Chapter Five
Muslim *fuqaha's* classification of liability of medical practitioners

1. Prologue

Four classes of medical practitioners are recognised by Muslim *fuqaha*:

(1) The authorised and competent practitioner who performs his duty according to the accepted methods of the profession.

(2) The authorised and competent practitioner who erred, or was mistaken, or was involved in a situation of misadventure or accident.

(3) The negligent practitioner.

(4) The criminally negligent practitioner.

Using the material available to classify the actions of medical practitioners, or to draw legal rules, necessitated quoting parts of the texts more than once. Another factor leading to the same result is that the 'frames' of incidents used by Muslim fuqaha in their writings are the same in some instances. They tended to be copied, and recopied: but with additions, developments of views, and explanations by successive generations of fuqaha.[1]

There is a wealth of ideas generated by their academic endeavours to separate mistake, error, and misadventure, from negligence.[2] Also their views on 'no fault: no compensation' are morally appealing, and may be investigated for socially fair solutions; these take into consideration the plight of those afflicted, and how best to utilise the available resources.

Such 'academic' inputs may bring into prominence areas of agreement amongst rules and help to make equitable common 'laws.' They are the justification and purpose of such studies as the one at hand.

As a matter of fact the classification above is not very different, in essence, from English law.

The first category is, in reality, the other face of the coin of the

Bolam test and principle. The second and third categories are academically separable in the Muslim fuqaha's classification, but factually difficult to separate from one another, but on the other hand there is sympathy for the separation amongst English law jurists. Criminal negligence, the fourth category, has common ground in both Islamic and English laws in its formulation; but it remains to look into retaliation as a punishment for some of the offences in Islamic fiqh. Muslim fuqaha have already done so, as will be shown below.

Negligence was, in a major part, the subject of the analysis in the previous chapter, particularly subsections two and three. In the following subsections of this chapter I examine the remaining categories of practitioners.

2. The competent practitioner who performs his duty according to the accepted methods of the profession and is authorised

The issue at hand in this subsection is a presumption by Muslim fuqaha of the existence of a category of medical practice, which may be attended by *sirayah*: complications or even death without there being any question of transgression *(ta'adi)*, incompetence, or negligence. Thus there is no liability attached to the action, even if the patient is harmed, and no compensation is due *(la daman)*.

The argument is that the practitioner is performing his duty *(wajib)*, for which he was trained, in the manner in which it is usually conducted. In the course of executing a duty one is only liable if one is not authorised or if one goes beyond the limits of such authorisation. The Islamic dictum is: "executing one's duty *(wajib)* does not entail a guarantee of safety nor success."[3] Medical treatment is a *necessity*, providing it is a *duty* of the society and individuals. "The consensus is that there is no liability attached to the consequences of performing one's duty *(wajib): (Sirayat al-wajib muhdara bi'l-ittifaq)*."[4] So the medical practitioner in charge may not be liable, "by consensus of all fuqaha."[5]

In Islamic fiqh this is only applicable in cases of the living (be it human or animal life). It is a different situation for craftsmen who agree to pierce a pearl, or make a sword, or create pottery. In these situations the craftsman is bound to do the job without fault, and he is liable if he does not honour the contract *('aqd mu'awada)*. "The dif-

ference is that elements of nature, beyond the control of the practitioner, govern the response to injury and consequent healing where there is life."[6]

2.1 Liability

Lack of competence, and deviation from accepted methods, if attended by harm, make the practitioner liable.

Lack of consent, even when not attended by harm, is battery and makes the practitioner in the overwhelming majority of cases liable.

Some specifics from the different schools are given below:

(a) The Hanafi school

Sarakhsi in *al-Mabsut* said:

> If a barber-surgeon *(hajam)* lets out blood, or incises an abscess, for a consideration; or if a veterinary worker *(bazagh)* treats an animal, for a fee; then if that person or animal dies, the performer is not liable.
>
> This is in contradistinction to the work of a tailor who spoils a dress: because he was contracted to deliver a piece of work without defect, which is within human competence. Whereas in the case of living objects the intervention opens up a door for the soul (reaction), a domain which is not under the control of the performer; as it unleashes elements of nature which may complicate the procedure *(sirayah)*. The contract of *mu'awada* (exchange) is not applicable where there can be unforeseeable results to the intervention. So in this situation the performer is not liable, if he did what he was asked to do, unless he transgresses or performs without consent.[7]

…But:

> If someone is asked to circumcise a child and he cuts off the glans, he is liable, as circumcision *(khatan)* should be limited to the prepuce only. So, by cutting off the glans he has transgressed.[8]

…Whereas:

> If he confines himself to the limits of what is required, but the patient dies because of consequences not within his control *(sirayah)* then he is not liable.[9]

Al-Kamal ibn al-Humam commented on this:

> [t]he unforeseen results of reaction to injury in animate objects, *shock,* leading to untoward effects or death. In such cases the practitioner, if he has operated within his bounds (cuts the prepuce only in circumcision, and does not include the glans), is not held liable, because it

> is inconceivable to take care of the unknown. "Obstacles should not be put in the way of useful occupations lest people become afraid of engaging in them, since they are a necessity and fulfil a need." It is not the same with inanimate objects, such as in tailoring. It should be possible to predict the outcome of intervention in such cases, as they have no reaction of their own.[10]

Three points are worthy of note from these quotes:
a) The Islamic legal mind does not accept strict liability
b) There is a thought to guard against defensive medicine
c) Non-physical injury (shock) may be grounds for compensation.

As to this last, the shock referred to by al-Kamal ibn al-Humam, in the quote above, may be a reaction to injury (e.g. fainting), or infection (poisoning or septicaemia). These two types of shock, which do not necessarily involve 'negligence' may be added to a third type which was mentioned by Ibn Qudama, "when he charged the practitioner who uses an instrument or a procedure that causes undue pain and shock, with negligence and made him liable."[11]

Islamic fiqh knew and dealt with yet a fourth type of shock, 'psychological' shock, which features nowadays in some compensation claims.[12] It is narrated that a man (Sa'd ibn Sa'nah) who demanded settlement of a debt on the spot physically stopped the Prophet (SAAS). 'Umar ibn al-Khattab who was accompanying the Prophet (SAAS) was enraged, and went for the man. The Prophet (SAAS) said,

> No! Give him what is due to him, and more: because you have frightened him. Perhaps I should have settled earlier, and perhaps he should have been more courteous in his asking. *(wa yazidahu 'ishrina sa'an lima rawa'ahu)*.[13]

This is compensation for psychological trauma without any tangible physical harm. There is another incident, where a woman was summoned to the Caliph 'Umar. She was so terrified that she dropped a foetus, which cried and died immediately. 'Ali ibn Abi Talib who was present told 'Umar to pay her the full *diya*.[14]

(b) The Maliki school

Ibn Rushd said:

> The essence of the principle in Imam Malik's school is that all craftsmen are liable for any damage that results from their handling of objects, whether it is burning, breaking, or tearing: be it piercing pearls, engraving stones, making swords, or baking bread.

> But with the physician and the veterinarian if death follows their intervention, there is no liability unless they have transgressed.[15]

He also said:

> Fuqaha are agreed that a practitioner is liable if he errs and cuts the glans with the prepuce. But it is attributed to Malik that even then he is not liable if he is known to be proficient in his domain, otherwise he is liable.[16]

Al-Baji narrated that:

> Ibn al-Qasim said,"The medical practitioner, the barber-surgeon, and the veterinary worker, if their action results in death, then there are two possibilities: that they have done what is usually done, in that case they are not liable; the reason being that they are required to do such jobs and are permitted...but if they err then they are liable.[17]

Al-Muwaq added,"This applies to the non-Muslim practitioner as well."[18]

(c) Shafi'i school

Ar-Rabi' said:

> Ash-Shafi'i said that if someone asks another to let his blood, or to circumcise his son, or to treat his horse, as a result of which loss occurred then the situation is as follows: if the person did what is done by the people in the trade in such circumstances which is considered beneficial then there is no liability. But if his performance was at variance with what is the customary practice, then he is liable.
>
> As regards the fee, it is definitely payable if the performance was in accordance with the methods adopted by those in the field even if there is loss of life or part.
>
> But it has been said that it is even payable to the one whose methods were not in accordance with what is accepted in the field, although he is still liable. But the predominant view is that he deserves no fee. Ash-Shafi'i said,"All fuqaha are agreed that craftsmen are liable for all the losses incurred at their hands; but they are all also agreed that this does not apply, in all cases, to those who deal with animate beings. I find no explanation for that other than that the living body has its own reaction to actions."[19]

