Fallah, Abbasi, 2011).

In the Shiite jurisprudence, it also seems that the opponents' reasons are more valid, since the destruction rule, one of the most important evidences of the majority opinion is not tradition, but is Estyadi, therefore there are plenty of reasons that the absoluteness has no way to them and the beneficence rule that is an interpretation of the precept of the practical reason does not accept exceptions and practically governs over the destruction rule. In the other words, the union of these two rules is that "المتلف غیرالمحسن ضامن" (non-beneficent destroyer is responsible) (Mousavi Bojnourdi, 2008, p.8; Mousavi Bojnourdi, 1993, p.42).

Another reason of the majority opinion is the tradition cited from Imam Ali (Peace Be Upon Him) that seems to be aimed at the unlearned physician assuming the validity of document, since his Excellency states in another place: يجب على الامام ان يحبس الفاسق من الجهال "الاطباء" (The leader should prison the wicked unlearned physicians) and the union of these two traditions with traditions cited from Imam Sadiq and Imam Hasan 'Askari in this respect will be the evidence of the accuracy of this claim (refer to K. Javadi and colleagues, 2007, pp.87-90 to see these traditions). Furthermore, the consensus which is a famous reason has little validity and may not be used as an independent reason (Hoseini Tehrani, 1428, pp. 224-231). The Iranian legislator has laid down precise and relatively comprehensive responsibilities for the limits of the physicians' practice by enacting or joining to some medical rules and/or codes such as the Nurnberg Declaration, Helsinki Declaration approved in 1964, 1975 and 2000 and the State Committee of Ethics in Medical Research Bylaw and so on, so that there is little need to regard the aforesaid individuals' obligations as the performance obligation (Abbasi, 2009, pp.55-65 and 121-122). Besides, the case law may, in cases where the permitted proficient physician has inflicted damages incidentally (by observing the scientific principles of the medicine and the common custom among them),

regard the destruction as resulted from the deficiency of the medical science and hold the physician as the principal in the infliction of a damage the main and stronger cause of which is the relative defect of the medical science and by the presumption of fault, in case of infliction of damage to the patient, create a status that the establishment of is reverse is possible by the medical professions (Katouzian, 2008, Vol.4, pp.168, 171 and for the verification of this opinion by a different argument see Mousavi Bojnourdi, 1993, pp.41-44).

Part 2: The Explanation of the Most Important Exceptions to the Nature of the Obligations of Medical Professions and Affiliates

Now that it was determined that the nature of the obligations of the medical professions is principally the best efforts obligation, some of important exceptions to this rule are dealt with as follows.

Chapter 1: Prostheses

Some French courts (Judgment of Metz court dated 13 December 1951) at first believed that the dentist was the same as the seller of false tooth and therefore held him responsible for the covert defects of the tooth and regarded his obligation as the performance obligation and this sale as conditioned to the condition of experience the breach of which would make the contract null and void and they held the physician responsible if for any reason, this tooth caused a problem for him (ash-Shurabi, 1998, p.90; Jamal ad-Din Zaki, 1978, p.394). The lawyers criticized this practice and said that the total obligations of both parties should be noticed and the contract might not be disintegrated and some of its elements might not be noticed to determine its nature (Abujamil, 1987, p.94, Jamal ad-Din Zaki; 1978, p.394) and this disintegration of the contract that is done by the economical criteria is in conflict with the human nature of the treatment contract (Savatier, 1956, p.212; Kornproboost 1975, p.857) and the conditioning of the contract to the experience was not correct.

