The Concept of Medical Negligence and its Litigation Process; A Comparison between the UK and the Saudi Arabian Jurisdictions

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ABREVIATIONS / DEFINITIONS

1. MOH: *Ministry of Health, usually referring to that of Saudi Arabia.*
2. PIC: *Primary Investigating Committee*
3. SMP: *Shariah Medical Panel*
4. MVC: *Medical Violation Committee*
5. NHS: *National Health Services*
6. UK: *United Kingdom*
7. PHP: *Practicing Healthcare Profession*
8. ADR: *Alternative Dispute Resolution*

GENERAL INTRODUCTION

Medical Negligence Claims in UK and Saudi Arabia; do they have anything in common?

Negligence, also generally known as carelessness, neglect, inattention, or laxity, is the 'failure to exercise the care that a reasonably prudent person would exercise in like circumstances'[1]

In law, however, it 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.'*[2]

Therefore, technically, the claimant in negligence must establish, by balance of probability, a duty of care, breach of duty, harm/injury and causation to enable it succeed. In the case of medical negligence, all the above mentioned elements apply, and specifically, the standard of care is 'according to practice accepted as proper by a responsible body of professional medical opinion.'[3]

Ordinarily, patients approach healthcare professionals or healthcare institutions to obtain medical treatment or other services with full expectation that the latter possesses the requisite knowledge and skills necessary to relieve their medical problems.[4] A 'perfect' situation is where the health care professionals are

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[1] http://www.merriam-webster.com/dictionary/negligence (Accessed 20/12/2014)
[2]Per Alderson, B in the case of *Blyth v Birmingham Waterworks Co* [1843-60] All ER Rep 478
[3] *Bolam v. Friern Hospital Management Committee* [1957] 2 All E R 118
[4] MS Pandit, and S Pandit, 'Medical Negligence: Coverage of the Profession, Duties, Ethics, Case Law, and Enlightened Defense - A Legal Perspective' (2009) 25(3) Indian Journal of Urology : Journal of the Urological Society of India

homogeneously educated and trained, and the patients are fully aware of the nature and course of the treatment.[5] In such cases, a set of rules clearly defining rights, duties, standards of care and liabilities should prompt a complete compliance devoid of negligence claims.[6] More often than not, however, such scenario depicted above is a rare finding, and thus the issue of medical negligence is increasingly becoming a topical medico-legal issue of discussion. Despite the long period of paternalistic medical practice that was, somewhat, "over protective and deferential"[7] to doctors during the middle of the twentieth century[8], there is recently a growing scrutiny from the legal system.[9] Consequently, there has been an escalation in the incidence of medical negligence litigation.[10]

There are diverse schools of thought regarding the value and the suitability of litigation against doctors. The proponents of suitability of litigation against doctors are of the view that it 'is useful because learning from errors makes health care safer' by holding them accountable for their actions or inactions.[11] The opponents of medical negligence suits, however, opine that even the suggestion that patients can sue their doctors is not only damaging to the future of medical care but actually unnecessary, and needlessly costly.'[12] They posited that adverse outcomes are inherent to medical care, and do not necessarily reflect

[5] *Dann v Hamilton* (1939) 1 KB 509.
[6] Patricia Munch Danzon (1991) *Liability for Medical Malpractice* Journal of Economic Perspectives- Volume 5, Number 3-Summer 1991-Pages 51-69
[7] *Foo Fio Na v Dr. Na v Dr. Soo Fook Mun* (2007) 1, 593. Malayan Law Journal
[8] Kim Price, *'Towards a History of Medical Negligence'* (2010) 375 The Lancet
[9] David Chacko, p3
[10] Abdulhamid Hassan Al-Saeed, 'Medical Liability Litigation in Saudi Arabia' (2010) 4 Saudi Journal of Anaesthesia
[11] Sir Liam Donaldson, 'Making Amends, A Consultation Paper Setting out Proposals for Reforming the Approach to Clinical Negligence in the NHS' (Department of Health 2003) p8
[12] Alsaeed, ibid

poor treatment.[13] The author is, however, inclined to the position taken by M. A. Jones, thus[14]:

> *The claim that it is the law that is positively detrimental to the practice of medicine ... cannot be accepted. When the rhetoric is stripped away, it is the tort of negligence that provides the bottom line: minimum standard of acceptable professional conduct. In practice, medical negligence is a failure to live up to proper medical standards, and those standards are set, not by lawyers, but by doctors.*[15]

Be that as it may, a physician may be sued in medical negligence by a patient who is harmed by his action from his failure to follow his profession's customary standard of care.[16] However, for the aggrieved patient to succeed in the suit, he has to establish that a) a duty of care existed, b) that either by commission or omission, the defendant breached his duty of care, c) that the complainant sustained injury that was d) proximately caused by that breach of duty. A successful suit in negligence would entitle the patient to compensation for all pecuniary and non-pecuniary damages.[17]

The applicable law in the U.K. is the English common law which is comprised of the Acts of Parliament, case laws and other regulations. Conversely, all laws in Saudi Arabia are basically governed by the *Shariah*[18] Law. Specifically, the *Law of Practicing Healthcare Professions*[19], a subsidiary legislation made by the Ministry of Health through a ministerial resolution no. 26 of 3/11/1426, is

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[13] Ian Kennedy, *The Unmasking of Medicine* (London ; George Allen & Unwin, 1982) 128.
[14] M. A. Jones, *Medical Negligence,* Sweet and Maxwell (2003)
[15] Ibid
[16]Patricia Danzon, '*Medical Malpractice: Theory, Evidence, and Public Policy'* (1986) 99 Harvard Law Review
[17] N McBride, 'Duties of Care--Do They Really Exist?' (2004) 24 Oxford Journal of Legal Studies 417, 417–441.
[18] the code of law derived from the Koran and from the teachings and example of Mohammed; "sharia is only applicable to Muslims" http://www.thefreedictionary.com/shariah Accessed 1/1/2015
[19] Formerly, *Rules of Implementation for Regulations of the Practice of Medicine and Dentistry of 1409*

the main law applicable to medical negligence claims litigations in Saudi Arabia. This law was promulgated pursuant to the Royal Decree No. M/59 of 4/11/1426

Ordinarily, under the Saudi Arabian legal system, the courts are exclusively vested with the jurisdiction to apply the *Sharia*, as prescribed by the *Qur'an*[20] and the *Sunnah*,[21] and any other laws not in conflict therewith.[22] Nevertheless, *The Law* provides for the *Shariah Medical Panel* to adjudicate claims in medical negligence.[23] The regular court, known as the *Court of Grievances*[24] would only entertain appeals from the *Shariah Medical Panels.*

There are a number of studies undertaken on the topic within the context of the respective jurisdictions[25], [26], but so far, there is not a single study that specifically conducted a comparative analysis of the concept of, and litigation process for medical negligence in the UK and Saudi Arabian jurisdictions. For instance, Patricia[27] set out a historical perspective on medical negligence trends in the UK during the nineteen eighties, and made a broad comparison of the medical negligence trend in the US, UK, Australia and Canada. Also, Femi Oyebode did make only a brief reference to the trends of malpractice claims in

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22 Article 48, *Basic Law of \governance, Royal Decree no* A90 of 27/08/1412 (1/3/1992)

23 Article 33

24 Article 38 of the *Law of Practicing Healthcare Profession*

25 Paul Fenn, 'Current Cost of Medical Negligence in NHS Hospitals: Analysis of Claims Database' (2000) 320 BMJ.

26 David Studdert and others, 'Claims, Errors, and Compensation Payments in Medical Malpractice Litigation' (2006) 354 New England Journal of Medicine

27 Patricia Danzon, 'The "Crisis"in Medical Malpractice: A Comparison of Trends in the United States, Canada, the United Kingdom and Australia' (1990) 18 The Journal of Law, Medicine & Ethics.

Saudi Arabia alongside with that of the UK.[28] In other jurisdictions outside the purview of this study, similar studies have been conducted.[29]

From the Saudi perspective, a couple of studies[30,31,32] have so far been conducted mainly by physicians focused on the volume and patterns of the medical negligence within Saudi Arabian rather than the actual substance of negligence or its litigation process. For example, Al Jarallah[33] studied the patterns of medical errors and litigation against doctors in Saudi Arabia where he identified that most of the litigations in which the claims succeeded were those that involved surgeons and obstetricians. He further lamented that the process of litigations need to be improved. Al-Saeed[34] noted in his study that there was an escalation in the trend of the claims for medical negligence, and therefore submitted that better adherence to the standards of medical practice was necessary to de-escalate the rates. Similarly, Habib[35] and Al Ammar[36] et al made separate studies related to medical negligence in obstetric and dental specialties respectively. Al Siddique also made similar study which slightly compared medical malpractices patterns in Saudi Arabia and Germany.[37]

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[28] Ibid at page327

[29] Ireh Iyioha, 'Medical Negligence and the Nigerian National Health Insurance Scheme: Civil Liability, No-Fault or a Hybrid Model?' (2010) 18 African Journal of International and Comparative Law

[30] Abdulhamid Hassan Al-Saeed, 'Medical Liability Litigation in Saudi Arabia' (2010) 4 Saudi Journal of Anaesthesia.p122

[31] Jamal S AlJarallah and Norah AlRowaiss, 'The Pattern of Medical Errors and Litigation against Doctors in Saudi Arabia' (2013) 20 Journal of Family and Community Medicine p98-105

[32] Ahmed A Al Siddique, 'The Dilemma of Litigations' (2004) 25 Saudi Med J 901-906

[33] Jamal S. AlJarallah ibid

[34] Al Sayeed, ibid

[35] Faiza A. Habib, Obstetricians' Perception of Medico-legal Problems in Al Madinah Al Munawarah, Kingdom of Saudi Arabia, Journal of Taibah University Medical Sciences (2010);5 (2) pp 66-78

[36] Wafa Al Ammar, A One-Year Survey of Dental Malpractices Claims in Riyadh, *Saudi Dental Journal* (Aug 2000) Vol. 12 No. 2 pp 95-99

[37] Al Siddique ibid

In the last few decades there has been a transformation in Saudi Arabia from a nomadic to an urbanised life. Healthcare services has also been revolutionised alongside by way of technological advancement and training of healthcare professionals. Modem medical facilities, including intensive care, are now widely available.[38] Arguably, due to the increasing population and the intensified awareness,[39] medical malpractice litigations have been on the increase.[40]

To checkmate this phenomenon, it became imperative for the Saudi Arabian government to formulate standards and regulations that prescribe the duties and liabilities of healthcare professional to their patients. It was in line with this initiative that *the Law*[41] was initially passed by the ministry of health pursuant to a royal decree in the year 1409H[42]. Also, that law provided for the establishment of the *Medico-legal Committee*[43] that was saddled with the responsibility of receiving and determining claims in medical negligence or malpractice.[44]

Significance of the study

There has not yet been any known academic work that explores the litigation processes of Saudi Arabia from legal perspective, either independently, or as compared to other jurisdictions. Moreover, neither the UK nor the Saudi Arabian

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[38] A Mobeireek and others, *'Communication with the Seriously Ill: Physicians'* Attitudes in Saudi Arabia.' (1996) 22 Journal of Medical Ethics

[39] Wayne Jones, Shabnam Karim and Louise McDonald, 'An Overview of Medical Malpractice in the Kingdom of Saudi Arabia' (*Clyde & Co*, 9 December 2014) <http://www.clydeco.com/insight/updates/view/an-overview-of-medical-malpractice-in-the-kingdom-of-saudi-arabia?utm_source=Mondaq> accessed 2 January 2015

[40] Al-Hajjaj MS: Medical practice in Saudi Arabia, the medico-legal aspect; Saudi Medical Journal 1996; Vol.17 (1): 1-4

[41] Of 1409. Now known as *Laws of Practicing Healthcare Professions of 1426 (H).*

[42] Equivalent to the Gregorian year 1988-1989

[43] Now known as the *Shariah medical panel* under the 1426 *Law*

[44] Article 34 of the 1426 *Law*

studies considered has compared the litigation process being followed in the two jurisdictions. They have not been able to show if, at all, there are aspects that can be lent to the other or, if there is any hybrid litigation process that could be evolved as an alternative model suitable for both jurisdictions.

Study Objectives

Therefore, the study would make a comparative analysis of the concept of medical negligence, and its litigation process as applied in the two jurisdictions under review. This study is intended to trigger off discussions on the lessons that the two jurisdictions can learn from each other in order to perfect their respective systems. In addition, the findings of this work can serve as guidelines for policies protocols and laws governing medical negligence litigation in the two jurisdictions.

Research Questions

To achieve those objectives, this study will address these research questions;

a) Is there a significant difference in the rules of medical negligence between the UK and Saudi Arabian jurisdictions?
b) Is there a significant difference in the litigation process applied in the two jurisdictions?
c) What features, if any, of the two respective jurisdictions can be adopted by each other to perfect their rules on medical negligence?

