

# Elements for Determining Medical Negligence

Taiba Al Saffar

t.alsafar@tamimi.com

Marwa El Mahdy

m.elmahdy@tamimi.com

UAE Law no. 10 of 2008 defines Medical Negligence as an “error caused by the lack of knowledge of technical matters when such knowledge is presumptive to exist in all those who practice the profession and that such error is due to negligence or substandard conduct (care)”.

This definition strives to maintain a balance between the protecting patients from the negligence of doctors and providing doctors with the freedom to practice without constant fear of medical malpractice suits which can be damaging to a doctor’s reputation, if not career-ending.

As set out in the below Dubai Court of Cassation Judgment, this balance is also reflected in the finding that a Doctor’s medical responsibility is not to achieve a result, but rather to adhere to a professional standard of care towards a patient.

Medical institutions and doctors are also required to carry adequate insurance, allowing doctors to practice without the fear of having to make huge payouts by way of compensation.

In order to obtain a judgment against a doctor for medical malpractice/ negligence, three things must be established:

- 1) That a duty of care was owed by the doctor to the patient; and
- 2) That the duty of care was breached due to the fact that the doctor failed to adhere to the correct standard of care; and
- 3) That the patient suffered damages as a result of the breach of the duty of care.

## **Dubai Court of Cassation Case**

This case examined a doctor’s duty of care towards his patient.

The Claimant/patient was admitted to a hospital (the “First Respondent”) suffering from varicose veins in his left leg. He was examined by a doctor (the “Second Respondent”) who determined that he required surgery to remove the varicose veins. During the procedure the Second Respondent committed a medical error and cut a nerve in the patient’s leg which was responsible for the movement of the leg. This resulted in the patient suffering from a 20% physical disability in his left leg. The Claimant therefore initiated proceedings before the Dubai Court of First Instance for damages.

The Court of First Instance, after reviewing the appointed medical committee’s report, awarded the Claimant the amount of AED 800,000. The First and the Second Respondents (the “Respondents”) subsequently appealed to the Court of Appeal and the award was reduced to AED 200,000.

Both the Claimant and the Respondents challenged the Court of Appeal’s judgment before the Dubai Court of Cassation.

The Respondents’ arguments before the Court of Cassation were twofold:

- 1- The Court of Appeal had erroneously established that the Second Respondent had committed negligent

medical malpractice despite the fact that documents which had been submitted to the court contained a medical report which concluded that the Second Respondent did not breach his duty of care towards the patient; and

2- The lower court when determining the sum awarded did not specify how the award was calculated in accordance with the damage allegedly suffered by the Claimant.

### **The Court of Cassation held:**

1- The Court rejected the Respondents' first argument on the basis that a doctor is not required to achieve a result (i.e. curing a patient) but rather has a professional duty to provide patients with competent medical care according to known scientific and technical principles in a manner that achieves the proper care for the patient.

When measuring when the correct level of competent medical care was provided it needed to be established that an average competent doctor with the required scientific knowledge and technical expertise would have acted in the same way, taking into consideration the surrounding circumstances while following professional ethics as well as known scientific principles.

When a doctor fails to provide such a duty of care, he or she is liable for damages suffered by the patient as long as it can be established that the damages were caused by the doctor's breach of his duty of care. Furthermore, the court has the discretion to determine whether the doctor has committed negligence from facts of the case.

Further, the Court held that medical committee's report (upon which the judgments of the lower courts were based) set out that the patient was admitted to the hospital with the full ability to walk. After surgery to remove Varicose Veins; the patient lost the ability to move his left leg as a result of a nerve in his leg being cut during surgery. There was also a failure to take swift remedial measures in respect of this. The report also added that from a medical standpoint, the severing of such a nerve rarely happens in this type of surgery which demonstrates that the doctor had been negligent.

2- The Cassation Court rejected the respondents' second argument for the following reasons:

Whilst the Court of Cassation recognized that the determination of whether damages had been suffered was ultimately subject to the review of the Court of Cassation, the sum awarded as compensation was to be determined by the court of substance (i.e. the lower courts) and was not subject to review by the Court of Cassation in circumstances where the court of substance had considered all of the elements of the damage and losses suffered by the injured party.

The Court of Cassation held that the lower courts when calculating the award had correctly taken into account the following:

- a) The fact that Material Damage had occurred resulting in the patient suffering a physical disability which required compensating;
- b) Moral Damages: the patient was a young man in the prime of life who due to the negligence of his doctor lost the ability to walk properly which affected his life.

Accordingly, the Court of Cassation upheld the judgment of the Court of Appeal.