(d) Hanbali school

Ibn Qudama, and other Hanbali fuqaha, point out that medical practitioners, and veterinarians are not liable if they are proficient, execute their job according to the accepted manner in the trade and

act within the bounds of the authorisation given.[20]

Ibn al-Qayyim explains:

> A practitioner, is not liable if it is known of him that he is competent in the craft and his hand did not transgress; even when consequent upon his action, which was consented to by the patient and which was sanctioned by the authorities, there occurred loss of a part, or a function, or life. This is the view of the consensus of fuqaha: as it is an unforeseeable spread *(sirayah)* of a permitted act.[21]

2.2 Unforeseeable Reactions *(Sirayah)*,

On *sirayah* (unforeseeable reactions) the varying Muslim fuqaha's views are as follows:

Hanafi school

> [i]n the case of the living, the intervention opens up a door for the soul to react, a domain, which is not under the control of the performer; as it unleashes elements of nature, which may complicate the procedure *(sirayah)*. [22]

And:

> [t]he unforeseen results of reaction to injury in living objects (shock), leading to untoward effects or death. In such cases the practitioner, if he has operated within his bounds, is not held liable; because it is inconceivable to take care of the unknown. [23]

Maliki school

> the principle in al-Imam Malik's school is that all craftsmen are liable for any damage that results from their handling of objects… But with the physician and the veterinarian if death follows their intervention, there is no liability unless they have transgressed…[24]

Shafi'i school

> All fuqaha are agreed that craftsmen are liable for all the losses incurred at their hands; but they are all also agreed that this does not apply in all cases to those who deal with animate beings. I find no explanation for that other than that the living body has its own reaction to actions. [25]

Hanbali school

> The view of the consensus of fuqaha is that, there is no liability, and there is no compensation *(muhdara)* for unforeseeable complications,

or spread (sirayah) of a permitted act. [26]

Fuqaha have extended the rule applicable to the medical practitioner in this regard to include the actions of the *wali* (ruler) who also bears neither blame, nor liability when he is executing the commands of the law regarding a crime, which was justly tried.[27]

Compare this with modern laws, which count unforeseeable causes as a defence against awarding damages. The EC Product Liability Directive (85/374/EEC), Art. 7(e) in its 1985 explanatory note refers to "the reaction of the human organism as a mitigating factor of liability" just as was suggested in Islamic fiqh:

> The safety, which a person is entitled to expect, raises particularly complex issues in respect of medical products and adverse reactions to them. Establishing the existence of a defect in a medicine administered to a patient is complicated by the fact that not only is the human body a highly complex organism but at the time of treatment is already subject to an adverse pathological condition…[28]

In the United Kingdom, the Consumer Protection Act 1987 came into force on 1 March 1988, and the Government enacted the 'development risks' defence, so that it is a defence to show that the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control (s. 4(1)(e)).[29]

This is advancement. Lewis notes that, "The Swedish system does not cover misfortunes which were within the area of foreseeable risk of a medically justified act"[30].

2.3 Concluding Remarks

According to Muslim fuqaha competence and consent are a defence against liability.

Competence is a quality control procedure by the authorities, resulting in the recognition of the professional standard of the treating practitioner. Islam requires one to do one's job well. The Prophet (SAAS) said, "Allah likes it when one does his job well *(inn'Allah yuhibbu min al-'amil idha 'amila an yuhsin)*."[31]

The Prophet (SAAS) also laid the ground for the requirement of levels of skill, or specialised competence, when he asked, "Which of you is better at medicine?"[32]

The second component of the defence, consent, was considered by Muslim fuqaha under the notion of 'authorisation' *(ma'dhunia)*, which embodies: consent of the patient or his guardian to the treatment, on the one hand, and permission to practise, on the other. Consent was considered above.[33] Permission to practise is a later development in the views of Muslim fuqaha. It presumes competence, which is measured against the yardstick of "what is done by others in the field."

Ash-Shafi'i said:

> If the medical practitioner's actions are similar to that of those in the trade whose actions are known to be beneficial then, he is not liable; but if his actions are not similar to those who are well versed in the trade then he is liable.[34]

Ash-Sharawani said:

> A medical practitioner is not liable, at the pain of ignorance, if two just and qualified men in the field consider him knowledgeable. They certify that his competence is well known to them, and that he had cured many people according to their knowledge.[35]

An-Najdi said:

> Medical practitioners are not liable if it is well known that they are competent, and they were taught the profession by known teachers, who gave them permission to practise *(ajazahu)*.[36]

> The standard required does not entail a guarantee of results, otherwise people would stop rendering a necessary service for which there is need,[37] because the practice of medicine may involve unforeseen elements beyond the control of the practitioner *(gharar)*.[38] If it is an essential and needed service in the community, rendering it may be mandatory *(wajib)*, and that does not always entail a guarantee of safety, and no liability is attached to it.

The Hanafi fuqaha, Ibn Nujaim (d. 1560 CE) and Ibn 'Abidin (d.1834 CE), related:

> If a practitioner performs within the usual bounds, then he has fulfilled his part of the agreement *('aqd*) of duty *(wajib)*, and no liability can be attached to executing a duty. *(ada'u al-wajib la yataqayyad bi shart as-salama: wa la yujami'ahu ad-daman)*.[39]

Permission to practice, as a separate issue from consent of the patient or the guardian, was an innovation of Muslim fuqaha in their era of advancements. It is more similar to 'Administrative law' rather than jurisprudence; but since it featured to a great extent in their

writings it is dealt with here, briefly.

The Prophet's (SAAS) hadith, in this respect, are general legal rules. The basis of liability is: the harm caused by the actions of someone who holds himself out to treat others without knowledge (due care); if there is no harm there is no liability. An example of such a hadith is:

> He who undertakes the treatment of others, without preparing himself, and causes loss of life or damage is held liable.[40]

There is no stipulation that the practice of medicine needed permission.

In the UK the current Medical Act 1983, states, "The legislation does not prevent a person from practising medicine if his name is not in the medical register, but he cannot hold himself out as being a registered medical practitioner… which bars him from (1) recovery of fees…(2) holding certain appointments: i. National Health Service, ii. Army, Navy, and Air Force, iii. any hospital…(3) certain work: i. not to attend midwifery cases, ii. not to treat sexually transmitted diseases…"[41] This reiterates a principle which goes back to the Medical Act of 1858.

This is a point for comparison in legal theory. The stand of the Medical Act is fair and practical, and it is, undoubtedly, commendable to have controls, registers, and licensing bodies to administer the profession.

Muslim fuqaha are agreed that, "The competent practitioner, who performs his duty within the prescribed professional code, and is duly authorised, is not liable; because he is required to perform a duty."[42]

One can infer that, in this particular circumstance, there is no provision for no-fault compensation or strict liability. This applies even if the practitioner chooses a method of treatment contrary to the views of some in the profession, and his patient succumbs.

Faqih Shams al-A'imma al-Hulwani was asked about a girl who fell off a roof and injured her head. Many attending surgeons said: if you allow her head to be opened she will die. One of them said, "If you do not open her head, she will die today. I will do that and cure her." He opened her head. She died a day later. Is he liable? Hulwani said, "No." He was asked, "What if he had promised to cure her?" He replied, "even though.."[43]

Two issues feature in this event: first, Faqih al-Halawani chose a

case in which an unusual, novel and dangerous procedure was used; and second, a cure was promised, but it was not fulfilled. Yet there was no liability because there was no fault. Notwithstanding that strictly it might have been; because she was going to die anyway even a risky procedure was sanctioned.

Compare this with modern day practice. As to the first issue of innovative practice, Montgomery has said:

> This does not mean that innovative practice is negligent merely because it is unusual. Professionals will be called upon to justify novel therapies or procedures, but seeking to improve on normal standards is the opposite of negligence provided that it is done properly.[44]

Taking the second issue, 'promise of a cure,' I quote Montgomery again:

> In theory it is possible for a health professional to contract to provide a standard of care that is higher than that required in negligence. However, the courts have shown themselves very reluctant to accept that they have done so. They have refused to accept that surgeons have agreed to exercise closer personal supervision than is normal or to guarantee success.[45]

It is also interesting to note that Faqih Najm ad-Din, quoted by Sarakhsi (d. 349/961) dealt, in one discourse, with similar ideas to these which fashioned the Bolam rule through its stages: of the Bolam test (common practice) in *Bolam* v. *Friern HMC* [1957]; and the Bolam principle laid down by Lord Scarman, in *Sidaway* v. *Bethlem Royal Hospital Governors* [1985] (practice contrary to some views); which complemented the Bolam test, more than twenty five years later.

