



## **Acceptance of Risk in Medical Matters as a Means of Paying Civil Liability**

**Nasir Muhammad Saeed Al-Balawi**

Jadara University, Jordan, Email: [Nasir-albalawi@hotmail.com](mailto:Nasir-albalawi@hotmail.com)

Received: November 8, 2021; reviews: 2; accepted: June 29, 2022.

### **Abstract**

The study aimed to clarify the legal conditions for the idea of accepting medical risk and to clarify the legal and legal position of accepting medical risk with the intention of treatment in therapeutic and non-therapeutic works (cosmetic) and to clarify the impact of acceptance of it on civil liability, and given the multiplicity of research methods and for the purpose of answering all the questions related to the subject of our research, we followed In our research, the analytical and comparative approach of jurisprudence opinions and judicial rulings in both Islamic jurisprudence and Jordanian civil law, to come up with legal rules that can be applied to practical reality. Based on the foregoing, the researcher reached a set of results, the most important of which is that acceptance of a medical risk requires an acceptance issued by the patient to undertake medical work. It is appropriate to do so, and the most important thing recommended by the Jordanian legislator is the necessity of the Jordanian legislator issuing a law or medical system for cosmetic operations, both types of treatment and improvement, stating their terms and provisions, and considering the acceptance of the risk as one of the means of paying the responsibility for the treating physician.

### **Keywords**

Acceptance of risk, medical responsibility, plastic surgery

**JEL Classifications:** J11, F43

### **1. Introduction**

Medical civil liability is one of the most complex and at the same time one of the most important legal topics, and if the origin is that anyone who causes harm to others requires compensation for that damage in the field of medical civil liability, but an exception to this origin, namely the means of payment of medical liability

for the defendant and his exemption from compensation, and some exceptions are explicitly provided for in civil laws, and some of these exceptions are not explicitly stated in the laws Civil, but adopted or applied by the judiciary in order to pay civil liability for the defendant or for the perpetrator of the damage, which is the case of acceptance of the risk by the victim, since in the case of acceptance of the risk and bearing the consequences that lead to damage to him, it is a means of paying responsibility for the defendant who caused the damage in the medical field and is the subject of our research.

Thus, the subject of our research is the acceptance of risk in the medical field as a means of advancing civil liability for the aggrieved defendant, according to which there are many means leading to the payment of civil liability for the defendant, called exceptional means of paying civil liability, meaning that the defendant who caused the damage can pay legal liability for himself if he can prove that there is no personal fault towards the victim.

## **2. Search Problem**

Accepting risk is one of the legal ideas that are not regulated by specific texts, and therefore it needs to clarify its features and various aspects in order to reach a clear theory that can be applied to the legal problems in which the acceptance of the injured has risks and its impact on civil liability, especially in the medical field, especially since the Jordanian legislator has not addressed the issue of accepting risks with specific texts showing the cases in which the patient accepts a serious or unusual medical procedure, such as in cosmetic operations, sex change, transfer and transplantation. Organs and abortion, and therefore the problem of research can be formulated in answering the main question of "What is the legal basis and legal nature of the acceptance of risk and its role as a payment of civil liability in the medical field?".

## **3. Importance of Research**

The importance of the subject is highlighted by the increase in the risks to which man is exposed in daily life and in all areas of life, especially in the medical field, due to the development in the medical field, medical operations and medical devices, and his acceptance of exposure to these risks and bearing the damage and consequences thereof.

## **4. Research Questions**

- What is the legal and legal position on accepting medical risks for the purpose of treatment? What is the impact of their acceptance on civil liability?
- What is the legal and legal position on accepting medical risk in non-therapeutic (cosmetology) works? What is the impact of their acceptance on civil liability?

## **5. Research Objectives**

- Stating the legal and legal position on accepting medical risks for the purpose of treatment and clarifying the impact of acceptance of them on civil liability .

- Stating the legal and legal position on the acceptance of medical risks in non-therapeutic (cosmetology) works and the impact of acceptance of them on civil liability .

## **6. Research Methodology**

Due to the multiplicity of research methods and for the purpose of answering all questions related to the subject of our research, we have adopted in our research the analytical and comparative approach to the views of jurisprudence and judicial rulings in both Islamic jurisprudence and the Jordanian civil law to come up with legal rules that can be applied to practical reality.

