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The Civil Liability from Medical Negligence of Doctors Treating Complications of Coronavirus in the English Law / A Comparative Study with the Iraqi Civil Law

Younis Salahuddin Ali

College of Law and International and Diplomatic Relations, Cihan Private University, Erbil, Iraq

Email address:
younis888_sss@yahoo.com

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Abstract: The Author has tried hard in this study to make a logic comparison between two different legal systems. That is to say the English common law, considered the leading system among other Anglo-American ones. And the Iraqi civil law highly affected and influenced by both the Islamic jurisprudence and the Egyptian civil law. It is worth-bearing in mind that the English common law includes many types of torts and the civil liability arising from them, including the tort of negligence in general. The general principles applied to which, can also be applied to medical negligence in particular. After the wide-spread dissemination of the coronavirus the British national health services organ (NHS) has given the cases of the doctor's treating the complications of this pandemic an ultimate importance. And the English courts based the civil liability arising from the medical negligence on three basic elements: the duty of care taken by doctors, the breach of this duty, and the damage suffered by patients. As well as the causation or the causal link between the tort of negligence and the damage or injury. Whereas the Iraqi civil law No. (40) of 1951 deals with the problems related to the civil liability arising from medical negligence of treating patients from coronavirus pandemic, by resorting to the general rules of the civil liability from the illegal act, which is based upon three basic elements: the trespass or transgression committed by the wrongdoer, the damage suffered by the victim and the causal link between them. As opposite to the Egyptian civil law No. (131) of 1948, which considers the first element of this liability as the fault rather than the trespass or transgression. After discussing the attitudes adopted by both the English and Iraqi laws, the author recommends that the Iraqi legislator should adopt the attitude taken by the English law, and let the Act of God deny both the fault element and the causation element of the civil liability arising from medical negligence. And also let the plea volenti non fit injuria deny both the fault element and the causation element of the civil liability of the defendant doctor arising from medical negligence.

Keywords: Civil Liability, Medical Negligence, Common Law, Civil Law

1. Introduction

The English common law of customary origins, which is unwritten and based upon judicial precedents of the English courts includes many types of torts, including the tort of negligence in general, and the medical negligence in particular. After the wide-spread dissemination of the coronavirus the British national health services organ (NHS) has given the cases of the doctor's treating the complications of this pandemic an ultimate importance. And the English courts based the civil liability arising from the medical negligence on three basic elements: the duty of care taken by doctors, the breach of this duty, and the damage suffered by patients. As well as the causation or the causal link between the tort of negligence and the damage or injury. Whereas the Iraqi civil law deals with the problems related to the civil liability arising from this pandemic, by resorting to the general rules of the civil liability from the illegal act.

The importance of this piece of research is represented by the comparison between both the Iraqi and English laws in how to regulate the civil liability from medical negligence of doctors treating patients from the complications of the

coronavirus.

The problem which this research tries to solve is focused on the questions that: are the basic elements required by both the English and Iraqi law suitable and sufficient to deal with civil liability arising from the medical negligence of the doctors treating patients from the complications of the coronavirus. And which one of these two laws is better than the other in dealing with these new problems of the civil liability arising from negligence.

This research has followed the comparative analytical methodology of scientific research, by studying the basic elements of the civil liability arising from the medical negligence of the doctors treating patients from the complications of the coronavirus, as well as the exoneration and immunity from this liability in the English law. and comparing them with the situation in the Iraqi law. Under the severe circumstances of coronavirus dissemination.

This research has been divided into two sections. The first discusses the basic elements of the civil liability arising from medical negligence in the English law compared to the Iraqi civil law. And the second one is related to the exoneration and immunity from the civil liability arising from medical negligence in the English law compared to the Iraqi civil law.