Hopefully, answer to these questions would prove the notion that although the concepts and rules governing medical negligence in the two jurisdictions are

essentially different, there is a lot they can adopt from each other's laws to perfect their respective systems.

Research Methodology

This research will be library based. There is a wealth of literature on the subject of medical negligence which the research will consult for the purpose of this research. These include journal articles, text books, conference papers, guide books, reports of decided cases in the UK and Saudi Arabia, dissertations and theses written on the subject. There is also a plethora of materials available on the internet which this researcher will consult in order to study and make a comparative analysis of the scope of medical negligence in both the UK and Saudi Arabia.

Study Design

In furtherance of its objective, the dissertation will be arranged and divided into chapters covering the various relevant topics that deal with the issues under discussion. After the initial introductory notes, chapter one discusses the general concept of medical negligence under the common law, while the study will cover the law governing medical negligence under the Saudi Arabian law in chapter two. In chapter three and four respectively, the study will look at the procedural rules for litigating negligence under the UK and Saudi Arabian law. The study will then make a summary, recommendations and conclusions.

Limitations of Study

A number of factors may limit the scope of this study. It is limited to the general concepts of and litigation process for medical negligence without delving into the specific spectrums of the various forms of medical negligence. Also, it is a time limited study, i.e., it has to be completed and submitted by the end of January, 2015. In addition, although plethora of data on medical negligence exists in the UK, data on the subject in Saudi Arabia is grossly limited.

Although both UK and Saudi Arabia have their own respective histories, different bodies of laws, and diverse rules of procedures governing medical negligence, no comparative studies have so far been done about the concept and procedural rules for litigating medical negligence claims in the two jurisdictions.

To establish a suitable platform for comparison, we will discuss the English law concept of medical negligence in the next chapter. The ideals espoused in the following chapter will subsequently serve as the basis for juxtaposing the English and the Saudi Arabian systems of medical negligence litigation.

CHAPTER ONE

1 THE ENGLISH LAW CONCEPT OF MEDICAL NEGLIGENCE

1.1 Introduction

In a lay language, negligence may be defined as "a want of attention to what ought to be done or looked after," or a failure to match up to required standards of performance.[45] Note that the terms medical negligence, clinical negligence and medical malpractice are used interchangeably.

In law, however, Alderson, B[46] defined negligence, thus;

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.[47]

Before we delve into the specific details of medical negligence, let us recollect the historical development of the concept of medical negligence under the English laws.

[45] The *Oxford English Dictionary*
[46] *Blyth v Birmingham Waterworks Co* [1843-60] All ER Rep 478
[47] Ibid, at Rep 478

1.2 The Historical Milestones of Medical Negligence in UK

The law of negligence, as a coherent and principled body of law became established in the UK only in 1932, although the basic concepts and ideas that underlie it, perhaps, pre-dates that.[48]

Since then, medical negligence under the English common law has undergone several evolutionary milestones throughout the history of healthcare in UK. Kim Price[49] led us through his reminiscence of the developmental phases of the medical negligence in the UK. He related that during the 18th century, patients had an upper hand in 'controlling diagnosis, negligence claims and the contractual process'[50] between doctor and patient. From the beginning of the 20th century leading up to the 1980s, doctors' power of control climaxed during the so called golden age. It was during this period that the NHS was founded, the *Bolam principle*[51] was expounded and the doctors' negligence was being viewed as distinct from others'. Also during the period, the patients had much fewer rights in medical negligence. Even with the introduction of privatization to the NHS that raised patients' expectations during the period leading to the 21st century, doctors still maintained power of diagnosis with the self-regulation of medical negligence. The *"Bolam"* precedent became under increasing pressure in the law courts, which culminated in the *"Bolitho"*[52] decision which arguably and theoretically gave the judges some latitude of discretion in

[48] Christopher Walton (ed), Charlesworth & Percy on Negligence (12th ed, Sweet & Maxwell, 2010) paras 1-34.
[49] Kim Price, 'Towards a History of Medical Negligence' (2010) 375 The Lancet. Issue 9710, Pages 192 - 193
[50] ibid
[51] *Bolam v Friern Hospital Management Committee :* (1957) 1 WLR 582.
[52] *Bolitho v City and Hackney Health Authority* (1997) 4 All ER 771

determining the reasonableness of expert opinion in exceptional cases with little or no practical change from *"Bolam."*

The issue of medical malpractice is increasingly assuming greater importance in the UK. There has been increase both in the number of annual negligence claims and the average award for damages have escalated the 1980's [53] as well as the late 1990s.[54]

In 2003, as a part of quality improvement strategy, the department of health introduce the concept of duty of candour which makes a mandatory requirement of providers to take responsibility of their negligent acts and show remorse to the patients when errors occur during medical treatment.[55]

The NHS Redress Act of 2006[56] also made recommendations that provided for a 'no fault' system to deviate attention away from blame culture to the one that encourages learning from mistakes.[57]

1.3 The Nature of Medical Negligence in UK

Generally, under English law, negligence is a tort or civil wrong that results in a foreseeable harm arising from the breach in a duty of care.'[58] It may also arise under any one of the other two realms of law; criminal and contract law. Criminal cases arise from lack of full consent, assault and battery; while contract

[53] Roger Bowles and Philip Jones, 'Medical Negligence and Resource Allocation in the NHS' (1990) 24 Social Policy & administration
[54] The NHS Litigation Authority (NHSLA) Report 2009
[55] Vinita Shekar and others, ibid
[56] NHS Redress Act 2006 http://www.publications
[57] Vinita et al ibid
[58] MA Branthwaite, 'Medical Negligence Yesterday and Today' (1998) 9 Current Anaesthesia & Critical Care

cases feature where a consideration is advanced in return for the medical services, or where a doctor gives a warranty of specific outcome.[59]

Most of the medical negligence claims come under the law of tort where no any contractual relationship exists. Such tortious relationship is captured Lord Atkin in *Donoghue (or McAlister) v Stevenson:*[60]

> *"The rule that you are to love your neighbour becomes in law ..... you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question"*[61].

The tortious concept of negligence seeks to serve compensation, correction and deterrence.[62] As stated earlier on, medical negligence, although a subset of tort of negligence, could also arise from a breach of contract against a physician or hospital as the two duties are analogous under the law of negligence.[63]

When negligence is compared with the so-called 'no-fault' system, the former focuses on errors committed by individual healthcare providers, while the latter focuses more on the prevailing 'conditions and systems' as the cause of errors, and develop preventive measures to avert future occurrences.[64] A close

[59] ibid
[60] [1932] All ER Rep 1
[61] Ibid, Rep 1
[62]3, citing J. Gilmour, *Patient Safety, Medical Error and Tort Law: An International Comparison,* report submitted to Health Canada (2006).
[63]3, citing I. Kennedy and A. Grubb, *Medical Law,* Butterworths (2000), pp. 271 and 272.
[64] F Oyebode, 'Clinical Errors and Medical Negligence' (2006) 12 Advances in Psychiatric Treatment.221-7, at 222, citing J. Reason, 'Human Errors: Models and Management', 320 *British Medical Journal* (2000): 768-70

examination of both systems reveals distinction in objectives but relatively similar outputs.[65]

The tort of negligence depends on the presence of fault or the breach of a standard.'[66] Theoretically, negligence identifies an individual or (his employer) who is responsible in law for the infliction of the patient's injury, and so, in fairness ought to recompense the patient for that loss'. **[67]**

Accordingly, the fault or breach may take the form of a medical technique fault or an affirmative negligence. The medical *technique fault* or *professional fault*[68] consist in the failure to observe rules settling the exercise of medicine due to inability, or breaches of generally recognized rules resulting from negligence, carelessness or disrespect of specific methods and procedures. That may take the form of *professional fault* due to incompetence, lack of foreseeability or, due to utter negligence. This category comprises of failure to require interdisciplinary advice, depriving the patient of chances, delaying the patient's sending to a specialist.

On the other hand, an *affirmative negligence*[69] arises on the premise that the health care professional is equally responsible both for his acts of commissions and omissions. In other words, he is responsible for everything he does and for everything he refuses/fails to do. For instance, refusal to respond to the patient's demand, refusal to intervene (non-assuming risks), refusal to send the patient to

[65] Joseph L Brand, 'Aspects Of Saudi Arabian Law And Practice' (1986) 9 B. C. Int'l & Comp. L. Rev 1., p59
[66] L. Klar, *Tort Law,* Thomson (2003), p. 9.
[67] Joseph L Brand, 'Aspects Of Saudi Arabian Law And Practice' (1986) 9 B. C. Int'l & Comp. L. Rev 1., p61
[68] Laura Stanila: *Medical Liability for Malpractice* 137 Studia Iuridica Auctoritate Universitatis Pecs (2005) p143
[69] ibid

a superior department (the deprival of chance), refusal to grant the patient the right to a second opinion in the same medical case.

A health care professional's liability in negligence cases could be a c*riminal liability*, if his act / omission constitute an offense e.g. assault and battery. It may also be d*isciplinary liability* for bringing disrepute to the profession with sanctions ranging from suspension to even exclusion from practice. *Compensatory (civil) liability* is incurred, if a) the alleged harm caused to the complainant has a causal link with the defendant's breach of an owed duty of care or, b) in cases involving payment for health services, for a breach of contract.[70]

1.4 Burden and Standard of Proof of Medical Negligence

As stated earlier on, to succeed a claim in medical negligence, the plaintiff must discharge the burden of proof by establishing, on the balance of probability, well established elements of medical negligence, to wit, a *duty of care, breach, harm* and *causation*.

Duty of care or legal obligation: A duty of care is the circumstances and relationships that create an obligation on the defendant to take proper care to avert a foreseeable injury to the claimant which can simply be implied once a professional-patient relationship is established.[71] A health care professional is said to assume a duty of care toward that patient once he/she agrees to examine,

[70] ibid
[71]3, citing G. Robertson, 'Negligence and Malpractice', in J. Downie, T. Caulfield and C. Flood (eds), *Canadian Health Law and Policy,* LexisNexis (2002), p. 91.

diagnose or treat a patient or when medical risk recognised.[72] [73] Although a health professional is not obliged to assume a duty of care in circumstances outside of his official work, but where he volunteers to assist, the same standard of care will apply.[74] Further more, where a patient consents to an experimental test, the duty of care of a therapeutic standard is not required.[75]

The act of negligence - breach of duty:

If the defendant fails to treat or manage the plaintiff at standard a reasonably competent health care professional would have done in a similar situation, then he/she has breached a duty of care.[76] This was further adumbrated in *Bolam*[77] where the court held that;

> *'…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 that it is sufficient if he exercises the ordinary skill of an ordinary man exercising that particular art.'*[78]

Additionally, that test must be based on some scientific and technical standards contemporaneous to the negligence, not some archaic standard applied in the present day.[79] Although professionals are required to keep up-to-date with current state of practice, they are not expected to read every single journal.[80]

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[72] *Newman & others v United Kingdom Medical Research Council* (1996) CA
[73] *Bolam, Bolitho*
[74] *Goode v Nash* (1979) 21 SASR 419
[75] *Siwa v. Koch* (2009) 1–06–3552 CA. Ill. Feb. 2010.
[76] *The Shakoor* Case (Shakoor v. Situ, [2000] 4 ALL ER 181
[77] (1957) 1 WLR 582
[78] *Bolam v Friern Hospital Management Committee* ibid p582
[79] *Roe v Ministry of Health* 1954 2 QB 66
[80] Per Lord Denning in *Crawford v. Board of Governors of Charing Cross Hospital* (1953) The Times, 8 December

Before the advent of *Bolam*[81], there was considerable latitude for external evaluation of clinical judgment in proof of standard of care in medical negligence cases[82]. The *Bolam test* brought about a significant milestone to the determination of standard of care, wherein, 'determining the standard was seen by the courts as essentially a matter for the medical profession, to be resolved by expert testimony with minimal court scrutiny.'[83] Contemporaries of this decision alluded to the thought that "excessive judicial interference raises the spectre of defensive medicine, with the attendant evils of higher medical costs and wastage of precious medical resources." [84]

All that was required by the law was to establish a standard of care was a "reasonable practice by a reasonable practitioner."[85] Under the *Bolam test, w*hat constitutes a standard of care was determined by the professionals. Expert testimony helped courts to decide what is accepted and proper practice in specific situations.[86] That is to say, "the law imposes the duty of care: but the standard of care is a matter of medical judgment."[87] This was because, as Yong Pung How[88] further justified, "a judge, unschooled and unskilled in the art of medicine, has no business adjudicating matters over which medical experts themselves cannot come to agreement."[89]

[81] ibid
[82] Harvey Teff, *'The Standard of Care in Medical Negligence - Moving on from Bolam*?' (1998) 18 Oxford Journal of Legal Studies
[83] ibid
[84] per CJ Yong Pung How, at p144
[85] Kim Price ibid
[86] B Hurwitz, 'How Does Evidence Based Guidance Influence Determinations of Medical Negligence?' (2004) 329 BMJ
[87] Per Lord Scarman, *Sidaway v. Board of Governors of the Bethlem Royal Hospital, 95* [1985] AC 871
[88] CJ of Singapore
[89] In a Singaporean case of , *James and Another v Gunpathy* [2002] 2 SLR 414; [2002] SGCA 25 7

In determining the standard of care, therefore, it is instructive to recollect the *Bolam* principles enunciated by McNair J**.**:

> *"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 area... Putting it another way around, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view*." [90]

The principle in *Bolam* has been criticized for allegedly granting "exceptional prominence to expert evidence of professional practice."[91] However, in *Hunter v Hanley*, the court reiterated that …

> *the true test for establishing negligence ……. 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 …"*[92]

The House Lords in the case of *Bolitho*[93] added a qualification that the courts may make their own assessment of experts' opinion and reach their own conclusions on the reasonableness of a clinical judgment[94] to the effect that standard of practice claimed must be recognized as 'proper by a *reasonably* competent body of opinion'.[95] That is, any opinion relied upon has a *logical* basis'.[96] The effect of the *Bolitho* standard is that it tended to replace 'inappropriate deference to medical opinion' with rule of law which requires listening to all parties, just like it applies to all other professionals.[97]

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[90] *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582

[91] Rachael Mulheron, *'Trumping Bolam: A Critical Legal Analysis of Bolitho's "Gloss*"' (2010) 69 The Cambridge Law Journal 609, 609–638.