### **Section I: Acceptance of medical risk in therapeutic works and its impact on civil liability**

In order for the work to be therapeutic, it must meet several legal requirements, including that the medical worker must be a qualified and legally licensed doctor to practice the medical profession, that medical work be carried out in accordance with medical scientific rules and principles, that it be intended to treat or cure the disease, as well as the requirement that the patient be admitted to the medical work and that medical work be legitimate. Therapeutic medical acts are intended to cure or cure the patient of his illness, that is, treatment is the purpose that gives the right to doctors to harm the sanctity of the human body in order to cure him of the disease or relieve his pain (Abdel Ghafour, 2016). Therapeutic medical work is all work that is carried out in accordance with the foundations and scientific principles of medicine, which aim to cure diseases and maintain the health and safety of the human body, and the social interests of maintaining the health of the whole society (Prajias, 2014).

Therapeutic medical work is divided in terms of its purpose into treatment, whether drug therapy, interventional therapy or surgery. In this section, we address the position of Islamic law and positive laws on it. The extent to which patient admission affects the tolerance of the risks surrounding it, and we divide this section into two requirements:

The first requirement: The legal and legal position of therapeutic medical work.

As for the position of Islamic law, the legal basis for the permissibility of medical acts carried out by doctors on the bodies of their patients is based on the permission of the Sharia and the permission of the patient, and this corresponds and fits with the right to the integrity of the body, and that this right combines the right of God Almighty and the right of the slave, then the Sharia is achieved by

society in the physical integrity in which the right of Allah the Almighty is embodied, and permission for the patient to carry out these acts on his body, but achieves the right of the slave to his physical integrity (Sharaf al-Din, 1987).

The preponderant view in Islamic jurisprudence is that the basis for the doctor's irresponsibility is the permission of the Sharia and the permission of the patient. The audience of jurists had agreed that if the doctor's act resulted in damage to the soul or organ, there was no guarantee of it when it was authorized by the street and authorized by the patient, and in accordance with the Sharia rule that "the legitimate passport is contrary to the guarantee(Code of Judicial Judgments Article 91), Islamic jurisprudence agrees on the necessity of patient permission and consent (Hanna, 2008), For the purpose of initiating medical intervention by the doctor, and that the patient's satisfaction plays an essential role for the legality of medical intervention in Islamic law, since the doctor's practice of medical intervention on the patient's body without his permission, it is transgressive and infringing, because it is not permissible to force a person to treat himself, and that the intervention of the doctor without the patient's permission and without necessity requires an exception to the patient's permission, he must be responsible (Sharaf al-Din, 1987).

As for the legal situation, health laws have stipulated the need to provide therapeutic services in state health institutions, government hospitals(Article (5) of the Health and Medical Liability Law of 2018 and Article (12) and (13) of the Jordanian Medical Constitution), And that the therapeutic work carried out by the doctor, whether it is treatment with medicines or surgical intervention, goes through several stages, including the stage of diagnosis and the stage of treatment (Salman, 2017).

We conclude from this that the Islamic Sharia has permitted the therapeutic medical work carried out by the doctor on the bodies of patients based on the permission of the Sharia and the permission of the patient, and that the lack of responsibility of the doctor is linked to or results from the permission of the Sharia and the patient, and there is no guarantee on him when there is damage to the soul when he is authorized by the street and the patient, and the Sharia focused on the need for the doctor to obtain the patient's direct consent for medical work, since without the permission of the patient, it is considered an excessiveness and he must take responsibility.

As for the legal position of medical work, health laws stipulate the need to provide therapeutic medical services in State health institutions. There are several stages that the doctor goes through for the purpose of conducting medical work, the stage of diagnosis and the stage of treatment. The stage of diagnosis is one of the most important and accurate stages, as it determines the quality and seriousness of the disease and against which the appropriate treatment is determined. It was found that the doctor requires him to obtain the patient's consent to make the diagnosis after being informed of the nature of the medical examination and the risks surrounding it.

As for the treatment stage, it turns out that it comes after the stage of diagnosis, after determining the quality of the disease and the degree of its seriousness and determining the type of treatment necessary to heal the patient, whether it is treatment with medicines or treatment with medical intervention. In both cases, it requires the doctor to take the necessary care and caution and obtain the consent of the patient or his legal representative after being aware of the risks surrounding whether treatment with drugs or surgery, and the concomitant pros and consequent possible complications and consent to bear the damage suffered by the patient from doing so. This acceptance is a protection of the physician from civil liability and is one of the means by which the physician can pay for civil liability.

Second requirement: Effect of the patient's acceptance of medical risk for therapeutic medical work on civil liability.