These quotations from Western jurists are similar to the viewpoint of Muslim fuqaha. There is however increasing clamour for no-fault compensation, in Western societies. Sir John Donaldson MR, states:

> The author…draws attention to the continuing 'clamour for no-fault compensation'…However, it is worth pointing to a feature which is unique to medical accidents. That is that in many and perhaps the majority of cases, the same medical or physical disability can result from natural infirmity or from accident in the course of skilled and careful treatment just as well as from medical negligence.[46]

And The Rt. Hon Lord Jusice Otton has said:

> He grapples with the big issue: should the present method of securing compensation of victims of medical mishap continue or should we be

> moving towards a no-fault or limit of liability or other arrangement? [He] perhaps underestimates the strength of feelings and arguments of those (including some senior judges) who feel that the present system should be re-examined in depth…The status quo is unsatisfactory (to put it mildly)[47]

Some modern day laws which refer to circumstances where there could be damage or complications without the physician necessarily having done any wrong, may find the practitioner liable or opt for no-fault compensation.

Lewis discusses 'the philosophy of compensation,' as follows:

> It may be that the fault-based system is a hangover from the Victorian ideals of self-help and has no place in a modern welfare state but it is not philosophically, even if it is politically, indefensible…
>
> But if he suffers one of the multifarious misfortunes that the vicissitudes of life are ever dealing us he has no right to demand that his fellows compensate him for that. He can always arrange his own insurance against such events…
>
> I maintain that a decision to permit no-fault recovery for medical misfortunes only has no philosophical justification…[48]

There is *definitely* no strict liability in Islamic fiqh when living creatures are involved. There is no liability if the act was duly permitted and was conducted according to the accepted proscriptions. I refer again to the observation of Ian Edge, "In fact, it is controversial whether Islamic law accepted the idea of strict liability at all."[49]

But I am putting forward an explanation that divides this area into two zones. There is no strict liability where one is dealing with the living, people or animals, because living creatures have their own response to stimuli. Dealing with objects may be different, it can be governed by contract not tort. But there are some minority views to the contrary in Islamic fiqh.

There is no compensation *(daman)* for loss of life, part, or function following permitted acts, performed in an accepted manner. Ibn Rushd said that Qadi Abu Muhammad 'Abd al-Wahhab, of the Maliki school, said: "that in his opinion such a practitioner is responsible for the *diya*, as death has ensued by way of error *(khatta')*."

Should the practitioner be found to be: ignorant, or to have transgressed the limits of permission, or negligent, in all such cases the practitioner is liable." Ibn 'Abd as-Salam said, "The ignorant one is, further, singled out for *adab* (disciplinary action), but error is not

punished (though it may be compensated); as to the one who acted without permission, punishment remains an open question."[50]

This rare viewpoint, of Qadi Abu Muhammad 'Abd al-Wahhab, may be a source of reference for those who want to support a 'no-fault compensation' claim in Islamic medical fiqh.

> A no-fault scheme would relieve doctors considerably, and be of advantage to the patient from the strictly legal point of view that he would not have to prove that he received negligent care; but he would still have the difficult task of proving causation,…[51]

The legal system may be content not to examine other ideas. It may be a pragmatic approach. But it is of dubious morality. There is no accountability, and one urge to improvement in the medical field is removed. The state may find itself spending money, which might have been better spent for communal welfare on persons who could have insured themselves as for any other mishap.

The British state, (the NHS included), is awarding vast amounts of money for some, whose major reason in getting the awards is to be cared for medically and socially. Some of that money, if diverted, could be spent on public facilities, hospitals and nursing homes included, to care for them and others. Besides, litigation can take years and many opportunities of limiting the damage, teaching and training are lost to the victim.

The British state should also concentrate on preventing mishaps by improving training, supervision, and facilities. It is beyond reason for a profession that knows that prevention is better – and much cheaper – than cure, not to practice the cardinal essence of its role. Its main message is to tell people to eat, rest, exercise, and play reasonably; yet many of its workers are in for long hours of tedious chores. More money should be spent on improving the health services provided, than spending on giving compensation in every case, in order to reduce those cases of compensation.

3. The authorised and competent practitioner who errs

In Islamic medical fiqh at the time of the great fuqaha most of the cases of liability revolved around circumcision or prescribing a drug containing poison. Circumcision was the commonest surgical procedure, hence the richest source of complications and litigation. Circumcision involves physical intervention on the part of the practitioner, and expects him to be in control of the situation all the time.

That is the presumption.

Prescribing drugs is an integral part of the practice of medicine, and drugs, sometimes, use poisons as a base. But in prescribing and ingesting a drug other parties may be involved: the patient, his relatives, friends, and other attendants. There are several facets to be explored here: a mere mistake in prescribing or, at the other end of the spectrum, the criminal use of poisons.

Using references to these cases this subsection is devoted to the important category of the 'competent and authorised practitioner who errs.'

Modern day laws do not make a distinction between error and negligence or the implications thereof. That is the whole point of the debate. In Islamic fiqh there is a distinction with applicable legal consequences.

Salmond, explains that, "mistake cannot be a defence in civil law."[52] However Islamic fiqh discusses the mistake *(tajawuz al-hadd)* of a competent practitioner in a separate context from negligence and arranges due compensation, *diya,* for the injured party.

English law has dicta however which indicate this distinction is not entirely unknown. Taylor, says:

> It has been said many times by many judges that negligence should be distinguished from 'a mere error of judgement,' but the line is a very fine one and very difficult to draw.[53]

And Lord Denning, stated in *Hatcher* v *Black* in 1954 that:

> the uncertainties inherent in the practice of medicine were such that a doctor, aware of a law which regards errors of clinical judgement as negligent, would sense this as 'a dagger at his back' when undertaking treatment."[54]

The views of Muslim fuqaha in this respect will be examined. Although they have made an academic distinction between negligence and error, even for them the line is a very fine one and very difficult to draw. It rests on intent, which is not always discernible. Malik said, "It is difficult to assume that the medical practitioner will not do the best for his patient."[55] Shafi'i said, "No restitution *('aql)* is due from a medical practitioner, nor is there any blame if his intentions are good, Allah permitting [sic]."[56]

The patient can be compensated fully without the practitioner being branded negligent. Muslim fuqaha separated error from negligence. There is provision for that in the Qur'an and Sunnah*:*

You are not to blame for any honest mistake you make but only for what your hearts premeditate:

And,

Our Lord, do not take us to task if we forget or make a mistake![57]

The Prophet said,

My people were excused: error, forgetting things, and what they were forced or compelled to do.[58]

But loss due to error is subject to restitution. Restitution is borne by the *'aqila*. The situation for error is detailed below.

3.1 Error

(a) The Hanafi school

Sarakhsi, (d. 483/1090), gives an example in circumcision. If the guardian of a child asks for him to be circumcised and the practitioner's hand slips and cuts off the *'glans penis'* instead of the prepuce, then the practitioner is liable, and the indemnity *(diya)* is payable by the 'relatives' *('aqila)* of the practitioner.[59]

But, an interesting feature of *diya* compensation is postulated by the fuqaha.

Compensation is computed on the scheme of *diya*. Loss of life (the whole body) is compensated for by the full value of *diya*, one hundred camels. Limbs and organs are computed with reference to the whole body. Since a person has two arms then each arm is worth fifty camels if it is lost; fifty camels compensate for loss of an eye, being one of a pair as well. Ten fingers are worth the full *diya*; each finger is worth ten camels. Single organs deserve the full value of the *diya* when lost, e.g. the nose and the tongue.

The glans penis is a single organ so the compensation is one hundred camels. But that is not the whole story, for if the child bleeds to death or dies of shock at the severance of the glans, the *diya* due is halved, it becomes fifty camels. The reason being that the practitioner was authorised by the guardian of the child, to remove the prepuce; but he erred and removed the glans as well, without permission. The cause of death was 'half-authorised,' or shared or contributed to by the guardian. So only half the *diya* is due, fifty camels.