[92] (1955) SC 200, 1955 SLT 231 at 217

[93] *Bolitho v. City & Hackney Health Authority* [1998] AC 232 , p241

[94] Harvey Teff ibid p473

[95] *Bolam*, p87

[96] *Bolitho v. City & Hackney Health Authority* [1998] AC 232 , p241 (emphasis added)

[97] M. Brazier and J. Miola, 'Bye-Bye Bolam: A Medical Litigation Revolution', 8 *Medical Law Review* (2000): 85-114 at 114.

To prove fault on the part of the defendant in the determination of breach of duty of care, the complainant is not required to establish malice.[98] On the other hand, the defendant has to take the plaintiff as he found him; the plaintiff's sensitivity would not negate his chance of recovering for the harm.[99]

Proximate cause and the relation of causality (Causation):

Quite often, it is much easier to establish that there has been negligence than to establish the direct link between the negligent act and the alleged harm suffered by the claimant. For instance, in the case of *Coyle v Lanarkshire Health Board*[100], it was held that the complainant had proved a causal connection between breach of duty by the midwives responsible for her care in failing to call for urgent medical assistance and the injury her son sustained.

A claim may fail unless there is some quantifiable injury and a causal link between the injury and the negligent act.[101] A cause which produces the injury must be in a continuous sequence unbroken by any intervening event, *(novus actus interveniens)*[102]and without which, the injury would not have occurred,[103] or that it was due to the plaintiff's contributory negligence.[104] Conversely, the claimant will have discharged that burden if, by evidence, it can be shown that

98 *Hollywood Silver Fox Farm v Emmett* [1936] QBD
99 *Jobling v Associated Dairies* [1981] HL
100 [2014] CSIH 78: [2013] CSOH 167
101 J Mason and Alexander McCall Smith, *Law and Medical Ethics* (London : Butterworths 1998)
102 *Reeves Respondent And Commissioner Of Police Of The Metropolis Appellant* - [2000] 1 A.C. 360
103 *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004
104 *Butterfield v Forrester* (1809) 11 East 60

'but for' the defendant's negligence, the injury he suffered would probably not have occurred. [105]

Injury and repairment of the damage provoked by injury: The plaintiff must finally show that he/she has, in fact, suffered an injury which may be physical or psychic injury.[106] A physical injury may be a loss of function, organ, or a permanent disability.[107] A psychic injury could be any psychological harm sustained as a result of the defendant's negligence, e.g., depression[108] [109].

1.5 Reliefs for a Successful Claim

In the case of physical injury, it is impossible to restitute the plaintiff in *status quo ante* prior to the negligent act. However, present or future financial losses consequential to the injury may be compensated.[110]

A successful litigant is entitled to damages to compensate for the injury or loss which may be *economic damages* where monetary compensation is awarded to cover, for instance, cost of treatment, or *non-economic damages* e.g., for pains and sufferings.[111]

Where an actual injury could not be proved, damages may still be awarded for loss of chance of better outcome.[112] Such damages will generally be less than those awarded under causation.[113]

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[105] *Bailey v Ministry of Defence* [2008] EWCA Civ 882, [2009] QB 657, [2009] 2 WLR 1039
[106] *Ravenscroft v Rederiaktiebølaget Transatlantic* [1991] 3 All ER 73, 76
[107] *Hotson v East Berkshire Health Authority* [1987] HL
[108] *Chadwick v British Railways Board* [1967] QBD
[109] *Farrell v Avon Health Authority* [2001] QBD
[110] Robert Palmer and Mary Maclachlan, 'Clinical Negligence' (2009) 10 Anaesthesia & Intensive Care Medicine
[111] Laura Stanila: *Medical Liability for Malpractice* 137 Studia Iuridica Auctoritate Universitatis Pecs 143 2005 p150
[112] *Rufo v. Hosking* (2002) NSWSC 1041, 246
[113] Tibballs, J. (2007). *Loss of chance: A new development in medical negligence law*. Medical Journal of Australia, 187(4), 233-5

In England, the National Health Service (NHS) mainly employs healthcare professionals. Under the doctrine of vicarious liability the employer is liable for medical liability expenses or claims incurred by its employees during the course of their employment, and therefore, medical liability insurance is unnecessary.[114]

1.6 Defenses to Medical Negligence

Generally, many of the defenses obtainable under the tort of negligence may as well be applicable to medical negligence. A healthcare professional may, for instance, claim that his practice is in line with his professional standards, or that the alleged injury was not as a result of a medical error.[115] Others include:

a) *Contributory negligence:* Where a patient failed to mitigate his own harm, or actually made it worse[116], for example, by willfully failing to follow the professional's instructions, the defendant may raise a defence of contributory negligence.[117] A successful defence of contributory negligence would reduce the damages recoverable by the complainant to the extent of his contribution to the harm.[118]

b) *Consent: Volenti non fit injuria;* "to a willing person, no injury is done."[119] Where the patient gives an informed consent, he is precluded from recovering as he had willingly accepted the risk,[120] or assumed responsibility[121] for the

[114] *The Catholic Child Welfare Society & ors v Various claimants & The Institute of the Brothers of the Christian Schools* [2012] UKSC 56
[115] http://injury.findlaw.com/medical-malpractice/defenses-to-medical-malpractice-patients-negligence.html#sthash.CGyp165U.dpuf
[116] Sec. 1(1), Law Reform (Contributory Negligence) Act 1945
[117] *Froom and others v Butcher* - [1975] 3 All ER 520
[118] Law Reform (Contributory Negligence) Act 1945 s.1 (1)
[119] *Dann v Hamilton* [1939] 1 KB 509
[120] *Smith v Baker & Sons* [1891] AC 325
[121] *Barrett v Ministry of Defence* [1995] CA

risk of any complication or adverse effect consequent to any breach of duty of care.[122]

c) *Unforeseeable risk:* The 'neighbour principle' provides that a duty of care is owed to persons whom one ought reasonably to foresee might be injured if one did not take reasonable care.[123] The action may fail, if the defendant can show that the injury suffered by the plaintiff was as a result of some other intervening events, also known as *a novus actus interveniens.*[124] That means, although negligence may have been established, but causation failed.

d) *Non-disclosure:* Where the patient failed to disclose important information, e.g., some critical elements of his condition to the doctor, he may be precluded from recovering for any harm consequent to a breach.

e) The defendant may also maintain that a respectable minority of professionals supports that line of treatment that he undertook.[125]

f) *Statute of limitation*: The plaintiff may bring a claim in negligence from the time he discovered the harm to the maximum period allowed by the statute of limitation. The claimant must start the process within three years of when the negligence happened,[126] or realised.[127] In the case of a mental incapacitated claimant, the statute bar will operate after three year time-limit of recovering his mental capacity.[128]

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[122] *Wells v Mutchmeats* Ltd & Anor [2006] EWCA Civ 963
[123] *Donoghue v Stephenson* [1932] AC 562
[124] *Reeves Respondent And Commissioner Of Police Of The Metropolis Appellant* - [2000] 1 A.C. 360
[125] *Bolam ibid*
[126] Ch 58 . s 11(4 a), Limitations Act 1980
[127] Ch 58 . s 11(4 b), Limitations Act 1980
[128] Ch 58 . s 38 (2), Limitations Act 1980

1.7 Summary and Conclusion:

Medical negligence is simply, a failure to keep up professional standard thereby causing harm to a patient. The patient (complainant) must establish, on the balance of probability that the healthcare professional owed him a duty of care, which was breached and that caused him a harm that would not have occurred but for the negligent act.

Often, the defendant may raise defense(s), inter alia, of the complainant's contributory negligence, consent, lack of causal link between the negligent act and the harm occasioned or a statute bar. A successful defense may afford the defendant with exoneration from the claim, or a mitigation of the damages payable. Conversely, where a claim in medical negligence succeeds, the complainant may be awarded damages, not in restitution to his status quo ante, but as a compensation for his financial or psychic loss which may be actual or anticipated.

The United Kingdom is not operating in isolation as regards the concept of medical negligence. Healthcare professionals all over the world face the same threat of claims in medical negligence. In some jurisdictions, it is argued that the threat of medical negligence suits have prompted health care professionals to engage in '"defensive medicine, which could potentially contribute to the rising healthcare costs.[129]

[129] See Patricia Munch Danzon (1991) *Liability for Medical Malpractice* Journal of Economic Perspectives- Volume 5, Number 3-Summer 1991-Page 51

In Saudi Arabia, up till the year 2012, expatriates constitute about 75% of medical doctors employed by the Saudi ministry of health.[130] Physicians, nurses and other paramedical professionals from diverse backgrounds and jurisdictions converge there to practice their respective professions. Coupled with this picture was the revolution that Saudi Arabia has witnessed in the area of healthcare. More modem medical facilities, including intensive care, became widely available.[131] Along with increasing population and the intensified awareness, there has been a remarkable increase in the medical negligence claims.[132] It is no wonder that the Saudi Arabian government promulgated a law called, *Law of Practicing Healthcare Professions* which prescribes duties and liabilities of health professionals to the public, patients and their colleagues.

In line with our research questions, the study hopes to find out if this is the same in concept with the medical negligence under the UK laws. In the following chapter, we will examine the concept of medical negligence under the Saudi Arabian jurisdiction.

[130] 'Statistics Book' (*Saudi Arabian Ministry of Health*, 6 March 2013) http://www.moh.gov.sa/en/Ministry/Statistics/book/Pages/default.aspx accessed 6 December 2014.
[131] A Mobeireek and others, *'Communication with the Seriously Ill: Physicians' Attitudes in Saudi Arabia.*' (1996) 22 Journal of Medical Ethics
[132] Al-Hajjaj MS: *Medical practice in Saudi Arabia*, *the medico-legal aspect*; Saudi Medical Journal 1996; Vol.17 (1): 1-4

2 CHAPTER TWO

SAUDI ARABIAN LAW CONCEPT OF MEDICAL NEGLIGENCE

2.1 Introduction

It is already settled that under the English common law medical negligence could arise from the breach of a tortious duty of care with resultant injury to the complainant. A medical negligence under the English law could also arise from a breach of contractual relationship where the complainant had advanced a consideration for medical services rendered to him by the defendant. Additionally, a medical negligence could be a criminal offence if the negligent act is clearly identified by a written law as a criminal offence.

To succeed in a medical negligence suit, the complainant has to successfully prove, on the balance of probability, that the defendant owed him a duty of care, and that the defendant was in breach of that duty. The complainant also has to show that he has suffered an injury as a result of that negligent act of the defendant. In the absence of a valid defense, a successful suit in medical

negligence under the English law could entitle the complainant with the award of damages as compensation for the monetary loss.

In the light of the foregoing, this chapter will focus the searchlight on the nature and spectrum of the rules of medical negligence claims under the Saudi Arabian law which is hinged on the *Shariah.* And to conceptualise the Saudi Arabian laws, it seems imperative to capture the general *Shariah* perspective on the medical negligence claims. Although the *Shariah* concepts to be discussed may generally form the basis for the Saudi Arabian law, they may not specifically apply to the Saudi Arabian jurisdiction.

2.2 The *Shariah* Law Perspective on Medical Negligence

Saudi Arabia is a culturally conservative Islamic society whose legal system is rooted on the *Sharia* which offers guidance for mankind in matters pertaining to their worldly and spiritual affairs.[133] The Saudi *Sharia* law is in general, applied in a more conservative and strict manner than other countries within the Middle East.[134] The primary sources of *Shariah* are the *Qur'an*[135] and the *Sunnah*,[136] which together define the legal, moral and ethical duties, rights and relationships between humans. For instance, the Holy Qur'an spelt out the law of retaliation as thus;

[133] Puteri Nemie Jahn Kassim, 'Medical Negligence in Islamic Law' (2006) 20 Arab Law Quarterly, 400–410.