2. The Basic Elements of the Civil Liability from Negligence in Both the English and Iraqi Laws

To begin with, the tort, in general, is a civil wrong not arising from the contract [30]. And the English common law, based on judicial precedents and customs [4], requires three basic elements for the civil liability arising from medical negligence, the Iraqi civil law requires also three basic elements for the civil liability arising from illegal act. Therefore we should discuss the basic elements for the civil liability in the English and compare them with those regulated by the Iraqi civil law in the following three sub-sections as follows:

2.1. The Basic Element of Duty of Care in the English Law Compared to the Iraqi Civil Law

The English law considers the duty of reasonable care owed by the defendant doctor as the first basic element of the civil liability arising from medical negligence. The duty of reasonable care in itself is qualified in the Iraqi civil law as an obligation of conduct, in the field of tortious liability, but not an obligation of result. The defendant doctor in the English law is usually owed by this duty while performing his or her medical tasks in general, and the duty of treating patients from the complications of coronavirus in particular. It is worth-bearing in mind that this duty in the English law is beneficial and is normally used as a safety valve to determine the negligence, and permit or allow the injured plaintiff (the patient) to bring or file the action of the civil liability arising from medical negligence [17]. The most important question to be answered is that: what will the judge do if the action of medical negligence is filed in front of the court? To begin with, the judge should rely on judicial precedents of other English courts [16]. He or she must use an objective and hypothetical reasonable person test or standard to measure the conduct of the negligent defendant doctor, by comparing it with that of the normal and reasonable person. Which is defined [6] as the standard or the test determining objectively the behavior or the conduct of the defendant (Wrongdoer), by measuring it with hypothetical conduct of the reasonable person, irrespective of the personal features or characteristics of each wrongdoer of the negligence [1]. This comparison is controlled by the principle well-known as the principle of reasonable foreseeability. According to which the negligent defendant doctor can not be considered as liable to the medical negligent, unless he or she expects in advance, or foresees the damage or injury from which the patient will suffer, at the time of committing or perpetrating the medical negligence [16]. In other words, the magnitude or the level of foresight should be measured by that of the reasonable person. Therefore, if the doctor want to avoid the civil liability arising from medical negligence, he or she should perform his or her duty of reasonable care, as precisely and comprehensively as possible, to avoid inflicting the damage on the patient. But the application of this legal principle requires the availability of another principle, that is to say, the principle of proximity [13]. An important criterion or standard (test) was derived from this principle, well-known in the field of English courts as the neighbor test. This test is used to determine the degree of proximity [19]. And according to this test the defendant doctor or the general practitioner must be obliged to perform the duty of reasonable care, to avoid any act (an obligation to perform act) or omission (an obligation to refrain from performing act), expected to inflict a damage to the plaintiff patient. The question to be answered in front of the English courts is that what is meant by term (neighbor) from the legal viewpoint? The term neighbor from the legal viewpoint does not refer to the geographical proximity between the negligent defendant doctor and both the theater of accident and the injured plaintiff himself [19]. But instead it refers to the damage inflicted to the plaintiff patient, which the direct consequence of the act or the omission of the negligent defendant doctor. Therefore, the neighbor is the most proximate or the nearest person, who is closely affected by the act or the omission of the defendant. that is to say, the neighbor plaintiff is the most closely affected person or the most damaged or injured person by the act or the omission of the defendant. Indeed the injured patient is the most closely affected or the most damaged or injured person by the medical negligence of the defendant doctor, when the damage or injury inflicted to him or her is a direct consequence of the fault, represented by the medical negligence. As far as the Iraqi civil law No. (40) of 1951 is concerned, it is affected by the Islamic jurisprudence, particularly, the Mejelle of juristic rules of 1869, which is considered as a European-style Ottoman codification of Islamic law of the hanafite school [29], from which it borrows most of its rules. As well as being affected by the