As a result of raised criticisms, some courts of this country (Dijone Appeal Court, 29/05/1952) examined the dentist's obligation considering the contract concluded with the hospital and discussed the dentist's responsibility in medical and technical respects and on the first respect the physician's obligation was held to be the best efforts obligations principally and on the second respect it was held to be the performance obligation (al-Jamili, 1430, p.233, al-Hyari, 1429, p.52) and in this state, the physician could be released from the responsibility only by the establishment of an external cause (Artime, 1994, p.85). In some other judgments (Court of Appeal, December 1956 and March 1967) including judgments of the Supreme Court of France in years 1977-79, the physician's obligation in making prostheses was introduced to be the best efforts obligation (al-Jamili, 1430, p.223; Shojapourian, 2010, p.165). The basis of these judgments has been that the characteristic of the treatment and combination of teeth is a technical medical act in which there is the probability element. Therefore, the physician's binding will be the best efforts obligation (Abd ar-Rahman, 1985, p.140). In the Iranian law, considering the enormous costs for the supply of prostheses, particularly dentistry and the ever-increasing raise of patients' discontents and complaints against these practitioners (Sheikh Azadi and colleagues, 2007,

p.172), it seems that in the medical respect, the dentist's and prosthodontist's obligations will be the performance obligation and in the technical respect such as proper prothesis and appliance, etc, these practices will be the best efforts obligation contrary to the medical respect.

Chapter 2: Blood Transfusion

The lawyers have considered the physician's obligation to receive or inject the sound blood that is compatible with the patient's blood group as the performance obligation and have stated that there is no conflict between the physician's obligation that is the best efforts obligation and the obligation to guarantee the blood's safety. Since, the patient does not expect healing from the granted or received blood, but he does expect reasonably that the blood grant or injection does not add any pain to his pains or cause the deterioration of his illness (Abd ar-Rahman, 1985, p.110, Abujamil, 1987, pp.75-76; Shojapourian, 2010, p.161). French courts, in various judgments (judgments of the French Supreme Court on 12/04/1995 and 13 February 2001 and the Appeal Court of Paris on 28/11/1991 and 17 December 1954) have regarded the obligation of blood transfusion centers as the obligation of safety in the outcome and have held the physician practicing in this job to be obliged to the performance (Abd az-Zahir Hosein, 1992, p.74; al-Jamili, 1430, p.229).

There are two theories in this respect in the common law. Some ones have deemed the blood transfusion a sale and believe in the absolute responsibility, while some others deem it a service provision and refuse to accept the responsibility in this regard (Jafaritabar, 1998, p.127). Also in France, some lawyers formerly believed that the physician's obligation in these cases was the best efforts obligation. It seems that this group of lawyers has mistaken the guarantee of the safety of blood products that is a performance obligation for the physician's main obligation (the best efforts obligation) and as it was stated these two apparently contradictory obligations are not in conflict and the judgments that were later issued in this respect are the evidence for the validity of this claim. In France, in accordance with the Compensation Act, approved on 31 December 1991 those who suffer from Aids through blood transfusion enjoy the legal presumption of causality and those who grant blood gratuitously will enjoy the advantages of the absolute responsibility of the governmental institutions provided in the Healthcare and Public Health Act of this country if a damage is inflicted on them (Panneau, 1996, p.29). However, some lawyers do not regard the enforcement of the contents of these Articles in practice as to be so successful and have used the clause of third party favored undertaking in cases where there is no contractual relation between the damaged person and the physician or the blood transfusion institute or the specialized physician and have presumed the relation between the damaging and the damaged parties to be contractual (Abd az-Zahir Hosein, 1992, p.74; al-Hyari, 1426, p.50).

In the municipal law, although there are no regulations and judicial decisions in this respect in this form (Boudan, 2003, p.7ff.; Amjad, 1419, p.162) but the legislator has shown its sensitivity in this regard through Articles 12, 13 and 14 of the Method of Prevention of Venereal and Contagious Diseases Act (approved on 1 June 1941 with subsequent modifications). Furthermore, it has provided for decisions and plans to prevent from and

control infections in Articles 22 and 23 of the abovementioned Act and paragraphs 1 and 2 of Article 4 of the Bylaw of the State Supreme Council of Planning for the Prevention of Aids Infection and its Control and the managing director of the blood transfusion Organization is a member of the State workgroup to combat and prevent from Aids infection in accordance with the paragraph 13 of the Article 8 of the aforesaid Act.