[134] Wayne Jones, Shabnam Karim and Louise McDonald, 'An Overview of Medical Malpractice in the Kingdom of Saudi Arabia' (*Clyde & Co*, 9 December 2014) <http://www.clydeco.com/insight/updates/view/an-overview-of-medical-malpractice-in-the-kingdom-of-saudi-arabia?utm_source=Mondaq> accessed 2 January 2015

[135] The Holy Text believed by Muslims to be the direct word of God,

[136] The example, whether in word or deed, of Prophet Muhammad incorporated in Islamic scriptures, See Doi AR. *Shar'iah: The Islamic Law*. London: Ta Ha, 1984: 2–84.

'And we ordained therein for them: Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth and wounds equal for equal. But if anyone remits the retaliation by way of charity, it shall be for him expiation.'[137]

The *Sunnah,* as a primary source, has provided for a number of issues what were not explicitly provided for by the *Qur'an*. For example, the saying of the prophet Muhammad (peace be upon him) regarding the legal capacity of the insane, child or a person in a sleep:

The pen has been lifted from three: the sleeper until he awakens, the child until his first wet dream, and the insane person until he can reason[138]

Where an issue is not directly dealt with by the primary sources, scholars may employ a secondary source, *ijtihad,* the law of deductive logic,[139] to interpret and contextualise religious teachings.[140] The contemporary advances in science and technology have added to the range of novel issues that have created medico-legal dilemmas for those involved with healthcare delivery.[141]

Professional ethics also play an integral part of medical negligence rules. The Islamic medical ethics[142] was founded on the principles of human honour,[143] right to live (human life is respected and protected),[144] and equity[145] ("deal not unjustly and you shall not be dealt with unjustly").[146] Others include, doing well (quality),[147] and "no harm and no causing harm (do no more harm)."[148]

[137] Holy Qur'an 5:45
[138] Kelle NHM. *Reliance of the traveller.* Maryland: Amana, 1994:42–6.
[139] A Gatrad, 'Medical Ethics and Islam: Principles and Practice' (2001) 84 Archives of Disease in Childhood 72, 72–75.p73
[140] A Gatrad, ibid
[141] ibid
[142] World Health Organisation, 'Islamic Code of Medical and Health Ethics', *Regional Committee for the Eastern Mediterranean* (2005)
[143] "We have honoured the children of Adam" (Quran 17:70)
[144] "When a person who kills a soul – unless it is [in punishment] for a [murdered] soul or for corruption on earth – it is as if he killed all people" (Qur\an 5:32)
[145] "And be fair; God loves those who are fair" (Qur\an 49:9)
[146] The Holy Qur'an 2: 279.
[147] "God enjoins equity and doing well" (Qur\an 16:90)
[148] it is unacceptable to bring harm on one's self, or to cause harm to others or to society in any shape or form.

Saudi Arabia is, like most other conservative Muslim world, is a culturally sensitive society. Therefore, healthcare professional must have some basic knowledge of its *sharia* driven culture to enable them deliver care effectively.[149] This could also enable healthcare professionals to appreciate of the moral contexts used by the patients to possible initiate medical negligence claims.[150]

Legal Capacity and Liability under the *Sharia* Law

Subject to any exceptions under Islamic law, any person who possesses full legal capacity is bound by his own act, privately or collectively.[151] Legal capacity is determined based on the ability to comprehend the *Shariah* message that creates legal rights and duties.[152] That is to say, once a person has attained both physical and intellectual maturity, as are the healthcare professionals, he/she is responsible for his act of omission or commission.

Specifically, the following *hadith* spelt out the liability of healthcare professionals;

> *He who does [the work of a] medical doctor and does not know his medical profession is liable to pay compensation for willful treatments.*[153]

Many contemporary scholars have further reinforced this dictum, e.g., "A doctor is liable to pay compensation if he is negligent".[154] Similarly,

> *'A surgeon who bleeds a patient or apply leeches to him does not incur any responsibility, even though the sick man succumbs, provided that the*

[149] A Gatrad, 'Medical Ethics and Islam: Principles and Practice' (2001) 84 Archives of Disease in Childhood 72, 72–75.
[150] Macnair, 'Medical Ethics' (1999) 319 BMJ 2, 2–3.
[151] Alghamdi
[152] Alghamdi
[153] Ibn Qayyim, Tl?m-ul-Muwaqqnn, Beirut: Dar al-Fikr, 1397H, at p. 327.
[154] Imam al-Shafici, Kitab al-Umm, 6th Ed., Cairo: Matbacah al-Kubra, 1325H, at p. 175.

operator does not overstep the limits imposed by science in operations of that nature.'[155]

Or, 'If a surgeon performs the operation of phlebotomy in any customary part [of the body], he is not responsible in case of the person dying in consequence of such operation.'[156]

Pre-conditions for Medical Treatment

Before a physician may proceed to treat a patient, certain pre-requisites must be satisfied:[157] Firstly, the practice must be permitted by the authority (Qualification and Licensure): A healthcare professional must conform to the regulations set by the authority of the particular country in which he practices.[158] Secondly, the practice must conform to the professional code of practice. His practice must be that which is allowed under the code of practice prescribed by the country in which he is practicing.[159] And lastly, except in in emergency cases, the sick person must consent to the treatment. The professional may only perform a medical intervention with the consent (sometimes in written) of the patient or his relatives.[160]

Healthcare Professional's Civil Liability under the *Shariah*

The Islamic concept of civil liability is neither "fault liability", nor "strict liability", but may be described as "damage liability." It is based upon the principle of indemnity against actual damage; "no liability without damage."[161]

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[155] Al-Nawaw?, Muhiudin Ab? Zakaria Yahya bin Sharif, Minhaj-et-Talibin
[156] Hamilton, C, Hedaya, Lahore: Premier Book House, 1975, at pp. 504-505.
[157] Ahmad Sharifuddin, Al-Ahkam Al-Shar?'cah Li Amal Al-Tibiyyah, Egypt: Dar al Thaq?fah, n.d., at p. 46.
[158] Al-Khat?bb, Mawahib, al-Ja?ll, Beirut: Dar al-Fikr, 1398H, at p. 321.
[159]Ibid.
[160] Ibid
[161] Muslehuddin, M., Concept of Civil Liability in Islam and the Law of Torts, Islamic Publications Ltd., Lahore, 1982 at p. 53.

Prophet Muhammad (peace be upon him) said "your blood (life), your property, and your honour (reputation) are sacred…"[162] and breach of this entails absolute liability. Medical negligence liability may arise from a breach of contractual agreement between the professional and the patient, or from the provision of the *shariah* law.[163]

Ordinarily, a qualified doctor who performs his duties correctly, and does not contravene with the *Shariah* principle will not be liable for any mishap which is beyond his control. On the other hand, an unqualified professional who causes injury to a patient shall be liable unless the patient is aware of his non-qualification, and agrees to the treatment despite that. Similarly, a treatment without the consent of the patient or his relative can incur civil liability for any injury caused. Where a professional uses or tries a new machine or technique to treat a patient, he will be liable in medical negligence unless that has been endorsed by the government.[164]

Proof of Medical Negligence under the *Shariah*

The following conditions are required to prove medical negligence:

1. Breach of Duty *(al ta'addi)*: As has been pointed out earlier on, the duty might arise from contractual relationship or from the operation of the law. A professional may breach a duty either directly (by an act of commission) like amputating the sound leg, or indirectly by an act of omission like failure to perform a treatment required which resulted in injury or deterioration in in

[162] See Al-Bukh?ri at http://hadith.al-islam.com/search/ This
[163] Al-Ghamid, Masculiyyah al-Tabib al-Mihaniyyah, Jeddah: Dar al-Andalus, 1997, at p. 219.
[164] Ibn Qayyim, Z?d al-Mac?d, Beirut: Maktabah al-Man?r, 1407H, Vol. 4, at p. 141.

his condition.[165] However, the professional may raise a defense of consent or that it was done in an emergency to save life.

2. Damage/Injury (*al-Darar*): The claimant must show that the defendant's wrongful act has caused either a physical (to the body) or moral injury (to honour or reputation, as in a breach of confidentiality) to him.[166] Usually, physical harm entails blood money.
3. Relationship (*al Ifdha*): There has to be a direct causal relationship between the breach of duty and the harm caused. A causal relationship may be direct (*al mubasharatah*)[167] or indirect (*at tasabbub*)[168] such as where a doctor made a wrong prescription which made a pharmacist to dispense a wrong medication, or a nurse to prepare a wrong medication and ultimately killing the patient.[169]

Standard of Proof of Medical Negligence under the *Shariah*

If you plan to make a claim in medical negligence, the Qur'an reckons on you to*". . . bring forth your argument if you are telling the truth. . . ."*[170] In order to substantiate the allegation, evidence has to be adduced by way of admissions, documents, or expert evidence.

1. **Admission** (al-Iqrar): Where a professional of sound mind freely admits guilt in the presence of many witnesses, it may be a sufficient proof of liability in negligence.

[165] Al-Khatabi, Mac?lim al-Sunan, Cairo: Matbacah Ansar al-Sunnah, 1367h, Vol. 6, at p. 378.
[166] Ibid No. 159, at p. 193.
[167] Ibid No. 159 p196
[168] Ibid No. 159 p197
[169] Jawziyyah, al-Tibb al-JVabawi, Beirut: Dar Maktabah al-Hay?h, 1407H, at p. 137.
[170] The Holy Qur'an, 27: 64.

2. **Witness** (al-Shah'dah): The Qur'an says *"...and take for witness two persons among you, endued with justice, and establish the evidence (as) before Allah. ..."* [171] If there are witnesses to the wrongful conduct of the doctor, the doctor will be liable,[172] provided that the statement given by the witnesses must be verified by other doctors, specialising in the same field, to confirm that what the doctor did not accord with accepted medical practice.[173]

3. **Opinions of specialists** (Ra'yu al-Khab'r)**:** The opinions of other doctors, specialising in the same field, is also important to determine a doctor's liability. Even one opinion may be sufficient to show that the doctor is liable.[174]

4. **Written documents (al-Kit'bah);** Documentary evidence of contract or medical records may be useful under the Islamic law of evidence. The Holy Qur'an says:

   > *"... When you deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing. . . ."*[175]

Reliefs Available under the *Shariah* Law of Medical Negligence

Under the Islamic law, the infliction of harm, whether deliberate or by negligence, gives rise to compensation. The Holy Qur'an says:

[171] The Holy Qur'an, 65: 2.
[172] Ibid No. 159 p. 281
[173] Ibid No. 159 p. 282
[174] Ibid No. 159 p. 283.
[175] The Holy Qur'an, 2: 282.

"If then anyone transgresses, the prohibition against you, transgress you likewise against him."[176]

Usually, blood-money (*Diyah*) is the monetary compensation imposed on the accused for causing homicide or bodily injury.

"Never should a believer kill a believer, but (if it so happens) by mistake (compensation is due); if one so kills a believer, it is ordained that he should free a slave and pay compensation to the deceased family, unless they remit it freely."[177]

Previously, compensation in blood money was being paid in camels. However, in the modern world, it may not be possible to pay compensation by paying camels. Therefore, maximum compensation in such a case like willful homicide could be as high as 1000 gold (dinars) or 10,000 silvers (Dirham).[178]

2.3 The Saudi Arabian *Law of Practicing Healthcare Professions*

Unlike under the English legal system, the Saudi Arabian legal system is based on the principles of *Shariah*[179], which, as stated earlier, is primarily sourced from the *Qur'an*[180] and the *Sunnah*[181] (deeds) of Prophet Mohammed.[182] The Monarch (King) is responsible for legislation by way of royal decrees according to the

[176] The Holy Quran 2:194

[177] The Holy Qur'an, 4: 92.