Egyptian civil law No. 131 of 1948. The duty of reasonable care in itself is qualified, in the Iraqi civil law, as an obligation of conduct (Obligation to exercise a care), in the field of tortious liability, but not an obligation of result. And is not considered as an independent basic element of the civil liability arising from the illegal act. But only a legal obligation not to harm others, and emanates from perception and discrimination. It is to be noted that the source of this obligation is the law itself, as opposite to the obligations arising from the contract, and the breach of which may lead to the contractual liability. Some of the Iraqi jurists [2]. distinguish between the legal and contractual obligations, within the field of civil liability. In that the contractual obligation, the breach of which will lead to the contractual liability, can either be anobligation of resultor an obligation of conduct. Whereas the legal obligation, the breach of which will lead to the tortious liability is always an obligation of conduct. And whether the obligation of conduct (Obligation to exercise a care) is contractual or legal, the debtor should take the reasonable care in performing his or her obligation. That is to say, the care of the normal or ordinary person, well-known as the reasonable person. Even though the intended object of the obligation has not been realized or materialized. In conformity with the article (251) of the Iraqi civil law, which provides that: (1- In case of an obligation to perform work: if the obligation stipulated that the debtor will safekeep (maintain) or manage the thing or if it was required of him to exercise caution in performing the obligation the debtor would have performed the obligation if he had exercised the care of an ordinary person even where the intended object has not been realised. 2- The debtor would however have performed the obligation if he had exercised the care he would customarily have exercised in carrying out his own affairs if it would be revealed from the circumstances that the intention of the contracting parties was directed to that end.). This means that the Iraqi civil law No. (40) of 1951 organized an objective standard to evaluate the conduct of the illegal act perpetrator or the wrongful act doer, and it is represented by the standard of the reasonable person [20], devoid from his or her internal personal circumstances, and surrounded by the same external circumstances of the wrongful act doer. In accordance with the first paragraph of the afore-mentioned article.

2.2. The Basic Element of the Breach of Duty of Care in the English Law Compared to the Iraqi Civil Law

The second basic element of the civil liability arising from the tort of negligence in general, and the medical negligence in particular in the English law is the breach of the duty of care. Because the defendant doctor is obliged to take the reasonable care towards the patient, his or her civil liability from the medical negligence arises, if he or she breach this duty. Therefore, the plaintiff must take two steps in the action of the civil liability arising from negligence towards the proof of the negligent defendant doctor's civil liability. In the first step he or she should prove that the defendant is obliged to perform the duty of care, then in the second he or she should prove that the defendant doctor has breached his or her duty of reasonable care [18]. Once again the plaintiff should resort to the standard of reasonableness, that is to say, the objective and hypothetical standard or test of reasonable person. In order to prove that the conduct of the defendant doctor has fallen or gone down below the standard set or required by the law, and determined by the reasonable person test. It is worth-mentioning that the plaintiff's proof that the defendant is negligent is a very hard task, because the plaintiff does not frequently know the nature or the defendant's work. Particularly, if this work is highly technical. And because the reasonable person test is an objective one, it does not take into account the individual disabilities or peculiarities. It is to be noted also that as long as the civil liability arising from medical negligence is a fault-based liability, because the negligence itself is considered as one of the aspects characterizing the moral element of the [7] fault-based tort, as well as the malice and the intention [22]. Therefore, the realization of medical negligence liability is based on the proof of the tort of medical negligence. And the plaintiff should prove that the defendant's conduct has fallen below the standard of reasonable care [16]. As far as the Iraqi civil law No. (40) of 1951 is concerned, it adopts the trespass or transgression as the basic element of the civil liability arising from the illegal act [14], as well as the damage and the causal link between them. It does not adopt the basic element of the fault, as it is the case with the Egyptian civil law No. (131) of 1948. This is clearly shown from the formulation of the article (204) which provides that (Every trespass or transgression which causes other than the injuries mentioned in the preceding Articles entails payment of compensation). The trespass is defined as the deviation from the limits to which the person shall adhere in his or her conduct. If we want to know the difference between the fault and the trespass, we can say that latter is only the material element of the former. Because the fault is made up of two basic elements: the material one, that is to say, the trespass, and the moral one, rationality (prudence and discernment) [1, 14][1]. As it is the case with the English law, this deviation is measured by an objective standard or test, that is to say, the reasonable person test. It is worth-bearing in mind also that the trespass according to the Iraqi civil law is sub-categorized into two aspects: the positive one which refers to the deviation of limits, and the negative one referring to the negligence and carelessness. The objective standard is more