"This is the strangest and most bizarre of tales: to pay more compensation if the child lives than is due if he dies!" exclaimed Faqih

Muhammad.[60]

(b) The Maliki school,

The Malikis have a direct and simple approach. Malik, (d. 179/795), said:

> Compensation, *diya*, is due in (non-intentional) mistakes. All the *diya* is the responsibility of the relatives *('aqila)*. Retribution *(qisas)* is the punishment for intentional transgressions; and it rests solely on the transgressor.[61]

Ibn Rushd, (d. 595/1198), said:

> If the medical practitioner is competent yet he commits a mistake then he is only liable for what is less than a third of the value of *diya*. More than one third of the full *diya*, should be met by his relatives *('aqila)*. But if he is not knowledgeable, then he is lashed and imprisoned. As regards *diya*, some would say that it is his obligation, others have saddled the *'aqila* with it...

It is attributed to Malik that he said, "A qualified and competent medical practitioner is absolved of all liability, even if he errs. Whereas an impostor is fully and personally liable.'[62]

Malik's views may be compared to the quote of Lewis:

> An English judge [sic.] in 1953 said:
>
> 'It is the duty of a doctor to exercise reasonable skill and care, but a simple mistake in diagnosis or treatment is not of itself negligence. The court is not bound to shut its eyes to the fact that there are quite a few cases at the present time in which doctors are sued for negligence. That may arise from the changing relationship between doctor and patient, but it matters not. There is a *considerable onus on the court to see that persons do not easily obtain damages simply because there is some medical or surgical mistake made* [our italics].
>
> 'But the court will not shrink from facing the issue if it finds that the doctor has failed to give to a case the proper skill and care which patients have a right to expect.' (per Finnemore J. in *Elder* v. *Greenwich Hospital Management Committee, The Times*, 7 March 1953)[63]

The general view in the Maliki school is that, the error of a competent practitioner is compensated for by *diya*: if it is less than one third of the full value of *diya* then it is borne by him, if it is more than that then it is borne by his relatives *('aqila).*[64] However, the competent practitioner can, on occasions, be totally absolved of any liability.[65]

(c) Shafi'i school

Ash-Shafi'i states that a competent practitioner who errs and causes damage, or practises without permission is liable; *diya* is payable but it is shouldered by his relatives (*'aqila*).

But if the patient dies, although the *diya* is still borne by the *'aqila*, the practitioner has to make a personal expiation *(kaffara).* He is to fast for two consecutive months, but if sickness prevents that he is to feed sixty of the poor with two fulfilling meals for that day, or permutations of that. This is a purely religious and personal obligation *(wajib)*. That added to the month of fasting *(Ramadan)* for that year comes to three months of fasting. It is a sign of admitting that a wrong was done and of repentance. That is "when the error is of a kind that can happen from his likes; but if the error is gross and not expected to happen, like removing the penis in circumcision, then the responsibility is his own."[66]

Ibn Hajar al-Haithami (d. 974/1566), says that the *diya* should be paid by the *'aqila*, but if that is not possible, the *bayt al-mal* should bear it. If that is not possible, then it becomes a debt of the practitioner.[67]

The summary of the views in the Shafi'i school is that a competent practitioner who errs in his practice is liable. But it is his relatives, *('aqila)* who will bear the cost. A second feature in the school is that the practitioner, and he alone, must carry out the expiation *(kaffara)*, which is mandatory in all cases where there is loss of life.

(d) The Hanbali school

Ibn Qudamah said that:

> a competent practitioner who transgresses is liable: transgression can take the form of an error in performance or lack of responsible consent.[68]

He narrated that, "when a girl died after being circumcised by a woman, 'Umar ibn al-Khattab made the relatives *('aqila)* of the woman pay the *diya*."[69] And he advanced the general Islamic rule:

> *'Aqila* does not bear the restitution of intentional harmful acts, or whatever is less than the value of one third of *diya* in consequences of error *(khatta')*.[70]

Some of the fuqaha in the Hanbali school are not averse to treatment without consent on occasions. Ibn Muflih said:

> It is related in *al-Huda*, that if a competent practitioner undertakes

> treatment successfully, with no resulting harm, but without consent then he is not liable, because he was lending a helping hand and doing a favour out of his own goodness. The Qur'an says, **"There is no way open against good-doers, Allah is Ever-Forgiving, Most Merciful. Most merciful."**[71]

Ibn al-Qayyim sums up most of the views in the Hanbali school. At times it may seem that there is differing emphasis on the different aspects of the case.

He once unequivocally stated that:

> The consequences of the (incompetent) practitioner's felony – according to the opinion of most fuqaha – falls upon his clan *('aqila)*.[72]

And:

> An authorised, competent practitioner, who has given the job its due, yet his hand slips and causes damage, is liable for the damage caused as it was by mistake. He is personally responsible for the payment if the damage is valued at less than one third of *diya*; otherwise it is to be born by his *'aqila*.

But what if the practitioner does not have any*'aqila*? Should he be responsible for all of *diya* or should it be the *bayt al-mal*? The two possibilities were both entertained by Ahmad (ibn Hanbal).

It was said [sic] that in case of a of a *dhimmi* practitioner, then it is to be borne by him. But if it is a Muslim practitioner, then the payment should be effected either by himself or the *bayt al-mal*. And what if there are no funds in the *bayt al-mal* in the case of a Muslim tortfeasor? Should *diya* be dropped? or should he bear it? the two possibilities were entertained; with a leaning towards dropping the diya.[73]

These are useful questions to ask because it moves the issue from statements and debate to the making of laws.

3.2 Non-Muslims

At this juncture the situation of a *dhimmi* (non-Muslim) requires elucidation. *Dhimmi* is not a derogatory term. On the contrary, it means somebody in the protection of Allah. Everyone wishes to be so,'in *dhimmati'llah*.' A Muslim believes that he is in the protection of Allah because he binds himself by Islam or surrenders himself to Allah. A non-Muslim who wants to live, in peace, within a Muslim community has the'contract' of trust *('aqd adh-dhimma)*, the protection of Allah and His Messenger *(dhimmatu'llahi wa dhimmatu*

Rasulihi). The Prophet (SAAS) said,"I am the adversary of anyone who is an enemy of a *dhimmi*."[74] The *dhimmi* status secures the right to, inter alia, organise one's affairs within one's own circle, including making arrangements to have an *'aqila* (relatives) or *ahl ad-diwan* (a guild).

The Prophet (SAAS) said,"Each clan, or group, arranges how to cater for indemnification." *('ala kulli batnin 'uquluhum)*[75]

In summary the consensus of Muslim fuqaha is that the practitioner who errs is liable though he is not branded as negligent. The patient who suffers the damage is to be compensated. The compensation is to be borne by the practitioner personally, in values which are less than one third of the full *diya*.

The value of full *diya* in modern day moneys is about £33,000 or $50,000.[76] Thus the amounts involved are in the region of £10,000 for one third of the *diya*.

Values above one third of *diya* are met by the community, be it the close relatives *('aqila)* of the tortfeasor, or members of his guild *(ahl ad-diwan)*, or the *bayt al-mal*. In modern parlance this could possibly translate into the NHS or co-operative and non-commercial insurance bodies[77] to which the practitioner has subscribed.

The Prophet (SAAS) said that in case of error or mistake, *diya* is the obligation of the *'aqila* and that the *bayt al-mal* stands in for the one who has no *'aqila*.'[78]

In serious errors resulting in death, ash-Shafi'i required more than the mere compensation of relatives. He demanded expiation of fasting two months. It is not to be converted into monetary terms unless the health of the tortfeasor prevents fasting. It is an indication that more than money is involved.[79]

A mistake or an error can materialise from a competent, attentive, and conscientious practitioner. It should not necessarily be classified as negligence but that should not bar the aggrieved party from being compensated.

3.3 Compensation *(diya)*

Islamic fiqh puts a cap on compensation for loss due to error or mistake *(khatta')*, Q.4: 92 *(wa diyatun musallamatun...)*. In cases of intentional transgression, although it is the right of the aggrieved party to insist on a similar hurt to be inflicted upon the offender to ensure justice, forgiveness is recommended, even for a consideration. The

mere fact that the aggrieved party accepts compensation and doesn't insist on retaliatory measures is a kindness that should be appreciated, Q. 2:178 (*fa man 'ufiya lahu min akhihi shay'un fa'ttiba'un bi'l-ma'rufi wa ada'un ilayhi bi ihsan.*" All of this is to foster good will, and curb damaging litigation.