[178] Ibid 159 p. 283

[179] Islamic canonical law based on the teachings of the Koran and the traditions of the Prophet (Hadith and Sunna), prescribing both religious and secular duties and sometimes retributive penalties for law-breaking. It has generally been supplemented by legislation adapted to the conditions of the day.
https://www.google.com/webhp?sourceid=chrome-instant&rlz=1C1BLWB_enSA568SA569&ion=1&espv=2&ie=UTF-8#q=shariah+definition

[180] The Islamic sacred book, believed to be the word of God as dictated to Muhammad by the archangel Gabriel and written down in Arabic, it touches upon all aspects of human existence, including matters of doctrine, social organization, and legislation.
https://www.google.com/webhp?sourceid=chrome-instant&rlz=1C1BLWB_enSA568SA569&ion=1&espv=2&ie=UTF-8#q=quran+definition

[181] *Sunnah is* the way of life prescribed as normative for Muslims on the basis of the teachings and practices of the Islamic prophet Muhammad and interpretations of the Quran.
https://www.google.com/webhp?sourceid=chrome-instant&rlz=1C1BLWB_enSA568SA569&ion=1&espv=2&ie=UTF-8#q=sunnah+definition

[182] Article 1 of the Saudi *Basic Law*

shariah.[183] The royal decrees may empower ministers to make, by ministerial resolution, subsidiary laws and regulations to deal with specific areas or issues within the purview of their ministries.[184] In the light of the above, the royal decree no. M/59 of 4.11.1426 (H[185]) vested the ministry of health with the power to issue *The Law of Practicing Healthcare Professions*[186] that governs medical negligence in Saudi Arabia. It is comprised of the regulation based on professional standards, as well as the procedures for its implementation based on the *shariah* law principles[187] *The Law*[188] *w*as passed by the ministerial resolution number 276 of 3/11/1426 (H).[189]

Professional standard dictates the culpability of the healthcare professionals, while the *Shariah* law determines the reliefs available to the successful party in cases involving personal (similar to civil) rights, and/or punishment incurred by the defendants if common (public) right(s) is/are involved.[190] The *Sharia's* personal right relief is usually 'compensation for any disability, morbidity or mortality that results from proven negligence or malpractice of medical intervention.'[191] Punishment for public right may be 'criminal' or 'disciplinary' in form which includes one or a combination of fine, imprisonment, lashes, revocation of licensure or some other restrictions.[192]

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[183]Article 1, *Basic Law of \governance, Royal Decree no.*A90 of 27/08/1412 (1/3/1992)
[184] Article 67, *Basic Law of \governance, Royal Decree no* A90 of 27/08/1412 (1/3/1992)
[185] Hijra, the Islamic lunar calendar
[186] No. 276 of 3/11/1426 (H)
[187] Al Saeed ibid p3/9
[188] *The Law of Practicing Healthcare Professions*, hereinafter referred to as *The Law*
[189] Law of Practicing Healthcare Professions (previously, Rules of Implementation of *The Regulations for the Practice of Medicine and Dentistry, 1401)*
[190] Samarkandi ibid
[191] Al Saeed p 4/9
[192] Articles 26, 28 & 31 of *The Law*

2.3.1 Duties and Obligations of Practicing Healthcare Professionals

Chapter two of the *Law*, which comprises of Articles 5 to 25, stipulates the professional's responsibilities generally, i.e., his obligations to his patient as well as to his colleagues. A failure on his part to discharge any of these responsibilities may be a valid ground for one or combinations of legal liabilities stipulated under part three (3).

The duties incumbent on healthcare professionals are further categorized in to general (public) duties[193], obligations towards the patient (civil)[194], and professional courtesy.[195] It requires that practicing healthcare professionals should "exert due care in line with commonly established professional standards" in discharging their duties.[196]

The healthcare practitioner may, in a non-emergency situation, refrain from treating a patient for personal or professional reasons if that would jeopardize the quality of care he provides to the patient, on condition that this [refrain] does not harm the patient's health, and that there is available another practitioner who is capable of treating the patient instead of him/her.[197]

Liability of Practicing Healthcare Professionals

The *Law* identified and categorized three basic types of liabilities that a practicing healthcare professional may incur in breach of the various duties

[193] Articles 5-14
[194] Articles 15-23
[195] Articles 24-25
[196] Article 16
[197] See Article 16 of the *Law of Practicing Healthcare Professions*

stipulated under the *Law*.[198] The liabilities are classified according to the type of duty that was breached by the professional.

A professional liability under *the Law* may be a *civil liability* where a physician fails in his responsibility to a patient with a resultant harm to that patient (Articles 26 and 27). Grounds for Civil Liability include error in treatment, lack of follow-up, or deficiency in knowledge of technical matters which are ordinarily known to his colleagues of similar specialty. Others include conducting unapproved experiments or scientific research on a patient. Similarly, prescribing medicine to a patient on an experimentation basis, or using medical devices or equipment without proper knowledge of mode of its operation or without taking precautions to prevent harm to the patient. A failure to consult relevant colleagues when patient's condition warrants is also a valid ground for civil liabilities.[199] Penalties for civil liability include payment of fine as indemnity, the amount of which is to be determined by the *Shariah* Medical Panel.[200]

Even where harm has not resulted to a patient, a healthcare professional's failure in his general obligations may incur a *criminal liability*:[201] This is usually for his failure to abide by the specific provisions[202] of the *Law*, including practice without license, obtaining license through illegal method or giving distorted information or to profess as a practicing healthcare professional even though one

[198] Articles 26-32
[199] Article 27
[200] Article 26
[201] Formerly known as punitive liability
[202] See Article 28

is not licensed.[203] Also, assuming the title normally conferred on medical professionals, or using medical equipment normally used in the medical practice without license could incur a criminal liability.[204] It is considered a medical negligence to abstain from treating a patient without justification.[205] Others are the violations of the *Law* regarding to a failure in the notification of infectious diseases,[206] or criminal elements[207] to the relevant authorities. Where a professional fails to update his knowledge and skills,[208] or fails to treat each patient according to the patient's best interest, or to obtain valid consent before a medical intervention (subject to the exceptions),[209] he could incur a criminal liability.[210] So also is the provision of a death report without full assessment of the cause of death, or conducting abortion (subject to the exceptions under the Regulation)[211] or trading in human organs or performing human organ transplant sourced from a trade.[212]

For all the above mentioned violations, a fine of up to SR50,000[213] or six (6) months imprisonment or both may be applied (Articles 29). Where a practicing healthcare professional violates other specified provisions of the *Law,* a fine not exceeding Saudi Riyals (SR) 50,000 will apply.[214] In other violations, where no specific penalty is provided, a fine not exceeding SR 20, 000[215] applies.[216]

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203 Article 2
204 Article 28
205 Article 9
206 Under Article 9a
207 Under Article 22
208 Under Article 9
209 Under Article 21
210 Under Article 9b
211 Under Article 24
212 Article 28
213 £8,570.26 http://www.xe.com/currencyconverter/convert/?Amount=50000&From=SAR&To=GBP Accessed 2/1/2015
214 Article 29
215 £3,427.97 http://www.xe.com/currencyconverter/convert/?Amount=50000&From=SAR&To=GBP Accessed 2/1/2015
216 Article 30

Lastly, in addition to, or distinct from any of the above mentioned liabilities, a breach of professional standards or ethics may attract *disciplinary liability*[217] which may be in form of a warning, fine not exceeding SR10,000[218] or revocation of license[219].

2.4 The Trends of Medical Negligence Litigations in Saudi Arabia

A number of studies[220] have been carried out mainly by physicians to examine the patterns of medical malpractices that were reported to the *Shariah* Medical Panels, and their ultimate outcomes. While they were almost unanimous in their conclusion that the rate has been rising over the periods of their respective studies, the focus of their studies varied considerably. Some of the studies were restricted to a particular region[221], to particular specialties like dental[222] anesthesia,[223] and obstetrics.[224] Moreover, they have noted that either the records were poorly kept[225] or that the access to data is exclusive to members of the panels[226], or otherwise accessible only on the order of the minister.[227] Recently, the ministry of health has started publishing its annual reports on its website.[228]

In 2004, Al Siddique's study[229] showed that there was an increase in the reported number of cases of medical malpractices cases considered by the *Shariah*

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[217] Article 31
[218] £1,714.07 http://www.xe.com/currencyconverter/convert/?Amount=50000&From=SAR&To=GBP Accessed 2/1/2015
[219] Article 32
[220] Hajjaj, Jarallah, Samarkandi, Siddiqque
[221] Samarkandi ibid
[222] Ammar ibid
[223] Samarkandi ibid
[224] Habib ibid
[225] Ahmed Al Siddiqque ibid p902
[226] Samarkandi ibid p88
[227] Jarallah ibid p102
[228] 'MOH Statistics Book' (*Saudi Arabian MOH*, 6 March 2013) <http://www.moh.gov.sa/en/Ministry/Statistics/book/Pages/default.aspx> accessed 6 December 2014.
[229] Habib ibid, p901

Medical Panels from 440 in the 1999 to 718 in 2001. There was also an average incremental rate of 21% over the three-year study period.[230] He further found that, the obstetric specialty had the highest number (27%) followed by surgery with 17% while dentistry had the lowest with 2.5%. The high rates amongst general surgery and obstetrics and gynecology patients may be explained in part by the fact that they compete for the highest position in the number of surgeries conducted in Ministry of Health, other governmental and private hospitals across Saudi Arabia.[231] Al Siddique's study also showed that the Jeddah region had the highest number of cases while Riyadh trailed in the third position behind Dammam. Female physicians, according to Al Siddiqque, had lesser numbers as compared to their male counterparts. The ministry of health hospitals which actually forms the bulk of healthcare institutions in Saudi Arabia had about 45% of the cases, followed by private clinics with 30% while the university hospitals constituted only 1.5% of the total number of cases.[232]

Al Saeed,[233] on the other hand, made a similar statistical analysis of period covering the period, from 1999 to 2008. He found that the pattern found by Al Siddiqque was maintained similarly throughout the period of his study with obstetric maintaining the lead with an average of 25.5% followed still by surgery with13.8% of the total cases reported to the *Shariah* Medical Panels. The anaesthesia specialty, which was his main focus, had only 2.7% of the total

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[230] Al Saddiqque ibid p 902
[231] 'MOH Statistics Book' (*Saudi Arabian MOH*, 6 March 2013) <http://www.moh.gov.sa/en/Ministry/Statistics/book/Pages/default.aspx> accessed 6 December 2014.
[232] Ahmed Al Siddiqque p902
[233]Abdulhamid Hassan Al-Saeed, 'Medical Liability Litigation in Saudi Arabia' (2010) 4 Saudi Journal of Anaesthesia.

number of cases. He further found that about half (49.9%) of the cases ended up with convictions. The easy access to the process and pressure from media must have made the public 'overly sensitive to medical errors'.[234] His findings with regards to the sectorial distributions and types of hospitals were consistent with that of Al Siddique.[235] His data showed a stair-case pattern of escalation in the rate of malpractice cases reported, from 440 in 1999 to 1,356 in 2008.[236]

Al Jarallah and Al Rowaiss did a study of cases considered by the *Shariah Medical Panels* during the period of 2007-2008. They focused on the plaintiffs' motives for the litigations, the type of harm occasioned, and the nature of punishment meted out by the *Panels.* They also studied the relationship between the results of the investigations and the actual harm suffered on the one hand, and the relationship between the results of the investigation and the place (region) of complaints on the other. They considered a total of 642 cases, but the result was slightly at variance with the other studies in terms of the specialty-wise distribution of medical malpractice claims. In this study, the surgery specialty led with 25.1%, followed closely by obstetrics while family medicine trail far behind with 1.3%. Distribution by health delivery units show the operating unit leading with 20.4% then followed by the emergency unit with 22.3%, general wards, 12.9% delivery rooms, 9.2% and the |ICUs with 2.9% trailing at the rear.

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234 Al Jarallah p103
235 Al Saeed p3/9
236 Al Saeed, P7/9

For the first time, Al Jarallah[237] et al studied the plaintiffs' motive for instituting the claims in medical negligence in Saudi Arabia. They found that about one-third (29.2%) of the plaintiffs asked for administrative punitive measures while nearly a quarter (23.1%) for general rights. Also, 15.5% asked for a combination of personal and general rights, 12.2% for compensation while 11.6% for *blood money*[238].

Three other separate studies on medical malpractices covered the specialties of dentistry[239], aneasthesia[240] and obstetrics/gynecology[241] but with different foci. Al Ammar, for instance, did a retrospective survey of dental malpractices for one year (1997) in Riyadh. The author found that of the total of 32 cases of dental malpractices reported in Riyadh in the year 1997, 62.5% resulted in conviction. His study further revealed that more female patients (62%) made claim in negligence than their male counterparts. Also, more Saudi citizens (71.4%) complained of medical negligence than the non-Saudis.[242] It is interesting to note that, in this study, more than half of the number of complaints (56.2%) received did not involve clinical judgment of interventions. Those complaints bordered on sexual harassment, extortions, advertisement violations, practicing without license etc. Amongst the limitations of his study was that all of the complaints emanated from private hospitals and clinics only.[243]

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[237] Al Jarallah, p105

[238] Is money or some sort of compensation paid by an offender (usually a murderer) or his/her family group to the family or kin group of the victim. See Grace Young, 'Blood Money (sociology)', *Encyclopædia Britannica*(Encyclopædia Britannica 2011) <http://www.britannica.com/EBchecked/topic/69809/blood-money> accessed 30 November 2014.