1 The reason why this difference exist between the Iraqi and Egyptian civil laws may be followed up to the origins of both of these two laws. While the Egyptian civil law is closely affected and highly influenced by the French civil code of 1804 which adopts the fault-based liability. The Iraqi civil law is influenced by the Islamic Jurisprudence, particularly the afore-mentioned Mejelle of juristic rules, in which the civil liability is based upon the trespass rather than the fault. In conformity with the article (19) of the Mejelle, which provides that (No ab initio or retaliatory injury or damage) this means that whoever inflicts an injury or damage is considered as a trespasser. The Iraqi civil law adopts also this attitude in the first paragraph of the article (216) which provides that (No ab initio or retaliatory injury or damage: the injury will not be eliminated by inflicting a similar injury; a person who has suffered a grievance shall not inflict the same grievance as he had suffered on another person).

suitable that the subjective one. Because the latter, that is to say the subjective standard takes into account the tortfeasor or the illegal act perpetrator, who can be found liable, even though he or she perpetrates the smallest and simplest deviation of conduct. Therefore, it can be said that this standard is unjust, because it blames the prudent and careful perpetrator for the smallest and simplest perversion in conduct. While it may only blame the careless perpetrator for great perversive conducts. Whereas the objective standard is more equitable, because it measures the measures the deviation or perversion of the conduct of the illegal act perpetrator, and compares it with the typical conduct of the reasonable person surrounded by same external circumstances of the perpetrator. Without taking into account the internal circumstances. The external circumstances include both the temporal (time) and spatial (place) circumstances. It is also worth-bearing in mind that the Iraqi civil law requires that the intentional malice or willfulness be available, as well as the trespass or transgression for the tortious liability to arise, and the transgressor will be obliged to compensate. But that is in the case of damaging the property or decreasing its value by the act of the transgressor. According the first paragraph of the article (186) of the Iraqi civil law which provides that (A person who wilfully or by trespassing has directly or indirectly caused damage to or decreased the value of the property of another person shall be liable). Although the Iraqi civil law is highly affected by the Islamic jurisprudence, when borrowing the rules of civil liability on the one hand, as well as its being affected by Egyptian civil lawon the other hand. But it has taken a different attitude from that of the Islamic jurisprudence in three points: the first is that the Iraqi legislator requires that the willfulness or purposefulness, as well as the trespass or transgression be available, for the compensation to be paid. As opposite to the Islamic jurisprudence, which does not require the availability of both of them in perpetrator. Secondly the Iraqi legislator requires that the deliberator or transgressor (trespasser) compensate, whether they be a perpetrator or an abettor. As opposite to the Islamic jurisprudence, which made the perpetrator alone liable, but not the abettor. Thirdly the Iraqi legislator permits the involvement of the both perpetrator and the abettor, and made them liable jointly and severally. As opposite to the Islamic jurisprudence, which does not permit their joint liability, because it does not imagine their joint involvement [2]. All of these rules are provided for in the second paragraph of the article (186) of the Iraqi civil law which provides that (Where two persons - a perpetrator and an abettor - are involved (in committing the damage) the one who acted wilfully or by encroachment shall be liable; where both are liable the liability will be joint and several). It is worth-noting also that the intentional malice or willfulness, in conformity with the viewpoint of the Iraqi legislator means that deliberator' will, that is to say, the illegal act perpetrator' will is directed towards inflicting the damage on the victim. The perpetrator' will towards the illegal act itself does not suffice, it requires also that the bad result represented by the damage inflicted on the victim be involved in the mind of the perpetrator. It is noteworthy also that the trespass or transgression, from the Iraqi legislator' standpoint, can have the same meaning of the negligence in the English law [9].