Having explained the legal and legal basis for the legalization of therapeutic acts, the purpose of these acts is to achieve healing for the patient or relieve his pain from the disease. In order to apply the idea of accepting medical risk in relation to therapeutic medical work, we have found the need to fulfill its conditions, in terms of the acceptance issued by the patient with full capacity, that this acceptance was issued after being informed of the risks of the disease and the complications that may surround it, that the intention of treatment is to heal the patient from the disease or alleviate his pain, and that these risks are legitimate. The patient's acceptance of the risk in therapeutic work, whether drug therapy or surgical intervention, has an impact on the civil responsibility of the attending physician in terms of its complete exemption or mitigation. This acceptance also removes the character of error from the doctor's work, and does not consider it an attack on the patient's body (Prajias, 2014).

The patient's acceptance of the risks of treatment, whether with medications or surgical intervention, as this treatment is required by the patient's state of health, as well as the benefits to the patient of this treatment exceed and outweigh the gravity of the damage, this acceptance is valid, and entails exempting the doctor from full civil liability and lifting the status of fault (Gaafar, 2005).

The patient's acceptance of the risks of treatment has fallen short of caution and has made a mistake on his part, as the patient bears the potential risks resulting from treatment, whether treatment with medications or surgical intervention, and the doctor is exempted from civil liability in this case. However, if there is a fault on the part of the doctor, such as violating the principles of medical art, then the patient's acceptance of medical risk does not exempt him from responsibility, and there is a common fault, and the rules of common fault are applied and the responsibility is distributed.

The second section: Acceptance of medical risk in non-therapeutic acts and its impact on civil liability.

Non-therapeutic medical work is also different from therapeutic medical work, as the latter have the direct intention of treating and achieving recovery from the disease and saving his life, while non-therapeutic medical work may be for the

purpose of achieving a purely scientific goal such as medical experience, or to achieve a moral benefit for the person such as cosmetic procedures. Our study in this requirement is limited to non-therapeutic medical work for cosmetic operations, because they are widespread operations in the medical field and there is disagreement about them in Islamic jurisprudence, and we address the statement of the position of Islamic law and positive laws on it, and the role of the patient's admission and bearing the risks surrounding it. We divide this section into two requirements:

The first requirement: The legal and legal position of cosmetic surgeon.

Cosmetic procedures are defined as operations performed for the purpose of improving a part of the body, whether superficially or hidden, or to improve the function of the part, whether there is a defect, damage or deformity in it (Al-Shneiqt, 1994), It has also been defined as a medical-surgical intervention aimed at improving the appearance or function of visible body organs (Al-Fozan, 2008), It has also been defined as medical means and methods aimed at treating birth defects and repairing those defects, or emergency defects that affect the human form as well and that cause harm both at the human and social level (Al-Ahmad, 2011), And cosmetic operations are divided into two types:

1. Therapeutic or orthodontic cosmetic operations: are operations that aim to repair and correct defects and birth defects in some people, or resulting from accidents and diseases to which they are exposed, requiring necessary and necessary therapeutic interventions to treat them and return them to their normal state, whether functionally or aesthetically (Abdel Ghafour, 2016).

2. Aesthetic reconstructive surgery or luxury surgery: In these cases, the aim of the surgical intervention is only to restore the beauty of the affected organ (Al-Jumaili, 2015).

As for the position of Islamic law on cosmetic procedures, I have prepared the first section, which (aimed at treating the congenital disease or the disease that occurred after birth with the intention of restoring the shape or function of the organ to the normal level that is customary for it, it is permissible by Sharia, as well as repairing the defect that causes organic or psychological harm (Husseini, 2019), As for the second section, the cosmetic procedures are not necessary or necessary, but its purpose is to change the creation of Allah the Almighty, and to tamper with them according to the whims and desires of people, they are not permissible by law, and it is not permissible to do so, because of the words of the Almighty (... And to command them, let them change God's creation)( Surat Al-Nisa', Verse number 119), "And the saying of the Messenger of Allah, peace be upon him, "May Allah curse the tattoos, tattoos, the suckers, the sniffers, and the infiltrators of the good changes created by Allah."( Directed by a Muslim in Sahiha Book of Dress and Decorations, 3966).

As for the legal position on cosmetic operations, the legal texts did not explicitly and specifically stipulate cosmetic operations and specify their conditions and controls, and Jordanian medical laws were devoid of provisions that define the

controls for performing cosmetic procedures. However, the modern trend in the law is to treat plastic surgery as a branch of general surgery, which must follow the rules and conditions of general surgery itself. Moreover, because plastic surgery is recognized by international scientific institutions, plastic surgery has become a branch of medicine, and special departments have been established to teach in medical schools and specialized doctors have been assigned to them, as plastic surgery has been prepared subject to the same general rules as traditional surgeries that must meet their conditions (Abdel Ghafour, 2016).