[239] Wafa Al Ammar, A one year study of Dental Malpractices in Riyadh, Saudi Dental Journal, vol. 12, May-Auguste 2000.; 95-99

[240] Abdulhamid Samarkandi, Medico-Legal Liabilities of Anaesthesia Practices in Saudi Arabia, M.E.J Anaesth. 18(4), 2006; 693-705

[241] Fawzia A. Habib, Obstetricians' Perception of Medico-legal Problems in Al Madinah Al Munawarrah of Kingdom of Saudi Arabia, Journal of Taibah University Medical Sciences, 2010, 5(2) 66-74

[242] Al Ammar, p96

[243] Ammar P98

It has been postulated that the cumulative effect of the revolutions in the healthcare industry in the last two decades, upgrade in technology and improved training, increasing population and awareness of the people may have led to the increase in litigations.[244] [245] In spite of the inherent limitations of his study, the author lamented that the rate of malpractice litigations in the dental sector is, as in the other sectors, escalating.[246] Samarkandi[247] made a similar study with focus on the anaesthesia specialty. His findings regarding the rates of citizens (relative to non-citizens bringing claims), was consistent with that of Ammar. Anaesthetists were involved in only 3.8% of the total numbers reviewed.[248]

During the period between 2000 and 2003, medical malpractice insurance was not available while post mortem studies were non-existent. Also, healthcare professionals had to represent themselves and defend their clinical decisions and judgment before the then MLC. No legal representation was allowed.[249]

Conversely, Habib's study[250] is related to medical negligence in the obstetrics and gynecology specialty, but rather focused on the perception of obstetricians and gynecologists regarding medical malpractice issues. She did a survey of 90 practicing obstetricians in Madinah from April to July, 2010 regarding their perspective on the risks, causes and effects of medical malpractice litigations to their professional life. Results of the study showed that all of the participants

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[244] Samarkandi 2006, p87
[245] Wayne et al ibid
[246] Ammar p98
[247] Abdulhamid Samarkandi, Medico-Legal Liabilities of Anaesthesia Practices in Saudi Arabia, M.E.J Anaesth. 18(4), 2006; 693-705
[248] Abdulhamid Samarkandi, p697
[249] Samarkandi, Anesthesia p694
[250] Fawzia A. Habib, Obstetricians' Perception of Medico-legal Problems in Al Madinah Al Munawarrah of Kingdom of Saudi Arabia, Journal of Taibah University Medical Sciences, 2010, 5(2)

had insurance cover, and majority of them were females (62.5%). It also showed that Saudi[251] female (90%)[252] participants had higher psycho-social impact ranging from depression (83%) to family problems. Additionally, more than half of the participants who had faced litigation ended up with liability in form of compensation or fine. The remaining were dropped, settled without compensation or withdrawn.[253]

In spite of the foregoing, it has been argued that 70 percent of complaints lodged against private hospitals were unsubstantiated and therefore quashed.[254] Consequently, the ministry of health accused the media for "sensationalising the problem and for focusing too much on malpractice cases that are eventually proved by the ministry to be false."[255]

2.5 Discussion and Summary

In the contemporary world, health care professionals from different jurisdictions find themselves practicing in places different from their places of training. In that context, you find British health care professionals practicing their profession in Saudi Arabia, and, very often, Saudi Arabian health care professionals come to the UK for further studies and training. No matter where they originate from, those professionals practicing the in UK are bound by the

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[251] Fawzia A. Habib P72
[252] Fawzia A. Habib P70
[253] Fawzia A. Habib P73
[254] 'Medical Malpractice Claimed in Death at Amluj Hospital' *Saudi Gazette* (1 July 2012) <http://www.saudigazette.com.sa/index.cfm?method=home.regcon&contentid=20120707129242> accessed 20 December 2014.
[255] The Fight against Saudi's Medical Malpractice' *The National* (6 April 2010)

English law rules in the tort of negligence, while rudiments of the *Shariah* law principles apply in Saudi Arabia for practitioners therein.

As discussed above, a plaintiff in a common law suit for medical negligence has to establish the four elements, to wit, a duty of care to the claimant, a breach of that duty, a harm alleged by the claimant caused by the breach.[256]

Under the Saudi Arabian jurisdiction, *the Law* only required that the healthcare professional should 'exert due care in line with commonly established professional standards'[257] without defining what that standard requires. The medical professional members of the *Shariah* Medical Panels determine the standard of care, on case to case basis, while the legal member (the judge) only determines the compensation or punitive measures.[258]

When juxtaposed with the standard of care in the UK jurisdiction during pre-*Bolam* era, the Saudi Arabian concept of standard is similar in that the medical professionals (who are usually the defendants) set their own standard of care, determine if the patient owe them a duty of care, if they have breached that duty, and if the breach was in fact the cause of the harm which the complainant (patient) alleges.[259] This allegation seems to be corroborated by this:

> *"The problem in the Saudi legal system is that it allows every ministry, including the health, to handle claims against it in case of violations related to it and this gives the ministry of health the power to cover up for many mistakes done by medical practitioners,"*[260]

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[256] Ibid
[257] Article 26.
[258] Siddique, Jarallah ibid
[259] Kim Price, *Towards a history of medical negligence,* The Lancet, Volume 375, Issue 9710, Pages 192 - 193, 16 January 2010
[260] Mr Abu al Khair, a defence lawyer alleges. See, The Fight against Saudi's Medical Malpractice' *The National* (6 April 2010)

When compared post *Bolitho,* the standard of care under the UK has now fallen within the ambit of the court's authority to determine the reasonableness of clinical judgment. That cannot yet be said of the Saudi standard of care.

In the foregoing chapters, we examined the substantial law on negligence which prescribed the duties and liabilities of healthcare professionals. We have found as a fact that while UK model of medical negligence emanated from a combination of case laws and statutes, the Saudi Arabian model is a creation of statute based on the *Sharia*. Having studied the substantive laws of medical negligence under both the English and Saudi Arabian laws, it has become imperative to also examine the rules of procedures for pursuing a claim in medical negligence under the two jurisdictions. In the coming chapter, the common law litigation process will be considered so as to serve as the basis for comparing with the Saudi Arabian litigation process, subsequently.

CHAPTER THREE

3 THE LITIGATION PROCESS (THE RULES OF PROCEDURES) FOR MEDICAL NEGLIGENCE UNDER THE ENGLISH LAW

3.1 Introduction

Over the years, several investigative panels found the UK's NHS complaint system ineffective because there were no satisfactory procedures for handling complaints and adverse events[261] or simply because the professionals had not the required open-minded attitude for anticipating and dealing with complaints, or that they were oblivious of the true picture of the poor standard of care rendered to the patients.[262] Often, patients and significant others were not fully informed of the nature, course and expected outcome of their treatment.[263] The fiduciary relationship puts the patients and their relatives at a disadvantage position that they often feel uncomfortable to complain for the fear negative impact on their treatment.[264]

Even where a claimant decides to pursue a negligence suits, the process is clogged by multiples of constraints, which include the cost of engaging an expert to establish the viability of negligence claims, inadequate record keeping, and unwarranted delays.[265]

It was in an attempt to simplify access to justice, ease the legal process, and mitigating the cost of litigation that Lord Woolf was appointed in March 1994 to review the rules of civil procedure.[266] Pursuant to his recommendations, the Clinical Disputes Forum was formed to, inter alia, 'find less adversarial and

[261] Public Inquiry into the Mid Staffordshire NHS Foundation Trust, Volume 1, Chapter 3 pp 245-2871, para para 1.)
[262] Ibid 13, p8
[263] Ann Clwyd and Tricia Hart, 'A Review of the NHS Hospitals Complaints System Putting Patients Back in the Picture' (2013)
[264] NHS complaints revolution 'needed' http://www.bbc.co.uk/news/health-24669382
[265] Ibid No 258
[266] A Zuckerman, 'Lord Woolf's Access to Justice: Plus Ça Change…' (1996) 59 The Modern Law Review.

more cost-effective ways of determining disputes on medical interventions.'[267] The Clinical Disputes Forum formulated the 'pre-action protocol' which provides for well-timed steps for parties to follow in a potential medical negligence suits.[268]

Similarly, in 2006 the NHS Redress Act[269] developed recommendations from *Making Amends*[270] and provided for a fast and suitable response to medical negligence cases of low monetary value. The goal was to provide for an alternative dispute resolution option, e.g., a 'no fault' system that could deviate from the traditional blame culture to the one that encourages learning from mistakes.[271]

Other Department of Health initiatives include encouraging healthcare providers to be open to criticisms and complaints, and to apologise or offer an explanation to aggrieved patients in the course of their treatment.[272]

3.2 Legal Options for Medical Negligence Claims Available under the English Law

Under the English law, negligence is a civil wrong or tort that arises when a foreseeable harm is proved to have occurred as a result of a breach in the duty of care.[273] Under this jurisdiction, the complainant usually seeks compensation for harm from medical negligence mainly through a legal process that begins

[267] http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_rcd#IDAVJ0HC
[268] ibid
[269] *NHS Redress Act 2006* available from URL: http://www.publications
[270] *Making Amends* A report by the Chief Medical Officer: a consultation paper setting out proposals for reforming the approach to clinical negligence in the NHS.
[271] Vinita Shekar et al, ibid
[272] Vinita Shekar et al ibid
[273] MA Branthwaite, 'Medical Negligence Yesterday and Today' (1998) 9 Current Anaesthesia & Critical Care

with a mere complaint of medical negligence.[274] And where a claimant finally decides to institute a medical negligence claim, he may approach regular high court or county court that has the jurisdiction to hear the suit.[275]

The NHS complaints procedure

The first option open to claimant when he felt unsatisfied with a medical service that he received, is to access the NHS complaint system as an alternative to medical negligence suit. It is noteworthy that, this is not the same as a claim in medical negligence for compensation where you sue the healthcare professional or the healthcare provider, e.g., the NHS trusts.[276] Here, the patient selects to seek for an explanation, or guidance on the next appropriate step.[277]

Initially, the complainant may forward his complaint to the health authority of the hospital through their complaint system. If he is unsatisfied with the result, he may then approach the the Parliamentary and Health Service Ombudsman with the matter.[278]

Filing a complaint does not preclude the complainant from seeking damages for medical negligence by suing the healthcare provider through the courts. Where a patient decides to raise a complaint under this procedure, he should do so within twelve months of the treatment.[279] The Protocol encourages and requires

[274] *Making Amends* ibid, p10
[275] 'Pre-Action Protocol for the Resolution of Clinical Disputes Clinical Disputes Forum' http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_rcd#IDALM0HC accessed 2 December 2014
[276] ibid
[277] ibid
[278] ibid
[279] Ibid no 270

parties to, first, try and resolve their disputes amicably through alternative resolution options. They may use the court proceeding as a last resort.

The Pre-Action Protocol

As noted earlier on, the rate of patients' complaints against healthcare services is increasing as patients are more aware of, and willing to know about their treatment options and the course of their treatment, and to pursue appropriate legal action where necessary. Usually, patients may feel content with an apology, or assurances about future action, and may not resort to legal redress for compensation unless if they felt unsatisfied with the outcome of the initial steps taken.[280]

Prior to the *Access to Justice Report* [281] of July 1996, the pre-action period has been generally noted for high costs and undue delays in litigations. It was in this light that Lord Woolf specifically recommended for a pre-action protocol to allow for parties to try other alternatives to resolve disputes, instead of proceeding to litigation.[282]

Clinical Disputes Forum prepared the protocol to be used as a tool that is less argumentative and a more economical way of resolving disputes arising from healthcare delivery. It encourages openness among the parties, removes distrust

[280] Ibid no 270
[281] Access to Justice - Final Report - The National Archives' (1996) http://webarchive.nationalarchives.gov.uk accessed 2 January 2015
[282] Pre-Action Protocol for the Resolution of Clinical Disputes Clinical Disputes Forum' <http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_rcd#IDALM0HC> accessed 2 December 2014

between them, and ensures predictability of the steps preceding legal suits for medical negligence.[283]

In the event of negligence claims, healthcare professionals are advised to assume an objective attitude towards complaints and claims, and agree that 'patients are entitled to an explanation, apology or, if warranted, to appropriate redress.'[284]

The protocol is a set of code of practice that commits parties to follow a recommended sequence steps in the event of an imminent litigation. The main goals of the protocol are to encourage greater openness between the parties so as to enable them to timeously explore for the most suitable option for resolving their dispute. The protocol may ultimately reduce delays, costs, and even the need for litigation.[285]

The Pre-Action Protocol Steps: Obtaining the health records

Where a patient decides to proceed with a medical negligence claim, he should make a request for the medical records using the standard forms.[286] The request should disclose sufficient information of any serious adverse effects suffered to alert the professional, and be specific about the records that is requested.[287] The healthcare provider should oblige to the request within 40 days, unless an extension was successfully sought and obtained or else, the complainant may apply to the court for an order for pre-action disclosure.[288]

The Pre-Action Protocol Steps: Letter of Claim

[283] Ibid no 271
[284] Ibid no 271
[285] ibid
[286] Section 3.8
[287] Section 3.7
[288] Section 3.9

Upon receiving the medical records, the potential claimant may consult experts to advise him of a probable claim for negligence.[289] If, upon receiving and analysing the records, and any other professional advice, grounds for a claim is established, , the patient should then send a letter of claim to the potential defendant as soon as practicable.[290]