There is a legislative gap on the establishment of a fund for the compensation of Aids victims (Abbasi, 2003, p.3) and considering that the professional insurance of the medical practitioners and affiliates is not obligatory (Salehi, 2011) there is very probable that the damaged person does not succeed after spending time and money and passing hearing procedures; hence the legislator is expected to remove the aforesaid gap as soon as possible and in the best way.

Noting the pitiful history of this issue in our country that led to the hemophilic infection by the arrival of the Aids-infected blood, it seems that the Iranian legislator and particularly the Supreme Court of the State should become inclined to the responsibility without error in these cases to compensate for the patients' damages by considering these professions as the performance obligation (Abbasi, 2009, p. 105). Finally, the blood transfusion enjoys a particular importance in the advanced legal systems so that to obtain public trust the abstract governmental responsibility has been provided to compensate for damages resulted from the blood transfusion (Abbasi, Shekaramarji, Mohammadi, 2009, p.70; Karimi, Azin, 2007, p.101).

Chapter 3: Anesthesia

The anesthetist's obligation is also the performance obligation, since except for emergencies the patient will not be anesthetized before making sure of the health of his heart and respiratory and urinary systems. In a case, the anesthetist were held to be obliged to the obtainment of outcome since he had not become assured of the emptiness of the patient's stomach and had anesthetized him and caused his death and even has been considered obligated to compensate for the damage resulted from the loss of opportunity of the patient's life (al-Jamili, 1430, p.421ff.; Kazemi, 2001, p.200ff.).

The French Supreme Court has provided in this respect on 10/06/1980 and 11/12/1984 that the anesthetist's obligation continues until the patient recovers completely and he should accompany his patient to this stage (Abbasi, 2008, p.57; Shojapourian, 2010, pp.174-5). Also, the French lawyers consider the anesthetist's obligation as to be an obligation to cure and do not limit his obligation to the care (Malory & Ens, no.469ff. cited by Katouzian, 2008, p.161).

In the first paragraph of the Resolution concerning unauthorized practices in the clinics approved on 27/12/1976 by the Board of Directors of the Central Medical Council, all operations accompanied with general anesthesia and also operations which need anesthesia have been declared forbidden in medical and dentistry clinics. Therefore, also in the municipal law, it seems that the anesthetist's obligation is the performance obligation noting

the risk of anesthesia and the reasonable sensitivity of the legislator in respect of this matter (Salehi, Abbasi, 2010).

Chapter 4: Medical Tests

Medical diagnostic tests such as blood test have usually accurate results by the ever-increasing medical progress. Therefore, the laboratory's physician should perform tests accurately and with utmost precision and he will be held responsible by the mere presentation of incorrect results (Mémentau, 2001, p.334). The percentage of errors has become very limited or negated using modern laboratorial tools and devices and consequently the obligations of the practitioners of this profession will be principally the performance obligation (al-Hyari, 1426, pp.49-50; Shojaporian, 2010, p.165). Also in France, although the courts primarily considered the obligations of the laboratories' physicians in respect of the unreal announcement of the patient's cancer etc as the best efforts obligations (al-Abrashi, 1951, p.86; Mansour, 1999, p.232), but afterwards, on 18 November 2000, the General Board of the Supreme Court of France issued a controversial and important opinion in this regard that has gained publicity as Proche case (Abbasi, 2003, p.32; Mémentau, 2000, n.270-Jourdin, 2002, p.892) and later created various debates among the lawyers of this country on the payment of indemnity to a disabled child born due to the mistake of the laboratory's officials (Aubert, 2001, pp.489-492; Kayser, 2001, p.1892). In that case, the mother of Nicolas Proche intended to abort her fetus due to suffering from measles but the tests introduced it as to be healthy and therefore she did not abort her fetus, but she filed a complaint against the laboratory's officials and after a controversial and long hearing, the Supreme Court of France issued its opinion as follows: "Whereas the physician's and Laboratory's fault deterred Mrs. Proche from abortion to prevent from the birth of a disabled baby, therefore the child may claim for the compensation of damages occurred due to the aforesaid fault." This case law judgment provided the compensation for the children in addition to the parents for the first time so that in case of the parents' death, the compensation is not negated. Notwithstanding, some lawyers regarded this type of compensation as in conflict with the ethics. The French legislator abrogated this judgment by the enactment of the so-called Anti-Proche Act and provided that "nobody may not benefit from the compensation of damages resulted from his own birth". This Act faced many debates and opponents and some hold it accused of demagogy and deem its approval under pressure and threats of profiteering groups like the insurance and the physicians (Abbasi, 2003, p.35).