Therefore, the legality of cosmetic procedures has been approved by the jurisprudence and the judiciary on the basis that they are available for the purpose of treatment, both physically and psychologically, but several conditions and controls must be met:

First: The doctor must be a specialist: which is indicated in Article 8 of the Jordanian Medical Association Law No. 13 of 1972 and this specialization is required in all medical fields in general and in the field of cosmetic operations in particular, depends on his experience, qualifications and honesty, and to be knowledgeable and practiced in conducting these operations that have specificity, and be familiar with their characteristics and complications.

Second: The proportionality between the risks of the process and its desired benefits.

Third: The doctor's commitment to enlighten the patient: The attending physician in cosmetic operations must enlighten the patient with all the possible risks surrounding the surgery, whether they are important, secondary or rare.

Fourth: Obtaining the acceptance of the enlightened patient: that is, the patient accepts everything that surrounds the cosmetic operation knowing his state of health and the type of surgery to be performed, as well as its results and risks.

Fifth: Commitment to the necessary care and the origins of art: It requires the attending physician in cosmetic operations to perform his art with great care and vigilance and the examination is carried out very carefully, as this surgery is not required by a state of necessity or urgency, but rather by the doctor to be careful and adhere to the utmost care, and he must be based on the principles and scientific medical rules established in the world of medicine and recognized scientifically and theoretically in the field of cosmetic operations (Al-Jumaili, 2015).

We conclude from this those cosmetic procedures are legally permissible for orthodontic or necessary cosmetic procedures that require intervention for the purpose of removing deformities and birth defects or who are exposed to accidents, for the purpose of returning them to their normal state. As for the improvement cosmetic procedures, they were not authorized by Islamic law because they change the creation of God and are not necessary and were not intended to cure deformities, but rather to repair the beauty of the age. As for the legal position on cosmetic procedures, the law does not explicitly stipulate them in the positive tests to determine their conditions and controls, but must refer to the provisions and general rules governing ordinary surgery, with strict conditions and controls in



terms of cosmetic operations, whether in terms of competence, foresight or approval or in terms of following the principles and rules of medicine and exerting the necessary care and vigilance.

Second requirement: Effect of Patient Acceptance of Medical Risk in Cosmetic Procedures on Civil Liability.

With regard to the impact of accepting medical risk in cosmetic operations in terms of bearing the potential risks and damages resulting from the cosmetic procedure, and its impact on the responsibility of the doctor, and for the first section of cosmetic operations, which includes orthodontic or necessary cosmetic operations, which are intended to treat and heal from deformities and defects and return them to their normal state, whether functional or cosmetic, when the conditions and controls are met in terms of foresight of risks and caveats and the issuance of an informed and explicit acceptance and follow the principles and rules of the technical, The doctor did not make any mistake on his part, as accepting the medical risk has an impact on the doctor's liability and exempting him from compensation for damages that occur during the cosmetic procedure (Prajias, 2014).

As for cosmetic operations, which include the second section, which is the improvement cosmetic operations, which are intended for cosmetology and not for the purpose of treatment, the acceptance of medical risk in the event of damage does not exempt the cause of damage from civil liability because it has lost one of its own conditions, which is treatment, and the permissibility of harming the human body one of its conditions is for the purpose of treatment, it is inconceivable that there is acceptance of medical risk in this form of cosmetic operations (Abdel Ghafour, 2016).

We conclude from this that the acceptance of medical risk is the result of the necessary and therapeutic cosmetic operations, which are intended to treat the deformities and defects to which the person is exposed from birth or as a result of exposure to accidents, for the purpose of returning it to its normal state from a functional point of view, and has an impact on the liability of the cause of damage when the cosmetic operation is performed and exempted from liability when the other conditions of the issuance of the acceptance are met explicitly after being aware of the risks and caveats of the process and following the principles of medicine for the cosmetic process, because the acceptance of the risk is considered A mistake on the part of the patient and a failure to take care and caution for his safety, so he has made a mistake on his part, and he must bear the damage that results from the cosmetic process, as well as the focus that there is a proportion between the risks of the cosmetic process and the desired benefits of it, and for cosmetic procedures improvement, it is not imagined that there is acceptance of the risk in them because they lack the intention of treatment and the patient's acceptance of the risks does not affect the responsibility of the cause of damage. In case of error on the part of the doctor, as if not following the principles of the art of cosmetology, he has made a mistake on his part, so we are faced with two



mistakes, the patient's fault for accepting the risk, and the doctor's mistake that he committed, in which case the rules of common fault must be applied.