The letter should sufficiently disclose the facts on which the claim is based and the alleged injuries suffered the main allegations of negligence and or the financial loss incurred.[291] Documents, supporting evidence and the opinion of experts consulted should also, where appropriate, be attached with the letter.[292] Although a template of the letter of claim is available,[293] it does not necessarily have the formal status of pleadings, and as such, no sanction is attached to its form.[294]

In order to allow room for possible amicable out of court resolution of the dispute, court proceeding shall be differed for four months after the receipt of the letter of claim.[295] At this stage, the patient may make an offer to settle in lieu of court proceeding.[296] An offer to settle should be supported by relevant documentation, which includes a medical report that discloses the injuries, condition and prognosis, as well as schedule of loss.[297]

The Pre-Action Protocol Steps: The Response

[289] Sec. 4.1
[290] Sec. 3.15
[291] Sec. 3.9
[292] Sec. 3.18
[293] Sec. 3.14
[294] Sec.3.20
[295] Sec. 3.21
[296] Sec. 3.21
[297] Sec. 3.22

The healthcare provider should use the available template[298] for the letter of response to, within 14 days, acknowledge receipt of the letter of claim identifying the claimant or his proxy.[299] The healthcare provider should then follow up the letter of response with a detailed answer clearly and specifically showing what is admitted and/or what is denied (if any), and if any such admission is binding. He has to do that within four months of the letter of claim. He should also provide copies of any additional documents that are relied on.[300] The healthcare provider may indicate in the response, with reasons, if he fully or partly accepts any offer to settle made by the claimant, or make a counter-offer or a new offer all together.[301]

If the parties reach an agreement on liability, they should aim to agree to a practicable time-frame within which to resolve on the value.[302]

[298] Sec. 3.23
[299] Sec. 3.24
[300] Sec. 3.25
[301] Sec. 3.26
[302] Sec. 3.27

Alternative Dispute Resolution (ADR)

The parties are enjoined to explore other alternative dispute resolution options available, and agree to the one that is suitable for them.[303] The evidence that alternative options have been explored will be required by the Courts in deciding whether to proceed with the case. The court should not issue proceeding prematurely until a settlement is exhaustively explored.[304]

The parties remain at liberty to choose the option of either a court proceeding, mediation or to enter into any alternative form of dispute resolution.[305] The alternatives may include discussion and negotiation, where parties may meet and explore ways of reaching understandings about what happened, and narrow the issues in dispute. This may also help to resolve the issue, especially where the patient is satisfied with an apology, explanation, or assurances. An early neutral evaluation and/or mediation by an independent professional could be a suitable option.[306]

Regular Court Proceedings

Evidence suggests that 60 to 70% of claims do not get to this stage. Usually, about 30% of claims are abandoned by the claimant, and 95% of settlements are reached 'out of court'.[307]

In minority of the cases where all other options fail to settle the issue, the court may issue proceeding for the court to adjudicate matter just like any other civil

[303] Sec. 5.1
[304] Ibid no 270
[305] Sec. 5.4
[306] For a Guide to Mediation see www.clinicaldisputesforum.org.uk
[307] *Making Amends* ibid, p11

matter. The claimant has to prove by evidence, on the balance of probability, all essential ingredients of medical negligence as well as causation before the court would determine matter.

The next chapter will examine the litigation process under the Saudi Arabian legal system with a view to subsequently comparing the two.

CHAPTER FOUR

4 THE LITIGATION PROCESS FOR CLAIMS IN MEDICAL NEGLIGENCE UNDER THE SAUDI ARABIAN LAWS

4.1 Introduction

Saudi Arabia's litigation system for medical negligence claims seems to be unique in the sense that patients or their relatives can easily file a complaint at the administrative level of the health care institution without the necessity for the conventional process of litigation found in the west.[308] As easy as it seem, the process may last several months or even years, in some cases involving claim for compensation. Sometimes, as in the year 2011, it may take up ten sessions before a case is resolved.[309]

It is noteworthy that there is no doctrine of binding precedent, nor comprehensive reporting of cases as would be the case under the common law. Cases are usually heard before a judge and other medical members, with no jury involved.[310]

4.2 The Adjudicating Panels

Part four (articles 34-39) of the *Law* provides for the machinery and process of litigations for medical negligence. A distribution of the *Shariah* Medical Panels across the regions of the Kingdom during the year 2011 showed that there were

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[308] Al Jarallah p103

[309] MOH 1433 (2012) p232

[310] Wayne Jones, Shabnam Karim and Louise McDonald, 'An Overview of Medical Malpractice in the Kingdom of Saudi Arabia' (*Clyde & Co*, 9 December 2014) <http://www.clydeco.com/insight/updates/view/an-overview-of-medical-malpractice-in-the-kingdom-of-saudi-arabia?utm_source=Mondaq> accessed 2 January 2015.

a total of 18 panels distributed in 7 provinces with the majority of it in Riyadh (4 panels).

The report of cases of medical malpractice, both new and deferred, that were referred to the *Shariah* Medical Panels [311] by region during the year 2011 showed that a total of 1,777 cases were referred during this year, of which 797 were new cases.[312] The total number of resolutions during the year 2011was 734, the majority of which took place in Makkah (27%) and Riyadh (26%)[313] The total number of resolutions related to dead cases that were made with conviction was 160 (53%), while the total number of resolutions made related to death cases without conviction was 142 (47%).

The *Shariah* Medical Panel[314]

Article 33 provides for a *Shariah* Medical Panel which shall be constituted by an at least grade 'A' judge appointed by the minister of justice who presides over the sessions, a medical college faculty member appointed by the minister of higher education, a legal advisor and two qualified physicians appointed by the minister of health[315] who shall serve for term of three years, renewable for similar terms.[316] As at 2010, there were 18 *Shariah Medical Panels* in the Kingdom with each being headed by a judge.[317]

The *Shariah* Medical Panel's jurisdictions include considering claims[318] of professional malpractice where personal right is claimed, or which results in

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[311] Now known as Shariah Medical Panel under the *Law (1426)*
[312] MOH 1433 (2012) p232
[313] MOH 1433 (2012) p232
[314] Jarallah p99
[315] Article 34
[316] Rules 34.1.L
[317] Al Jarralh ibid p101
[318] Samarkandi p87

death or loss of organ or function[319] based on Islamic *shariah* even where no private right is claimed.[320] Its quorum shall be full members in attendance, while its resolution is by simple majority provided that the judge is among the majority. The judge then issues the verdict based on the members' opinion, and sentence based on *Shariah* law.[321] Where there is difference in opinion among the members, the *Panel* may send the case to several other experts for their opinion to enable the members reach a consensus and a verdict.[322]

Appeals emanating from their decision shall lie with the Board of Grievances within 60 days from receiving the resolution.[323]

The Medical Violation Committee (MVC)

Article 38 provides that the Minister of Health may, by a resolution, create a variation of the SMP for each region, which shall be constituted by three members including a Saudi legal specialist and a Saudi practicing healthcare professional, provided that their resolution is subject to approval by the relevant minister.[324] The MVC has the power of penalty application, and can investigate violations involving MOH and private medical institutes to the extent that the SMP may not have to try the same case again[325] Appeal from their resolution shall lie in the Board of Grievances within 60 days, provided that where the suit involves loss of organ or function or death, it would refer the case to the SMP.[326]

[319] Under Article 34
[320] Al Jarallah p103
[321] ibid
[322] ibid
[323] Under Article 35
[324] Al Sayyeed
[325] The Regulation 38.1.L
[326] Jarallah p99

The Primary Investigation Committee (PIC)

This committee is similar to the SMP that is created by[327] the directorates of health affairs, director of health services or deans of medical colleges.[328] The responsibility of the PICs is to interview the parties, peruse the medical records and establish the existence of an error. It has to distinguish between "medical mistakes and complications" and side effects of medical treatments.[329] It sends its report to the appointing authority.[330]

4.3 The Litigation Process at the *Shariah* Medical Panel (SMP)

A patient or his relative usually makes a formal complaint of medical negligence to either the facility's administration, ministry of health or the city administration.[331] The procedure may well begin with a preliminary investigation carried out by administration department of the facility involved.[332] Where such is the case, the director of the hospital shall cause to preserve all medical records[333], laboratory samples and results for possible conveyance to the *Shariah* Medical Panel when it is eventually referred to.[334] Once the case has been properly referred to the SMP, the panel shall prohibit the defendant from leaving the country to guarantee his attendance.[335] For instance, it was consequent to this power that healthcare professionals who were accused

[327] See Article 52 of Rules of Implementation of the private medical institutes regulations
[328] Aljarallah p 99
[329] Dr. Entessar Taylouni, member of LMC Ref 27 p1
[330] Jarallah p99
[331] Alsaeed p 3/9
[332] Samarkandi p88
[333] Samarkandi p87
[334] The Regulation 36.1 &2.L
[335] A travel ban was placed on a physician involved in a medical malpractice suit for the death on October 24, 2013 of a 17 year-old girl in Jeddah as reported by Arabnews of November 14, 2013.

of malpractice at a hospital in Saudi Arabia were prevented from departing the country while an investigation was yet to be concluded.[336]

Both parties are then notified of the date and venue of the sitting which shall be in a facility of the ministry of health.[337] Pleadings are heard and recorded in Arabic language. Parties can bring their own translator that they trust, or may have to do with a translation by one of the panel members.[338]

Where any of the parties or their attorneys fails to appear despite proper notice being served, the *Shariah* Medical Panel may adjourn for another hearing after 30 days. In the event that the plaintiff fails to appear, the defendant shall be discharged of the personal right claim, but the *Shariah* Medical Panel may decide to proceed with the common right aspect (the criminal aspect), if any. The file will then be returned to the facility that referred the case, and any travel ban may be lifted.[339] Conversely, if it is the defendant that defaults in appearance, the *Shariah* Medical Panel may proceed with its verdict which, for all intent and purpose, shall be deemed valid.[340] All verdicts and results of the *Shariah* Medical Panel resolution shall be communicated in writing to all parties of the suit.[341] Any dis-satisfied party may appeal within 60 days to the Board of Grievances, provided that the appellant shall submit his objection to the Minister of Health within 30 days for onward dispatch to the Board of Grievances.[342] An

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[336] Doctors in Malpractice Case Barred from Leaving Saudi' *Arabian Business.com* (1 May 2013) <http://www.arabianbusiness.com/doctors-in-malpractice-case-barred-from-leaving-saudi-500206.html> accessed 19 December 2014.
[337] The Regulation 36.3-6.L
[338] The Regulation 36.7.L
[339] The Regulation 36.8.L
[340] The Regulation 36.9.L See also under Article 12 of the Board of Grievances rules and procedures enacted by Council of Ministers \resolution no. 190 of 16/11/1409H
[341] The Regulation 36.10.L
[342] Wayne Jones, Shabnam Karim and Louise McDonald, 'An Overview of Medical Malpractice in the Kingdom of Saudi Arabia' (*Clyde & Co*, 9 December 2014) <http://www.clydeco.com/insight/updates/view/an-overview-of-medical-malpractice-in-the-kingdom-of-saudi-arabia?utm_source=Mondaq> accessed 2 January 2015.ulation 36.11.L

appeal can involve a total re-hearing of the matter, and new evidence may be adduced. The appeal session considers only the process and the verdict, not the professional standard aspect of the decision.[343]

Where the suit does not involve a personal right, or that the personal right was dropped for non-appearance of the plaintiff, or in addition to the private right, any common right aspect shall be prosecuted by an appointee of the minister of health.[344] [345] Where the defendant is found to only be partly responsible for the malpractice, then, he would only be accountable for that portion of responsibility.[346]

The rules of procedures for the MVCs is similar to that of *Shariah* Medical Panel except that the former has no power of travel ban or the right to subpoena parties previously subjected to investigations.[347] Also, only the *Shariah* Medical Panel has the power to handle cases involving death, or loss of organ or function with claim for compensation in form of blood money and indemnity respectively.[348] [349] The *Shariah* Medical Panel may as well encourage settlement between the parties, or decide that a sort of 'no case submission' and close the case.[350]

In all cases, a claim in medical negligence must be brought under the *Law* within one year of the knowledge of the negligence to avoid becoming statute barred.[351]

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[343] Jarallah ibid
[344] Article 36 and Regulation 37.1.L
[345] Jarallah ibid
[346] Jarallah
[347] The Regulation 38.4. L
[348] Article 34
[349] Jarallah p 99
[350] Ahmed Al saeed p 2/9
[351] Article 37

4.4 Examples of Medical Negligence cases Determined by the *Shariah* Medical Panels

Unlike under the English case laws where we have law reports for all case laws, there is no case law reports for cases handled by the SMPs in Saudi Arabia. The reports only come in trickles as press releases from the ministry of health at the conclusion of cases. For instance, a female doctor in Riyadh was fined SR20, 000 for 'displaying negligence (by not) following proper medical procedures during surgeries and for failure to follow-up her patient during hospitalization and after discharge.[352] Similarly, 11 nurses were fined for |their negligence in carrying out their duties".[353] An obstetrician was fined SR140, 000 for 'damaging' the patient's uterus during a Caesarean section operation that resulted in infertility.[354] One case that involved a 'punishment of hospital' was in Jeddah where an 8 year-old child allegedly died of wrongful administration of oxygen. The hospital maintained that the maintenance company wrongfully mixed up oxygen with nitrogen during a routine maintenance .[355] The SMP ordered the closure of the hospital for two months.