2.3. The Basic Element of the Damage and Causation in the English Law Compared to the Iraqi Civil Law

The third basic element of the civil liability arising medical negligence in the English law is the damage or injury suffered by the plaintiff patient and the causation, that is to say, the causal link or relation between the tort of medical negligence and the damage [23]. Once again, in the actions of medical negligence the plaintiff patient should prove that he or she suffered the damage or injury. If the damage or injury does not take place, the action of the civil liability arising medical negligence can not be filed, even though the conduct of the defendant is negligent or careless [21]. The damage or injury may normally be sub-categorized into three sub-types: the personal damage or injury, damage to property, and economic loss. Therefore, the tort of negligence in general, and the tort of the medical negligence in particular are non-actionable per se [7], but they should be proved, if the action of negligence is to be successful. It is worth-noting that the relation between the tort of negligence and damage is a cause and effect relationship. But the question which is to be answered frequently will be: what is meant by the cause which leads to the damage? The English courts have developed two standards to ascertain the realization of the cause and effect relationship between the tort of the negligence and the damage, the first is the "but for" test, and the second is the direct consequence test or standard. This standard is based upon a question to be frequently asked by the judge: would the plaintiff patient have been exposed to the damage but for the fault committed by the defendant doctor, and represented by his or her breach of duty of care?. If the answer is that but for the defendant clinician's fault or conduct, the plaintiff patient would not have been exposed to the damage. Or the damage would not have occurred to the plaintiff, then the clinician's civil liability from the medical negligence will arise. It is worth-bearing in mind that this standard is usually used to prove the causal link or relationship between defendant clinician's medical negligence and the plaintiff patient damage or injury [23]. The second test or standard is the direct consequence test. According to which the defendant doctor's civil liability from medical negligence will arise for all direct consequences of his or her faults [7]. This can also be interpreted by the principle well-known as the principle of remoteness of damage. Which means that the plaintiff may sometimes be deprived from receiving damages or compensation, although proving the relationship between the negligence and the damage or injury. If it has been shown that the damage is too remote, that is to say, it is not the direct physical consequence of the defendant doctor's medical negligence [7]. Finally if the plaintiff want to prove the tort of negligence in the tort action based upon negligence, he or she should prove that the defendant is negligent by a preponderance of the evidence.

The standard of negligence is by a preponderance of the evidence is met, if the plaintiff shows a probability that the defendant was negligent. But is not met when the evidence only shows the possibility that the defendant was negligent [24].

As far as the Iraqi civil law No. (40) of 1951 is concerned, the general rule as to the causal link in the field of the civil liability, whether it be contractual or tortious, is that no one is responsible for the results of the acts committed by the third party, because this is neither acceptable legally nor logically [8]. The human being is liable for compensating the damage made only his or her act. This rule is contained in the article (168) of the Iraqi civil law, although principally dedicated to the contractual liability, but its rule about cutting off the causal link by the extraneous cause may also apply to the tortious liability. It provides that (If it is impossible for the obligee of a contract to perform his obligation specifically he will be adjudged to pay damages for non-performance of his obligation unless he establishes that the impossibility of the performance was due to a cause beyond his control; the adjudication will be the same if the obligee has delayed (was late in) the performance of his obligation). This article is obvious that the oblige or the debtor of the obligation is usually burdened with the onus of proving the cutting off the causal link between the fault and the damage, or negating this link by proving the extraneous cause [2]. It is also worth-bearing in mind that the plaintiff is tasked with the burden of proving the causal link between the trespass and the damage or injury in the Iraqi civil law. And if he or she succeeds in this task, then the burden of proof will be transformed to the defendant, who tries to negate it [2]. And the defendant can negate the causal link by two ways: the first is direct, and in conformity to which he or she can prove that his or her fault is not the cause which inflicts the damage to the injured plaintiff. The second is an indirect way by which the defendant can negate or refute causal link by proving the extraneous cause which inflicts the damage directly to the plaintiff. We think that the Iraqi civil law has also adopted the direct consequence test or standard, as it is the case with the English law, to prove the causal link between the illegal act and the damage, when it decided that the damage or injury sustained by the injured plaintiff, should be a natural result of the unlawful act [12]. In conformity with the article (207) which provides that (1-In all cases the court will estimate the damages commensurately with the injury and the loss of gain sustained by the victim provided that the same was a natural result of the unlawful act). If the damage is a natural result of the unlawful act, it means that it must be a direct consequence of the unlawful act [5]. It should also be noted that the scope of compensation within the field of the civil liability arising from the illegal act in the Iraqi civil law, encompasses the whole direct damage, whether it be foreseen (expected) or unforeseen (unexpected). As opposed to the scope of compensation within the field of the contractual liability, which is restricted to the foreseen (expected) direct damage merely. Unless the debtor of the obligation or the obligee commits cheating (fraud) or a grievous (gross) fault, in which case he or she will be liable for compensating both the foreseen and unforeseen types of the direct damage [10]. According to the article (168) of the Iraqi civil law, which provides that (Where the debtor had not committed cheating (fraud) or a grievous fault the compensation may not exceed the loss suffered or the amount of the lost profit which had been normally anticipated at the time of the contracting).