Common law reforms consider placing a cap as well:

> A significant feature of any discussion of tort reform is an effort to place a cap on monetary awards. There are two varieties of caps - a cap on noneconomic [sic.] damages and a cap on the total award… These caps on total awards vary from a high of $1,000,000… to a low of $250,000… In four states, the total cap is associated with the statutory provision of continued payment for future medical expense as long as the expenses are incurred as a result of the compensable [sic] event.[80]

In Islamic fiqh, values of less than one third of the *diya* are payable by the tortfeasor.[81] That rule could be made into a general rule, and it could even anticipate or pre-empt events by rendering these moneys into a form of co-operative insurance.

Islamic fiqh puts forward *diya* as a scheme of compensation; but is the monetary value valid in modern times? Is it, also, valid if the 'funds' are to be moved from the country where the injury took place to the country of permanent domicile of the injured or the successors?

The value of *diya*

Some have argued that the original value of *diya* was set in *dirhams* and *dinars* (silver and gold). This argument is against the very origin of *diya*.

Islam adopted *diya* from the pre-Islamic customs, and it was one hundred camels.

The Prophet detailed the giving of *diya*: the numbers of camels in each age group, the period in which it was to be paid, with a shorter period for graver transgressions. But even during his time he put other alternatives to camels: 2,000 sheep and goats, 200 cattle, 200 two-piece sets of clothes, 12,000 *dirhams* of silver.[82]

There are several hadith about *diya*, two of them describe different modes of paying *diya* in: gold, silver, cattle, sheep and goats apart from camels.[83]

> "First hadith, "The Prophet (SAAS) made *diya* 12,000," meaning dirhams of silver.

> Second hadith, "The Prophet (SAAS), though he prescribed camels for *diya*, made it 400 (gold dinars) for 'towns people' *(ahl al-Qura)*, or the equivalent in silver.

He also varied the price of a hundred camels according to differing values with time, 400-800 gold dinars or the equivalent in silver 8000 dirhams. He also adjudicated that it is 200 of cattle, and 2000 of sheep or goats."

The second Caliph 'Umar ibn al-Khattab, with the spread of Islam, adopted gold and silver moneys as alternative methods of settling *diya*, "as camels were not a feasible proposition for 'towns' people.'"[84]

Sudan is a camel-rearing country. A camel is worth approximately £300. The value of one hundred camels would be £30,000, which is worth Sudanese 120,000,000 *dinars*. A middle class family of five persons can live on 100,000 Sudanese *dinars* a month. The full value of *diya* supports such a family for about 10-15 years. It is argued that this should be the standard adopted. That is money enough to support a family for about 12 years wherever the *loss* has its effect. This transferred to England should translate into an equivalent sum of approximately, £1,000 per month, £12,000 per year, a total of about £144,000 at today's values.[85]

'Umar ibn al-Khattab awarded one person who survived an attack four full *diyas* (400 camels); for the loss of his mental capacity, hearing and eyesight, and because he became impotent as well, thus loosing the function of an organ.[86]

Ibn 'Abidin quoted another example of payment of twice the *diya* for the loss of two testicles (each 50 camels), and the loss of penile copulative function.[87]

It may be argued that this did not occur. But this is not the issue. The issue is that serious Muslim fuqaha have entertained higher values of *diya* for certain catastrophic injuries.

Furthermore, the *diya* in cases of murder, when accepted, is subject to whatever the parties may agree to; they are not bound by any limits. Ibn Rushd said, "Abu Hanifah did not set a value for *diya* in murder: it is whatever the parties agree to *(laysa 'indahu diya fi al-'amad; ma astalaha 'alaihi)*."[88] In reference to what the Prophet (SAAS) said, "Cases of murder may be settled by whatever the parties may agree to" *(Ma sulihu 'alaihi fa huwa lahum)*.[89] On one occasion there was a settlement for the value of two *diyas*. The Prophet (SAAS)

blessed the agreement.[90]

Taking the views of fuqaha into consideration, the *diya* may be set at the value of 400 camels or more, according to the narrative ascribed to Caliph 'Umar ibn al-Khattab. Also the fact that murder cases may be settled for more than the *diya*, all of these open up avenues which may be used to review the values of *diya*.

4. The medical practitioner and criminal negligence

Islamic law punishes crimes by: *Hadd*, *ta'zir*, or *qisas*.[91]

4.1 *Hadd*

Hadd is a fixed punishment for specific and named crimes:

Murder and bodily injuries, adultery and fornication, slander - particularly concerning sexual honour (*qadhf*), theft, highway robbery, intoxication, acts of rebellion, and apostasy. The punishment does not vary with the character of the criminal, nor does it vary with the circumstance of the crime. Proof must be beyond any doubt. Punishment is not to be made if there is any doubt *(idra'u al-hudud bi shubuhat)*.[92]

Once one of these crimes has been brought before the authorities and proven, then the specified punishment must be meted out; but the Prophet (SAAS) encouraged people to forgive *hudud* crimes amongst themselves and not to report them should they see them being committed *(ta'afu al-hudud fi ma baynakum, fama balaghani min hadd faqad wajab).*[93] He told Hizal, the one who sent Ma'iz to admit his adultery,

> It would have been better for you, if you covered him with your clothes, instead of sending him to admit his adultery.[94]

4.2 *Ta'zir*

Ta'zir is a discretionary punishment, which is left to the authorities, for a range of crimes against law and order in the society. It ranges from a simple summons, or a warning, to the penalty of death: in some cases for the very same transgression. It takes into consideration the character of the offender and the circumstance of the crime. Hadith, *"Aqilu dhawi al-haya'at 'atharatahum"* (Be kind to honourable people (lift them up) when they stumble (blunder)).[95]

It is not necessary for its initiation to prove a crime beyond all

doubt as in *hadd*. It includes fines, imprisonment, and lashing. The Prophet (SAAS) said,"One should not prescribe more than ten lashes as a punishment except for *hadd*." *(La yajlid ahadun fawqa 'ashrat aswat, illa fi hadd)*.[96] Some are of the view that *ta'zir* lashings should not exceed thirty-nine lashes: since forty lashes are 'the *hadd*' for drinking. Caliph 'Umar ibn 'Abdal-'Aziz recommended that the number of lashes, in *ta'zir* punishment should not exceed ten.

Imprisonment is greatly abhorred in Islam. It usually means changing the usual domicile, or deportation/exile for a year *(taghrib)*. It does not mean incarceration necessarily; so that the offender can still earn his own living. It is not recommended for women. Fines can be a part of *ta'zir* punishment.[97]

4.3 *Qisas*

Qisas is a punishment, which in its essence is totally left to the jurisdiction of the wronged party or the relatives of the deceased; but its execution is the function of the authorities. It is a punishment which involves retribution, the punishment exacted is exactly similar to the offence, **"free man for free man, slave for slave, female for female"** (Q. 2:177); **"So if anyone oversteps the limits against you, overstep against him the same as he did to you"** (Q. 2:193); **"We prescribed for them in it: a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and retaliation for wounds."** (Q. 5:45) It is sometimes difficult to match the offence. *Qisas* is used for murder and bodily injury.

As always, Allah recommends forgiveness. But even if a life is exacted in retribution, then that in itself is saving other lives as far as Islam is concerned (Q. 2:179), meaning that it is a stabilising factor in the society, and it is for community welfare. It will establish law and order, and further on peace. Furthermore, it is an expiation for the person against whom retribution is exacted for the harm he has done.

4.4 Criminal Negligence

Gross negligence or criminal negligence, is considered an intentional crime in Islamic fiqh. Generally the majority of fuqaha are of the opinion that criminal negligence should be penalised by retaliation *(qisas)*.[98]

So if a case involves the death of a patient then the practitioner will lose his life, unless the relatives forgive him for free or for a settlement. Because the practitioner either by intentional commission, or omission, as in refusing to help or rescue a patient, has caused the death of the patient,"if he cuts a blood vessel of someone whom he found asleep and leaves him to bleed to death, then *qisas* is due."[99] For intentional transgression the penalty is stipulated in the Qur'an, **"a life for a life,…and retaliation for wounds."**[100]

But the Hanafis made it almost impossible to accuse a medical practitioner of murder. Murder in the Hanafi school, generally, must be the direct result of injury, using an instrument, which is made for that purpose, like a sword, a knife or an arrow. Even when a medical practitioner actually and forcibly makes a patient ingest poison, it is still not murder to Abu Hanifah, as death was caused by an intermediary and not directly by the action of the practitioner. Stifling with a pillow is not murder to Abu Hanifah. For Abu Hanifah such cases warrant *diya* only.[101]

The Malikis also qualified the actions in which *qisas* is due by saying:

> Although *qisas* is due in case of loss of life, it is impossible to be certain that the crime was intended as this is not what is expected of medical practitioners nor is it the known behaviour amongst physicians; besides, it is impossible to prove beyond reasonable doubt. Therefore it should not be treated as murder.[102]

The Shafi'i fuqaha advocate that:

> Criminal negligence is an intentional crime. The punishment is either *qisas* or *diya*, which are on offer up front.
>
> In cases of circumcision if the practitioner removes the whole penis, an act which is unacceptable by the standards of his colleagues, then he is kept in custody until the youngster becomes of age. It is up to the youngster then to choose between retribution and the full *diya*. On the other hand if the youngster dies after the injury, then it is up to the heirs to choose between retribution and the full *diya*.[103]

Shafi'i's understanding that in intentional crimes the response is either *qisas* or *diya* has its significance when the deceased has no family. The ruler may always decide to accept *diya* instead of retribution.