This matter is not limited to the France and is considered as a big dilemma of the medical society throughout the world and in the municipal law, the issue becomes more complicated considering the prohibition of the abortion by many famous scholars (Allame Tehrani, 1410, p.157 onwards) and other limitations which exist in this regard that is beyond the scope of this paper. Therefore it seems that in the Iranian law the obligations of these physicians should also be regarded as the performance obligations unless in exceptional occasions like tests the results of which could not be foreseen exactly noting that the science is not yet so advanced and/or some tests that are implemented in the laboratories of deprived regions and villages that have limited resources and in these cases, the judge may consider the physician's obligation as the best efforts obligation noting the circumstances of the case.

Chapter 5: Guarantee of the Patient's Health

The guarantee of the patient's health does not meant to undertake the patient's healing, but it means that the medical practitioners do not expose the patients to another illness in the process of treatment, the tools and devices that they use due to non-disinfection of devices or the environment (al-Jamili, 1430, p.225 and Mémenau, 2001, p.339). Nevertheless, the damages inflicted on the patient that are not directly and completely related with the treatment process and are aside from the medical operations- in its exact meaning- the subject of the obligations of medical practitioners is the performance obligation, but the damages resulted from the process of treatment or technical and professional features in which the element of probability is concealed are in principle the best efforts obligations (al-Jamili, 1430, p.226, Shojapourian, 2010, pp.176-177).

French lawyers and judges have applied benchmarks to separate the related and unrelated issues with the treatment process and in summary, in cases where the actions of the physician and/or the hospital are related with the traditional and exact concept of the treatment process, it will be the best efforts obligation and in other cases, the performance obligation. Since, an implicit condition in the contract of treatment is that no pain is added to the patient's pains due to being hospitalized or using the hospital's stuff such as clothes, tools, etc (Jamal Al-Din Zaki, 1978, p.53, Abd-Al-Rahman, 1985, pp.21-131; Savatier, Auby et Pequignot, 1956, p.218).

Various judgments have been issued in this regard in France, including the one that has deemed the surgeon obliged to sterilize the tools and devices used in the surgery and making sure of their safety (Court of Lyon judgment dated 13/12/1961). Also in other judgments, the hospital has been held responsible for damages inflicted on the patients due to fire (judgments dated 20 December 1962, 26 November 1953). In these judgments, the courts have base their opinions on the separation between medical and professional services and other presented services that are not related with the medical professions and science (Emran, 1980, pp.102-3; Abd Al-Rahman, 1985, pp.131-2) and finally, in 1993 the French State Council accepted the physician's obligation for the guarantee of the patient's health without being committed to the patient's healing (Abbasi, 2005, p.281). In the municipal law, during a case, the physician was also sentenced to the payment of damages to the plaintiffs for non-observance of health and safety principles and infectious effects resulted from the surgery operation that had caused the blindness of patients (judgment no.84-1043 dated 06 December 2005, branch no.107 of Ahvaz Criminal Court). Therefore, it seems that in such cases, also like the French legal system, the obligations of medical practitioners are principally the performance obligations in the Iranian law.