A case that had reached the Board of Grievances was that which involved an emergency physician who was held to have unjustifiably delayed treatment of an accident victim which resulted in the victim's death. The doctor's appeal was rejected on the ground that the panel's "evidence was enough to prove the

[352] Saudi Gazzette, Female doctor fined SR20,000 for Negligence August 27, 2013
[353]11 Nurses Fined SR205,000' *Arab News* (1 November 2014) <http://www.arabnews.com/saudi-arabia/news/653371> accessed 1 December 2014.
[354] The National, The fight against Saudi's medical malpractice April 6, 2010
[355] Saudi Gazzette, Chaos, panic as ministry closes hospital. November 19, 2012

doctor's negligence". He was fined SR150, 000 as compensation in blood money. This was considered half of the usual fine for blood money as he was found guilty of a lesser charge of manslaughter.[356] Also recently, the Minister of health fired a Saudi physician and also revoked his license for negligence.[357]

One controversial ruling that attracted global headlines was one in which a judge ruled that a surgeon should be 'surgically paralyzed' for causing the surgical paralysis of a 24-year old Saudi patient[358] in line with the *Shariah* principles of recompense of '*an eye for an eye'*[359] In a similar case, a young Saudi woman who became paralysed following an automobile accident refused monetary compensation of 6 million riyals but preferred the court to punish the driver by paralyzing him in like manner as retribution for his wrongful act.[360]

Summary

Generally, the uncertainty of the procedure makes litigation risk significantly higher in Saudi Arabia compared with other jurisdictions like the UK, although the level of damages being awarded remains relatively much lower than in those jurisdictions with impact on both parties.[361]

[356] Saudi Gazzette, SR150,000 fine for medical negligence. April 4, 2013
[357] Arabnews, Medical Errors on the Rise. February 3, 2014
[358] American Bedu, Saudi Arabia: Hippocratic Oath – Ethical or Compassionate April 8, 2013 Accessed: 22/11/2014 http://americanbedu.com/2013/04/08/saudi-arabia-hippocratic-oath-ethical-or-compassionate/
[359] Holy Quran: 5:45 We ordained therein for them: "Life for life, eye for eye, nose or nose, ear for ear, tooth for tooth and wounds equal for equal." But if any one remits the retaliation by way of charity, it is an act of atonement for himself. And if any fail to judge by (the light of) what Allah hath revealed, they are (No better than) wrong-doers.
[360] Saudi accident victim refuses 6 million riyals compensation, wants driver to become paralysed. Jan 28, 2013 http://riyadhconnect.com/saudi-accident-victim-refuses-6-million-riyals-compensation-wants-driver-to-become-paralysed/ Accessed 22/11/2014
[361] Wayne Jones et al ibid

5 OVERALL SUMMARY, RECOMMENDATIONS AND CONCLUSIONS

5.1 Summary

The research set out to explore and conduct a comparative analysis of the concept of medical negligence as applicable under the UK and Saudi Arabia jurisdictions. That is, the laws governing medical negligence and the rules of procedures (process) of litigating claims in medical negligence were to be examined.[362] Therefore, the research questions were framed in such a way as to elicit the similarities and distinctions, if any, between the two jurisdictions as regards those aspects of the law with a view to evolving a workable model from the two systems.

It was found that UK and Saudi Arabian legal system have different sources and histories. The English common law applies in the United Kingdom while the *Shariah* law applies in Saudi Arabia. In spite of those major differences, it is noteworthy that the rate of medical negligence claims in both jurisdictions has been monumentally growing each evolving year.[363] Also, both jurisdictions bear similar concepts of medical negligence, and are in agreement that healthcare professionals must be accountable for their actions and/or inactions that result in harm to others.[364] [365]

Generally, under the UK legal system, the rules of medical negligence is a combination of case laws, statutes, civil procedure rules and other regulations.[366] Additionally, although a claim in medical negligence is mainly a subcategory of

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[362] See General introductory notes in this work
[363] Al Siddiqque, Al Jarallah, Samarkandi ibid
[364] *Donoghue v Stevenson*
[365] Article 27 of the *Law*
[366] Wayne ibid

tort of negligence, it may also arise from a breach of contractual duties or as a criminal offence. Conversely, all Saudi Arabian laws are based on the *Shariah* law which primarily emanated from the holy *Qur'an* and the *Sunnah* of Prophet Muhammad. The King passes statutes and acts in form of royal decrees that apply generally to the kingdom. A claim in medical negligence is a statutory creation via *The Law of Practicing Healthcare Professions* of 1426 (H) passed by a ministerial resolution pursuant to royal decree No. 59 of the year 1426 (H).

In addition to the English general civil procedure rules as generally applicable to negligence proceedings, case laws (judicial precedents) play a major role in constituting both substantive and procedural rules of medical negligence. For instance, Alderson, B in *Blyth v Birmingham Waterworks Co*[367] defined what negligence is, Lord Atkin in *Donoghue v Stevenson*[368] captured the duty of care while *Bolam*[369] and *Bolitho*[370] tried to shape the standard of care.

The Saudi Arabian *Law*[371] solely provides for both the substantive and procedural rules of medical negligence involving all practicing healthcare professionals.[372] It provides for the machinery of adjudication, i.e., the *Shariah* Medical Panel, its membership,[373] constitution [374] and jurisdictions.[375]It also defines the duties and liabilities of practicing healthcare professionals to their patients, colleagues and the public. Each case is treated *suo motu* without

[367] [1843-60] All ER Rep 478
[368] [1932] All ER Rep 1
[369] ibid
[370] ibid
[371] *The Law of Practicing Healthcare Professions* of 1426 (H)
[372] ibid
[373] Article 35
[374] Article 33
[375] Article 34

necessarily resorting to judicial precedent which is a principal source of law in the UK.[376]

For a claimant to succeed in medical negligence claims under the English law, he/she has to prove, on the balance of probability, the existence of a duty of care, breach, harm as well as causation.[377] But the question that may pop up is, is the standard of care/practice that of 'a prudent and reasonable man,'[378] or is it that 'of the ordinary skilled man exercising and professing to have that special skill.'?[379] When *Bolam* and *Bolitho* are read together, it may be safe to say that, 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 area...'*[380] provided that *'the court (is) satisfied ... that such opinion has a logical basis'*.[381]

In order to reduce costs and delays in the pre-action process, the Pre-action Protocol[382] was established as recommended by Lord Woolf's *making amends*.[383] The Protocol also promotes openness and predictability to the pre-action process. Consequently, a very low proportion of complaints reach to court proceedings. Most of the complaints are sorted out and settled through the NHS complaints system or through alternative dispute resolutions options. Where

[376] Wayne et al ibid
[377] *Froom and others v Butcher* (1975) 3 All ER 520
[378] *Blyth v Birmingham Waterworks Co*
[379] *Bolam*
[380] ibid
[381] *Bolitho v. City & Hackney Health Authority* [1998] AC 232 , p241 (emphasis added)
[382] ibid
[383] ibid

parties, nevertheless, get to a court proceeding, the court applies the relevant civil procedure rules to determine claims in medical negligence.

Unlike under the UK legal system, The Saudi Arabian *Law* is not specific on the standard of care required.[384] It stipulates that professionals should exert due care consistent with commonly established professional standards.[385] However, the test should be based on 'scientific and technical standards' contemporaneous to the negligence, not some obsolete standard applied in the present day. [386] That could only be deduced from our review of the *Shariah* principles that the complainant must show that there was a breach of duty, harm and causation. It is not clear how to establish a duty of care.

Under the English law liabilities for medical negligence may be a civil, arising from a tortious breach of duty, or breach of a contractual duty to serve as compensation, correction and deterrence.[387] It may also arise from a criminal breach, e.g., assault and battery for lack of consent. Similarly, under the Saudi laws, liabilities in medical negligence may be one or a combination of civil (involving patient), criminal (a breach of specific rules under *The Law*) or disciplinary (for breach of professional standards).[388] Civil liability attracts payment of fine as indemnity or compensation (or blood money where loss of life is involved) the amount of which is to be determined by the *Panel*.[389]

[384] Wayne et al ibid
[385] Article 26
[386] *Roe v Ministry of Health* 1954 2 QB 66
[387] Joseph L Brand, 'Aspects Of Saudi Arabian Law And Practice' (1986) 9 B. C. Int'l & Comp. L. Rev 1., citing J. Gilmour, *Patient Safety, Medical Error and Tort Law: An International Comparison,* report submitted to Health Canada (2006).
[388] Articles 26, 28 & 31
[389] Article 27

Criminal liability attracts fines,[390] while disciplinary liability may incur fines, suspension or revocation of licence.[391]

Interestingly, under the English law, even where the complainant succeeds, the professional may not become personally liable. The employer may be liable under the doctrine of vicarious liability if the negligent professional acted within the scope of his employment.[392] The Saudi law holds professionals personally liable in medical negligence; the employer is not vicariously liable even if the circumstance meets the common law criterion for vicarious liability.[393] Consequently, it is mandatory for all doctors and dentists to subscribe to cooperative insurance to guarantee payment of compensations pursuant successful negligence claims. The employer is not vicariously liable, but is mandated to guarantee offsetting of such payments in case of lack of insurance or insufficient funds, but may demand reimbursement by the employee.[394] Although judges usually encourage parties to settle through forgiveness, the Saudi Arabian law allows a successful claimant to demand maximum compensation from, or punishment to the defendant.

The English law affords the defendant with a number of defenses to avoid liability. Those include contributory negligence, [395] consent: *volenti non fit*

[390] Article 29
[391] Article 32
[392] *The Catholic Child Welfare Society & ors v Various claimants & The Institute of the Brothers of the Christian Schools* [2012] UKSC 56
[393] Article 27
[394] Article 41
[395] Sec. 1(1), Law Reform (Contributory Negligence) Act 1945

injuria,[396] unforeseeable risk,[397] statute of limitation,[398] respectable minority[399] or non-disclosure of essential information. Under the Saudi Arabian law a claim may be statute barred if brought after one year of the knowledge of the negligent act[400] unlike the UK's three years.[401] There is no negligence where the panel declares that it is a complication or side effect of medical treatments.[402]

Recommendations

In an answer the last final research question, to wit, what feature could the two jurisdictions lend to each other to perfect their respective systems, the study recommends the following:

a) UK: to codify its case law on clinical negligence to make it more clear and concise.
b) UK: to embrace the spirit of forgiveness in the pre-action stage to encourage potential complainant to forgive and settle out of court.
c) Saudi Arabia: To identify standardised ingredients of the tort of medical negligence to unify decisions on cases of medical negligence.
d) Saudi Arabia: To have elaborate rules of procedure so as to avoid wide latitude of discretion on the part of the *panel* members, and make their decisions, predictable.
e) Saudi Arabia: To ensure independence and accountability;

[396] *Dann v Hamilton* [1939] 1 KB 509
[397] *Donoghue v Stephenson* (1932) 1
[398] Ch 58 . s 11(4 a), Limitations Act 1980
[399] *Bolam ibid*
[400] Article 37
[401] Ch 58 . s 11(4 a), Limitations Act 1980
[402] Dr. Entessar Taylouni, member of LMC Ref 27 p1

i. transfer the *Shariah* Medical Panel to the judiciary and/or, review the membership of the *panel* to include more judicial officers or,

ii. to make the *Panel* accountable to the judiciary rather than the ministry of health which, in many cases, is the employer of the defendants or,

f) Saudi Arabia: To borrow the UK's concept of Pre-Action Protocol so as to encourage amicable out of court settlements, and to ensure timeliness and openness during the pre-action stage.

g) Saudi Arabia: To hold employers accountable for employing non-qualified and inexperienced practicing healthcare professional or systemic failures.

h) Saudi Arabia: In order to unify and standardize decisions of similar cases, Saudi Arabia may borrow the doctrine of judicial precedents of *shariah* compliant judicial decisions.

5.2 Conclusion

It is clear at this stage that the two jurisdictions have different sources and forms of legal systems,[403] with the UK applying the English common law while the Saudi Arabian legal system is based on the *Sharia* law.[404]

Notwithstanding the above, it may be deduced that the concepts of medical negligence applied under the two jurisdictions are substantially similar,[405]

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[403] See page 65 para 1 supra
[404] See page 3 supra
[405] See p 44, para 3

although there is a marked difference in their respective litigation procedures. In addition, both jurisdictions still rely heavily on expert medical opinion for the determination of standard of care.[406]

Also, although the inherent procedural uncertainty under the Saudi law makes litigation risky for both parties, the amount of damages awarded is relatively lower than that of the UK.[407]

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[406] See page 4 supra

[407] See page 63 supra

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