The Prophet (SAAS) implored someone:

"Take the *diya* instead [of retaliation], may Allah bless you" *(khudh ad-*

diya barak'Allahu laka fiha).[104]

The Hanbalis say that:

> If the practitioner removes a part (organ) without permission, and causes death, then he is liable for retribution *(qisas* or *qawad).*[105]

It may be opportune to give examples of what was considered criminal negligence, or intentional criminal acts in the views of some fuqaha:

The Hanafi school gave an example of someone who cuts a vein in a person who is asleep (without consent), and lets him die. *Qisas* is the penalty for such an act.[106]

This is not as farfetched as it seems. A practitioner may have consent for a limited or a simple procedure to be conducted under general anaesthesia, then he goes beyond the limits of consent and 'cuts a vessel' or commits a mishap which causes death.[107]

The Maliki school take their example from the implementation of *hudud* punishment. If a practitioner is asked to do an amputation for a *hadd*, and he intentionally transgresses, then *qisas* (retaliation) is due.[108]

Az-Zurqani said:

> An intentional criminal act committed by a medical practitioner is punishable by *qisas*, but in practice it is difficult to ascertain the intentions in such situations, so *diya* is due instead.[109]

The Shafi'i school: Ash-Shafi'i gives an example of gross negligence, which may be equated with malicious intent, in circumcision cases:

> If the practitioner cuts the glans with the prepuce then that is the sort of error that can happen with undue care. But if the practitioner cuts the whole penis, an action the like of which cannot be committed by his peers, then this can only be counted as a maliciously intended crime.
>
> The penalty is to keep the offender under surveillance until the child comes of age: then he is given the choice of either retaliation *(qisas)* by amputating the practitioner's penis or else opting for the full value of *diya*: one hundred camels. If the child dies at any stage then the one who inherits him, inherits the right of *qisas* or *diya.*[110]

The Hanbali school says:

> If the practitioner operates without permission and death ensues, then retaliation *(qawad)* is due.[111]

And:

> If someone and an accomplice operate without permission on another and cause his death then both are for retaliation *(qawad* or *qisas).*[112]

The yardstick for gross negligence, which was laid down by ash-Shafi'i (d. 820 CE) is comparable to that of Lord Denning. Ash-Shafi'i said:

> An authorised physician who commits an error, the like of which can be committed by another of his peers is only liable for damages; but should the error be gross and is not expected from one in his position then it is considered as an intentional crime. The punishment is retaliation *(qisas)*; or *diya* if the aggrieved party is agreeable.[113]

Compare this to what Lord Denning said:

> To test it, I would suggest that you ask the average competent and careful practitioner: 'Is this the sort of mistake you yourself might have made?'[114]

Muslim fuqaha consider that operating without permission is a crime for which retaliation is due. This assumes great importance with the advent of organ transplantation and the possibility of illicit removal of parts of the bodies of non-donors.

5. Summary

The summary of opinion in Islamic fiqh is that gross negligence, irresponsible and reckless behaviour are considered as intended crimes, and are punished accordingly. The viewpoint of English law may be gleaned from the following captions, and further developments:

> [i]n England and Wales, at least, the advent of the Crown Prosecution Service has done something to counterbalance the inherent reluctance of the police to prosecute doctors and dentists; moreover there is an increasing tendency to apply the criminal law in cases where loss of life follows upon negligence,…instances of a manifestly inexcusable lack of care…in one case; the patient became disconnected from her oxygen supply while the anaesthetist left the operating theatre for a drink of milk.[115]

Montgomery, observes:

> In most circumstances, malpractice is only the concern of the civil law. However, in extreme cases, there may also be criminal implications… it is possible that the health professional could be prosecuted for manslaughter.

> For this to happen, there must have been not merely negligence, but gross negligence.[116]

In March 1998 the Guardian newspaper reported the case of consultant cardiologist Dr. James Taylor, of Great Ormond Street Hospital - London:

> …who attempted to dilate an artery in an anaesthetized girl of six (Debbie Jerkins) without the parents' full consent. The child died of brain damage the next day, due to obstruction of blood flow. The doctor is facing charges of serious professional misconduct before the GMC. The St. Pancreas coroner, Stephen Can recorded a verdict of misadventure. He described Dr. Taylor's actions as "erroneous and unwise,…but not grossly negligent…"
>
> The case continues.[117]

One case is already on record where a medical practitioner went to jail for gross negligence.

> **Anaesthetist jailed (yesterday) for fatal blunder…**
>
> Bradley Miller, 14, died after he was given nitrous oxide gas instead of oxygen to help him recover from the anaesthetic…Sheffield Crown Court was told that the operation should not have been carried out in a dental surgery…
>
> Mr. Justice Poole sentenced (Prabhakar) Gadgil, 65, to six months in prison and ordered him to pay £12,500 towards the costs of the manslaughter hearing.…
>
> although Bradley suffered from Goldenhar's syndrome, a rare bone condition, (associated with craniofacial anomalies)…no medical history was taken.
>
> Jailing Gadgil, the judge said: "It is clear this was not a single error. There was a whole catalogue of errors… This was a case of gross negligence."**118**

Islamic law and English law agree on the main theme of duty of care, what constitutes a breach of that duty, and the compensation for the harm, which is caused, by that breach. Both laws have accepted that if there was no negligence there is no liability.

But Islamic law went further to compensate harm that ensues from error, mistake and misadventure without invoking negligence. English law is yet to accept that. But at the same time English law accepts the Bolam test, which, many assume, is weighed against and loses the victim redress for obvious harm if he cannot prove negli-

gence. There may be a point for Islamic law in separating mistake, error, and misadventure from negligence, and 'English law' may find a way for that in the principle of *res ipsa loquitur*.

Notes

1 Examples are: *Hashiyat Ibn 'Abdin: Radd al-Muhtar 'ala* Ad-*Durr al-Mukhtar Sharh Tanwir al-Absar*. Ibn'Abidin (d. 1252/1834), the *Hashiya (Radd al-Muhtar)*, is his commentary on the explanation *(Sharh)* of al-Haskafi, (d. 1088 AH) to the original text of *Tanwir al-Absar fi Fiqh Abi Hanifa an-Nu'man*, which was written by Muhammad ibn'Abdullah at-Timurtash (d. 1004 AH). *Fath al-Qadir*, and *al-Mabsut* are others.

2 See pp. 129-131 above, for mistake, error, and misadventure in Islamic Medical Fiqh.

3 Hanafi school: Sarakhsi, *al-Mabsut*, 1958,vol. 16:10-11, and 13-14; Maliki school: Kandhloy, *Awjaz al-Masalik ila Muwatta' Malik*, 1989, vol. 13:27; Shafi'i school: *al-Umm*, 1993, vol. 6:244; and Hanbali school: Ibn Qudama, *Al-Mughni wa al-Khirqi*, 1981, vol. 5:538-9; and Ibn Qudama, *al-Muqni'a*, 1980, vol. 2:217.

4 Ibn al-Qayyim, *Zad al-Ma'ad*, 1979, vol. 4:139.

5 Sarakhsi, (also known as Sarkhasi), *al-Mabsut*, 1958, vol. 16:10-14, and vol. 26:147.

6 Sarakhsi, *al-Mabsut*, 1958, vol. 16:10-11, vol. 26:147; Mirghinani, *al-Hidaya*, 1936, vol. 3:179; compare the following: "The judge [in *Bolam* v. *Friern HMC* [1957] 2 All ER 118] clearly directed the jury to treat the test of negligence which he formulated as exclusively applicable in medical cases."Lord Scarman: *Sidaway* v. *Bethlem RHG* [1985] I All ER 643, [1985] 1 AC 871, [1985] 2 WLR 480, 1 BMLR 132, see
Mc Hale, fox, and Murphy, *Health Care Law*, 1997:341.