## **7. Conclusion**

At the end of this research, through which we dealt with the provisions of acceptance of medical risk and its impact on the payment of civil liability, the researcher reached a set of conclusions and recommendations, which can be summarized as follows:

### **First: Results**

1 -The acceptance of medical risk requires the existence of an acceptance issued by the patient to carry out medical work, and this acceptance requires that it be issued in the light of the doctor's informing his patient of the necessary information, risks, benefits and complications of medical work in order to facilitate the patient to make the appropriate decision to do so.

2- The idea of accepting medical risk in order to be a means of paying civil liability for the doctor in the event that the patient suffers damages as a result of medical interventions, must meet several conditions, including that there must be acceptance issued by the patient before the doctor starts medical work and this acceptance is considered as a green light for the doctor to start.

3- Acceptance of the patient to bear the risks of treatment has fallen short of caution and caution and has committed a mistake on his part, the patient bears the potential risks resulting from treatment, whether treatment with medicines or surgical intervention, and the doctor is exempted from civil liability in this case. However, if there is a fault on the part of the doctor, such as violating the principles of medical art, then the patient's acceptance of medical risk does not exempt him from responsibility, and there is a common fault, and the rules of common fault are applied and the responsibility is distributed.

4- Cosmetic operations may be therapeutic and may be optimizing, and this classification has a role in determining the impact of risk acceptance on this medical procedure.

### **Second: Recommendations**

1 -The need to stipulate the idea of accepting reasonable risks in the texts of the Civil Code and the medical law as a means for the patient to express his acceptance of medical work and on the other hand exempt the doctor from liability if all the conditions for accepting reasonable risks are met.

2 - The need for a specialized medical judiciary that informs and knows all aspects of medical law because of the importance of the judiciary and its attachment to the human body, which is protected from being harmed except in the interest of it.

3 - The need to consider the extent of the doctor's commitment in various medical fields is to exert care as a general asset and his commitment to achieve a result in areas where stability and stability of its medical results have been obtained.

4- We propose to the Jordanian legislator to issue a law or medical system for cosmetic operations of both therapeutic and improvement types, to state their terms and conditions, and to consider risk acceptance as one of the means of paying responsibility for the attending physician.

### **References**

- Abdel Ghafour, R. A. (2016). *Plastic Surgery and the Physician's Civil Responsibility Arising from a Comparative Study*, Zain Human Rights Publications, Beirut.
- Al-Ahmad, H. E.-D. (2011). *Medical Responsibility in Plastic Surgery*, Al-Halabi Human Rights Publications, Beirut.
- Al-Fozan, S. b. M. (2008). *Plastic Surgery Medical Presentation and Detailed Fiqh Study*, 2nd Edition, Dar Al-Tadmariyah, Riyadh.
- Al-Jumaili, A. O. A. (2015). *Modern Legal Trends in Plastic Surgery A Comparative Study*, Al-Halabi Human Rights Publications, Beirut.
- Al-Shneiqt, M. i. M. a.-M. (1994). *Provisions and Implications of Medical Surgery*, 2nd Edition, Sahaba Library, Jeddah.
- Gaafar, R. M. (2005). *The Satisfaction of the Injured Person with the Damage and its Impact on the Right to Compensation*, New University House, Egypt.
- Hanna, M. R. (2008). *Medical-Surgical Error in Islamic Law and Arab, European and American Laws*, 1st Edition, Dar Al-Fikr Al-Jami'a, Alexandria.
- Hussein, H. A. (2019). *Commitment to Patient Insight into the Medical Contract*, Published Research, Journal of Law Thesis, University of Karbala, Iraq, Q18. 8.
- Prajas, N. (2014). *Acceptance of Medical Risks and its Impact on Civil Liability: A Comparative Analytical Study*, Legal Books House, Egypt.
- Salman, O. Y., W. Abbas, Muhammad Ibrahim. (2017). *The Criminal Responsibility of Physicians for Errors in Diagnosis and Foresight Comparative Study*, Research Published in Tikrit University Journal of Law, Year 1, Part 2. 1(4).
- Sharaf al-Din, A. (1987). *Sharia Provisions for Medical Works*, 2nd Edition.