3. The Proof of the Civil Liability and the Exoneration and Immunity from It in Both the English and Iraqi Laws

The proof of the civil liability arising from medical negligence can be realized in the English law by some important standards or tests, the most of which are objective. as it is the case with the Iraqi civil law, which also adopted the objective standard or test, to help the judge ascertain the rise of the civil liability. And the exoneration and immunity from liability, can be materialized in the English law by some extraneous causes denying or negating one of the basic elements of the liability, so is the case with the Iraqi civil law, in which the causal link can also be cut off by the extraneous causes. Therefore we shall study the proof of the civil liability arising from medical negligence and the exoneration and immunity from it in both the English and Iraqi laws in the following sub-sections and as follows:

3.1. The Proof of the Civil Liability Arising from Medical Negligence in the English Law Compared to the Iraqi Civil Law

The English law developed four legal and judicial standards of proving civil liability arising from the tort of negligence in general, and the civil liability arising from the medical negligence in particular, each of which is used to prove each basic element of the civil liability arising from the tort of negligence. And these standards or tests are: The neighbor standard used to prove the basic element of the duty of reasonable care. The reasonable person standard, which is based upon the reasonable foreseeability, implemented to prove the basic element of the breach of the duty of care. As well as the learned hand test used also to prove this basic element. The but-for-test, and the learned hand test, to be used to prove the basic element of causation, that is to say, the case-and-effect relationship between the fault (negligence) and the damage. and as follows:

The first standard or test used by the English law to prove the civil liability arising from the tort of negligence in general, and the medical negligence of physicians and clinicians in particular, is the neighbor standard or test. It can be defined [19] as the criterion or test which is based upon the principle of proximity, and enables the judge to prove the breach of the duty of care. Its early uses dates back to the judicial precedents of the English courts. It became a well-established standard or test of proving the negligence, embodied in the breach of duty of care as early as the first quarter of the twentieth century, in the light of the judicial

precedent (Donoghue v. Stevenson 1932). In his judgment issued in this judicial precedent, the English judge lord Atkin declared the principle of proximity, upon which the neighbor standard or test was based [16]. This means that whoever is obliged with the duty of reasonable care, should forbear or avoid any act expected to inflict any damage on his or her neighbor [13]. But the urgent question will be: what is meant by the term (neighbor) as far as the legal terminology is concerned? The meaning of the term (neighbor) in the legal concept is different from its meaning in the geographical concept. The neighbor in the geographical concept is someone who lives or resides next by my house. But the neighbor in the legal concept is someone who is directly affected by the act or forbearance of the wrongdoer [25]. This act or forbearance is represented in the medical field by medical negligence. That is to say, the neighbor the patient who is the most directly affected by the act or forbearance of physicians, clinicians and surgeons. This criterion can frequently be used to prove the medical negligence, when there is no medical contract concluded between physicians, clinicians and surgeons from one hand, and patients from another hand. For example when both public and private hospitals resort to the exclusion or exemption clauses excluding them from contractual liability, or in the field of emergency medicine, particularly when the patient undergoes emergency surgery. In which case the realization of the informed consent from the patient is difficult, if not impossible. In summary, we can say that the neighbor standard or test, and the principle of proximity based upon which, are aimed at proving the existence of the duty of care on the wrongdoer of the tort of negligence, towards the most proximate person to this negligence. That is to say, the highly affected or the highly damaged person by this fault. Whereas the standard used to prove the second basic element of the breach of the duty of care, is the reasonable person standard or test. This test prevails in the English law after the failure of the personal or subjective standard or test, depending upon the individual differences and capabilities of wrongdoers [16]. It can be defined [6] as the standard or the test determining objectively the behavior or the conduct of the defendant (Wrongdoer), by measuring it with hypothetical conduct of the reasonable person, irrespective of the personal features or characteristics of each wrongdoer of the negligence. The reasonable person standard or test, which is also known as the standard of reasonableness, takes three forms in the English law: The first is the reasonable foreseeability standard or test emerging from the objective reasonable person test, is also used to prove the element of the breach of duty of care. It is a criterion which puts the burden of proving or onus of proving on the shoulders of the defendant of the action of negligence. And its liability will not arise, unless he or she foresees or expect the damage inflicted to the plaintiff, at the moment of committing the negligence [16]. The second is the professional standard of care, which is referred to also as the (Bolam test). It is used to prove the breach of duty of care committed by those who exercise a profession requiring skills and technical capabilities. Such as surgeons, clinicians and physicians. Therefore, their breach of duty of care must be proved and decided by this highly specialized standard, rather than by the standard of the non-specialized reasonable person. The third standard or test is the threefold standard or test which is called to also as the (Caparo test). This standard is applied by proving three factors: the foreseeable damage inflicted to the patient, and the relationship of proximity between the plaintiff patient and the defendant clinician and physician. And the imposition of the duty of care must be reasonable. Another standard or test is also used to prove this element is the learned hand standard or test. And is applied to ascertain whether the breach of the duty of care is committed or not in a quasi-mathematical way. That is to say this standard or test is based on two mathematical equations. Therefore, the breach of the duty of care is realized and the civil liability arising from medical negligence is materialized, when the burden of taking precautions to protect the patient from risks, and prevent or, at least, minimize the damage or injury of the patient is smaller and lesser than the probability that the risk will materialize, and the likelihood that the damage, injury or harm will realize [21].