7 Sarakhsi, *al-Mabsut*, 1958, vol. 16:10-11; and vol. 26:147.

8 Sarakhsi, *al-Mabsut*, 1958, vol. 13-14.

9 Sarakhsi, *al-Mabsut*, 1958, vol. 26:147; and Mirghinani, *al-Hidaya*, 1936,, vol. 3:179.

10 Ibn al-Human, *Fath al-Qadir Sharh al-Hidaya*, (1299 AH), vol. 7:206-207.

11 Ibn Qudama, *al-Mughni 'ala al-Khirqi*, 1981, vol. 5:538-539; Ibn Qudama, *al-Muqni'a*, 1980, vol. 2:217.

12 Cane, *Atiah's Accidents,* 1997, pp. 72-75: Nervous shock, mental injury, or psychological damage.

13 Malawi, *as-Sira an-Nabawia*, 1399/1979, pp. 376-377. (That event led the man to embrace Islam, in al-Baihaqi and Ibn Hibban). ['*Ishrin* is twenty; and *sa'*=4 handfuls, usually of grain].

14 Ibn Hazm adh-Dhahiri, *al-Muhalla*, al-Maktab al-Tijari, Beirut,? 1969, vol. 11:24; Ibn Qudama, *al-Kafi*, 1982, vol. 4:60; see also Madkour, *al-Madkhal*, 1966:311.

15 Ibn Rushd, *Bidayat, al-Kulliyat*, vol. 2:255.
16 Ibn Rushd, *Bidayat, al-Kulliyat*, vol. 2:454-455.
17 Baji, *al-Muntaqa Sharh al-Muwatta,'* Dar al-Fikr al-Arabi, vol. 7:77.
18 Muwaq, *al-Taj wa al-Iklil li Mukhtasar Khalil*, vol. 6:321, with Hattab, *Mawahib al-Jalil li Sharh Mukhtasar Khail*, (1329 AH), vol. 5:430-443.
19 Shafi'i, *al-Umm*, 1993, vol. 6:186-187. C.f. *Bolam* test, and *Bolam* rule (*Bolam* v. *Friern HMC* [1957] 2 All ER 118"the test…as exclusively applicable in medical cases"; *per* Lord Scarman in *Sidaway* v. *Bethlem RHG* [1985] 1 All ER 643 (Bolam Rule: see above p. 147, 164), and Mc Hale, Fox, and Murphy, *Health Care Law*, 1997:341.
20 Ibn Qudama, *al-Mughni*, 1981, vol. 5:538-543; Ibn Muflih, *al-Furu'*, 1962, vol. 4:451-452; Bahwati, *Kashf al-Qina'a*, (1319 AH), vol. 4:34-35; Najdi, *al-Rawd al-Muraba'a*, (1405 AH), vol. 5:337-339.
21 Ibn al-Qayyim, *Zad al-Ma'ad*, 1979, vol. 4:139.
22 Sarakhsi, *al-Mabsut*, 1958, vol. 16:10-11; and vol. 26:147.
23 Ibn al-Humam, *Fath al-Qadir*, (1299 AH), vol. 7:206-207.
24 Ibn Rushd, *Bidayat, al-Kulliyat*, vol. 2:255.
25 Ash-Shafi'i, *al-Umm*, 1993, vol. 6:239.
26 Ibn al-Qayyim, *Zad al-Ma'ad*, 1979, vol. 4:139.
27 Hanafi school: Sarakhsi, *al-Mabsut*, 1958, vol. 26:147, and Ibn 'Abidin, *Hashiya*, 1966, vol. 6:565; Maliki school: Kandhloi, *Muwatta' Malik*, 1989, vol. 13:27; Shafi'i school, ash-Shafi'i, *al-Umm*, 1993, vol. 6:244; Hanbali school: Ibn Qudama, *al-Mughni*, 1981, vol. 5:538-539.
28 (85/374/EEC), see Lewis, *Medical Negligence*, 1998:423-424.
29 Consumer Protection Act 1987 (39 *Statutes*).
30 Lewis, *Medical Negligence*, 1998:430.
31 Jarrahi, *Kashf al-Khafa*, Maktabat al-Turath, Halab, Syria, vol. 1:285, analysis of *hadith* No. 747.
32 Malik, *al-Muwatta,'* (ed.), Saad, 1983:812, *hadith, (ayokuma atab?)*.
33 Consent was, mostly, dealt with in Ch. 4.3 pp. 140, 152: *ta'adi* and *tajawz al-hadd* (definition: failure to secure consent or acting beyond the limits of consent), 153 the views of the schools, 160 (negligence).
34 Ash-Shafi'i (d. 204/817), *al-Umm*, 1993, vol. 6:239-240.
35 Sharawani, *Hawashi ash-Sharawani…'ala Tuhfat al-Muhtaj Sharh al-Minhaj*, vol. 9:197;
36 Najdi, *al-Rawd al-Muraba'a*, (1405 AH), vol. 5:337-339.
37 Ibn al-Humam, *Fath al-Qadir*, (1299 AH), vol. 7:206 (Hanafi school); see also Ibn Hajar, *Tuhfat al-Muhtaj*, Dar Sadir, Beirut, vol. 9:197 (Shafi'i school)."Warning against defensive medicine."

38 'Ulish, *Sharh Minah al-Jalil*, 1984, vol. 3:790 (Maliki school).
39 Ibn Nujaim, *al-Bahr ar-Rai'q,* (1311 AH), vol. 8:33; and in *Hashiyat Ibn Abidin*, 1966, vol. 6:565.
40 Hindi, *Kanz al-'Ummal* 1971, vol. 10:32.
41 Medical Act (1983), Kennedy, and Grubb, *Medical Law:*1994:36-37; see also The Medical Act [1983].
42 Kandhloy, *Awjaz al-Masalik…Muwatta' Malik,* 1989, vol. 13:27.
43 Ibn Qadi Samawa, *Jami' al-Fasilin*, (1300 AH), vol 2:186; also attributed to Faqih Najm al-A'imma al-Halimi by Tarabulsi, *Mu'in al-Hukkam*, 1973:204. See also p. 138 above with fn. 488, and p. 142 above with fn. 505. (There is, necessarily, a paucity of examples of 'cases,' hence the repetition).
44 Montgomery, *Health Care Law*, 1997:170 (*Waters* v. *W. Sussex Health Authority* [1995] 6 Med. LR 362, *Wilsher* v. *Essex Area Health Authority* [1986] 3 All ER 801, 812).
45 Montgomery, *Health Care Law*, 1997:166. Closer than normal supervision, in *(Morris* v. *Winsbury-White* [1937] 4 All ER 494); guarantee success, in (*Thake* v. *Maurice* [1986] 1 All ER 497).
46 In Lewis, *Medical Negligence*, 2nd. ed., 1992:ix. (Foreword).
47 In Lewis, *Medical Negligence*, 4th. ed., 1998:v. (Foreword).
48 Lewis, *Medical Negligence*, 4th. ed., 1998:428, and 429.
49 Edge, Ian, 'The Development of Decennial Liability in Egypt' in *Islamic Law and Jurisprudence*, (ed.), Heer, Nicholas, 1990:173.
50 'Illish, *Fath al-'Ali al-Malik*, 1958, vol. 2:348, with *Tabsarat al-Hukkam*, by Ibn Farhun, vol. 2:348.
51 Lewis, *Medical Negligence*, 1998:427.
52 Salmond, *Jurisprudence*, 1924:429.
53 Taylor, *Doctors and the Law*, 1976:80.
54 *The Times*, 2 July 1954, and in [1980] 1 All ER 650 at p. 658 (his own previous pronouncements).
55 Zurqani, *Sharh 'ala Mukhtasar Khalil*, Matba'at Mustafa Muhammad, Cairo, vol. 8:117.
56 Ash-Shafi'i, *al-Umm*, 1993, vol. 6:244.
57 Q. 33:5, and Q. 2:285; (both verses tr. Bewley).
58 *Sunan Ibn Majah*, 1952, vol. 1:658-659.
59 Sarakhsi, *al-Mabsut*, 1958, vol. 16:13-14.
60 Ibid.; and in Ibn'Abidin, *Hashiyat,* 1966, vol. 6:69,and 624, where it is also rendered, by at-Tusi, into a verse of poetry in wonderment!
61 Malik, *al-Muwatta,'* (ed.) Sa'd, 1983:740; see Kandhloy, *Awjaz al-Masalik*, 1989, vol. 13:27.
62 Ibn Rushd, *Bidayat, al-Kulliyat*, vol. 2:255, and 454-455.
63 Lewis, *Medical Negligence*, 1998:12-13.