Chapter 6: Beauty Surgery

Beauty surgeries are divided into two groups:

1. Necessary or restorative surgeries that are performed for the removal of the organ's defects of the patient etc and also make the patient's appearance more beautiful like the plastic surgery of an individual on whose face has been poured an acid. This kind of

surgeries the necessity of which is also confirmed by the custom is subject to the general rules of the physician's civil responsibility and it seems that the physician's obligation is the best efforts obligation (Shekaramarji, Abbasi, 2008; Harichaux, Ramu, 1993, p.6; Clément, 2001, p.57).

2. Unnecessary beauty surgeries that do not aim at the recovery and treatment of the patients, but are requested merely for capricious desire, beauty and luxury like the minimization of the nose, maximizing or minimizing the breasts and buttocks, whitening or bronzing of the skin, removing the wrinkles of the face or body (liposuction) and so on (Abdelhaffid, 2003; p.131) which all the lawyers believe that the physician's obligation will be the performance obligation in this state (Panneau, 1996, p.9-Harichaux Ramu, 1993, p.6) (Katouzian, 2008, p.166). The obligation of the plastic surgeon has been regarded as the performance obligation (Ben Chabane, 1995, p.771-Rouge, Arbus et Castagliola, 1992, p.125) in some judgments of the French courts (Paris Court of Appeal dated 5 June 1962). Some writers deem a firm dividing line between these two kinds of surgery operations difficult and unlikely and the obligation of the beauty surgeon is the best efforts obligation in their opinions (Abujamil, 1987, pp.67-68; Al-Fazl, 1995, p.48; Shojapourian, 2010, pp.170-1).

Notwithstanding, considering that the plastic surgery has changed into an industry (Cubrian, Bita, p.116) and as some insiders believe it has some consequences like the emergence of the new wave of global feminism (Kungard Black, Bita, p.10) and the enormous costs of such practices and the personality characteristics of the volunteers for the performance of beauty surgery (Saravi & Ghalebandi, 2004, p.11) and that fantastic surgeries are not necessary and dozens of other elements cause that we consider the obligation of the beauty surgery as the performance obligation. Some lawyers while mentioning the arguments of proponents and opponents have not expressed their views in this regard explicitly, but they have considered difficult conditions for the plastic surgeons (Katouzian, 2008, p.166) and also have deemed their obligation the performance one in many cases (Ghezmar, 1431, pp.95-96; Urefli, 1984, p.755).

Conclusion

By the comparative study of the nature of the obligations of the medical practitioners this outcome is attained that the physician's obligation in most Islamic countries, France and common law (USA and UK) is in principle the best efforts obligation. In the Iranian legal system, the physician's obligation has been apparently deemed performance obligation following the majority of Shiite jurisprudents, but some preceding jurisprudents and especially late-comer jurisprudents and even most lawyers regard the nature of the physician's obligation as the best efforts obligation and deem it more compatible with the realities of the society and the realization of the justice in the relation between the physician and the patient and the judicial equity. Hence, it seems that the Iranian legislator should regard the nature of the physician's obligation as the best efforts obligation by the understanding of the society's realities and the implications and consequences of the physician's obligation. However, some medical practices in which the science has had many progress and medical professions have a considerable control in their specialty concerning the

patient's body and the treatment process and other factors have little role and it seems their obligations in this cases are the performance obligation like the prostheses, medical tests, blood transfusion and anesthesia. Also in some other practices, the physician's obligation will be principally the performance obligation due to the high cost of treatment and sometimes the lack of necessity factor in their performance like fantastic surgeries. However, the exceptionality of the nature of medical obligations is not limitative and it is likely that they decrease or increase in the future and/or the principle-in the nature of the medical obligations-itself changes.

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