64 Dardir, *Ash-Sharh al-Kabir*, Dar Ihya' al-Kutub al-Arabia, al-Halabi, Cairo, [n.d], vol. 4:335.
65 Ibn Rushd, *Bidayat, al-Kulliyat*, vol. 2:454-455.
66 Ash-Shafi'i, *Kitab al-Umm*, 1993, vol. 6:81-82.
67 Ibn Hajar, *Tuhfat al-Muhtaj*, (1304 AH), vol. 9:197.
68 Ibn Qudamah, *al-Mughni*, 1981, vol. 5:538-539.
69 Ibn Qudamah, al-*Muqni'a*, 1980, vol. 2:217.
70 Ibn Qudama, *al-Kafi*, 1982, vol. 4:121.
71 Ibn Muflih, *al-Furu'*, 1962, vol. 4:451-452. The Qur'anic quote, *(ma 'ala al-muhsinin min sabil w'Allahu ghafurun rahim)*, is in Q. 9:91, (tr. Bewley).
72 *Medicine of the Prophet*, Johnstone, 1998:105; Ibn al-Qayyim, *Zad al-Ma'ad*, 1979, vol. 4:139.
73 Ibn al-Qayyim, *Zad al-Ma'ad*, 1979, vol. 4:140-141.
74 *Sunan Ibn Majah*, 1953, vol. 2:896-897, four *hadith*; see also Sabiq, *Fiqh as-Sunnah*, 1995:49-56 *('aqdu adh-adhimma)*. (See f.n. 578 and text for 'Non-Muslim medical practitioner is treated as a Muslim').
75 Baihaqi, *Al-Sunan al-Kubra*, (1354 AH), vol. 8:107.
76 Full *diya* =100 camels, less than a third is 33 camels. "*Diya* in UA Emirates is over $41,000." Al-Quds al-Arabi, 9 March 1998, p. 18, now it is 150,000 dirhams UAE/6= £25,000 on 23rd January 1999. *Diya* in Saudi Arabia is 100,000 Riyals, about £16,500, reference: Ash-Sheikh Dr. Salih bin Abdul Rahman bin Suliman al-Muhimeed, Chief of Law Courts, al-Madina al-Munawara Region. (Personal communication, March 1999).
77 The generally agreed on position with respect to insurance is that commercial insurance is not acceptable, but that under certain conditions, co-operative insurance or insurance arranged by the imam can be acceptable [Ed.]
78 *Sunan Ibn Majah*, 1953, vol. 2:879-880.
79 Ash-Shafi'i, *al-Umm*, 1993, vol. 6:52-53; Shirbini. *Mughni al-Muhtaj*, (1377 AH), vol. 4:108; Sabiq, *Fiqh*, 1995:348-349.
80 Kridelbaugh, William W., and Palmisano, Donald J., "Compensation caps for medical malpractice," *American College of Surgeons Bulletin*, vol. 78, number 4, April 1993, pp. 27-30, p. 27.
81 Ibn Qudama, *al-Kafi*, 1982, vol. 4:121.
82 Malik, *al-Muwatta,'* (ed.), Sa'd, 1983:737.
83 *Sunan Ibn Majah*, 1953, vol. 2:878-879.
84 Malik, *al-Muwatta,'* (ed.), Sa'd, 1983:737. (See also Chapter Three: *diya*).
85 *Article 293* of the Dutch Criminal Code, considers euthanasia at the express wish of the deceased a serious offense which punishment may not exceed 12 years imprisonment or a fine of the fifth category…

and *Article 23* of the Dutch Criminal Code defines, Fifth category fine = *f*100,000. That, also, may be a yardstick in the assessment of *diya* compensation.

86 Sarakhsi, *al-Mabsut*, 1958, vol. 26:69; and Ibn'Abidin, *Hashiyat*, 1966, vol. 6:576, (substituting speech for impotence for the loss compensated for by the fourth diya).

87 Ibn'Abidin, *Hashiya*, 1966, vol. 6:577.

88 Ibn Rushd, *Bidayat*, 1935, vol. 2:402; see Ibn'Abidin, *Hashiya*, 1966, vol. 6:529.

89 *Sunan Ibn Majah*, 1953, vol. 2:877.

90 Sarakhsi, *al-Mabsut*, 1958, vol. 21:9.

91 Qadri, *Islamic Jurisprudence*, 1973:290-291; (1st. ed., 1963); Sabiq, *Fiqh as-Sunnah*, 1995, vol. 2:237-395; (in almost every *Fiqh* book).

92 *Hadith* in *Sunan Ibn Majah*, 1953, vol.2:850.

93 *Sunan Abi Dawud*, 1973, vol. 4:540.

94 *Sunan Abi Dawud*, 1973, vol. 4:541; and *Sahih Muslim*, 1983, vol. 3:1322.

95 *Sunan Abi Dawud*, 1973, vol. 4:540.

96 *Sahih al-Bukhari*, (tr. Khan), 1994:1010; *Sahih Muslim*, 1987, vol. 3:1333; and *Sunan Ibn Majah*, 1953, vol. 2:867.

97 *Sunan Ibn Majah*, 1953, vol. 2:781-782; and Sabiq, *Fiqh as-Sunnah*, 1995, vol. 3:393-395; and Madkour, *al-Madkhal*, 1966:739-740 for a general reference of the contents including fines.

98 Alamgir, *Al-Fatawa al-Hindiya*, Bulaq, (1310 AH), vol. 6:34, (Hanafi)); Ibn Farhun, *Tabsirat al-Hukkam,* 1958, vol. 2:243, (Maliki); Ramli, *Nihayat al-Muhtaj*, 1938, vol. 7:262 and 276, (Shafi'i); and Ibn Qudama, *al-Mughni*, 1981, vol. 7:706, (Hanbali).

99 Damad, (Sheikhi Zada), *Majma'a*, (1327 AH), vol. 2:392-393; Ibn 'Abidin, *Hashiyat,* 1966, vol. 6:68-69.

100 Q. 5:45.

101 Ibn'Abidin, *Hashiyat,* 1966, vol. 6:543.

102 Zurqani, *Sharh 'ala Mukhtasar Khalil*, Matba'at Mustafa Muhammad, Cairo, vol. 8:117.

103 Ash-Shafi'i, *al-Umm*, 1993, vol. 6:82.

104 *Sunan Ibn Majah*, 1953, vol. 2:880.

105 Ibn Qudama, *al-Muqni'a*, 1980, vol. 3:331-332. *(Qisas=qawad)*

106 Damad, (Sheikhi Zada), *Majma'a al-Anhur*, ([1327 AH), vol. 2:392-393.

107 Case of consultant cardiologist Dr. James Taylor, *The Guardian* 16 March 1998, see below p.197.

108 Dardir, *ash-Sharh al-Kabir*, Dar Ihya' al-Kutub al-Arabia, al-Halabi, Cairo, vol. 4:29, and 4:252.

109 Zurqani, *Sharh 'ala Mukhtasar Khalil*, al-Maktaba al-Tijaria, Mustafa Muhammad, Cairo,, vol. 8:117.
110 Ash-Shafi'i, (d. 820 CE), *al-Umm,* 1993, vol. 6:82.
111 Ibn Qudama, *al-Muqni,'* 1980, vol. 3:331-332.
112 Ibn Qudama, *al-Mughni,* 1981, vol. 9:382; and Bahwati, *Kashaf,* (1319 AH), vol. 5:506.
113 Ash-Shafi'i, *al-Umm*, 1993, vol. 6:82.
114 Davies, *Medical Law*, 1996:87.
115 *R* v *Adomako* [1994] 2 All ER 79; Mason & McCall Smith, *Law and Medical Ethics*, 1994:214-215.
116 Montgomery, *Health Care Law*, 1997:187-188.
117 *The Guardian Newspaper* Monday 16th. March 1998, p. 6 columns 1 and 2 (upper part of page).
118 *The Times* July 30 1999, p. 4 columns 7 and 8 (mid page), by Paul Wilkinson. (Case started 27 Oct. 1997).