$$B<P \times L=\text{Liability}$$

Vise-versa the breach of the duty of care will not be realized and the civil liability arising from medical negligence will not be materialized, when the burden of taking precautions to protect the patient from risks, and prevent or, at least, minimize the damage or injury of the patient is greater than the probability that the risk will materialize, and the damage, injury or harm will realize.

$$B>P \times L=\text{No Liability}$$

While the third basic element of the civil liability arising from tort of negligence, that is to say, the element of the damage suffered by the plaintiff patient and the causation, is frequently proved by the but-for-test or standard. This standard is based upon a question asked by the judge: would the plaintiff patient have been exposed to the damage but for the fault committed by the defendant clinician and physician and represented by his or her breach of duty of care? (but for the clinician's fault or conduct…had it not been for the clinician's fault or conduct…if it had not been for the clinician's fault or conduct, would the plaintiff have been exposed to the damage. Would the damage have occurred to the plaintiff). If the answer is that but for the defendant clinician's fault or conduct, the plaintiff patient would not have been exposed to the damage. Or the damage would not have occurred to the plaintiff, then the clinician's civil liability from the medical negligence will arise. It is worth-bearing in mind that this standard is usually used to prove the causal link or relationship between defendant clinician's medical negligence and the plaintiff patient damage or injury [23]. As far as the Iraqi civil law No. (40) of 1951 is concerned, we can repeat again that it has organized an objective standard to evaluate the conduct of the illegal act perpetrator or the wrongful act doer, and is represented by the

standard of the reasonable person, devoid from his or her internal personal circumstances, and surrounded by the same external circumstances of the wrongful act doer. In accordance with the first paragraph of the article (251) of the afore-mentioned law. This test or standard is often used to prove the civil liability arising from illegal or wrongful act. And this law has also adopted the direct consequence test or standard to prove the causal link between the illegal act and the damage, by requiring that the damage or injury sustained by the injured plaintiff, should be a natural result of the unlawful act. According to the article (207) of this law.

3.2. The Exoneration and Immunity from the Civil Liability Arising from Medical Negligence in the English Law Compared to the Iraqi Civil Law

The exoneration and immunity from the civil liability arising from medical negligence in the English law can be realized by the denial or negation of one of the basic elements of this liability. The defendant can deny or negate the fault element of the liability, which is represented by the breach of the duty of care, or deny the damage element, or even deny the causation element, that is to say, the causal link or relation between fault and the damage. This means that the extent of the exoneration and immunity from the civil liability arising from negligence is wider in the English law than the in Iraqi civil law. In other words the exoneration and immunity from the civil liability arising from illegal or wrongful act can only realized by the negating or refuting the cause and effect relationship between the fault (trespass) and the damage in Iraqi civil law, through denying the causal link, and proving the extraneous cause. Whereas this exoneration and immunity can materialize in the English law, by denying one of the three basic elements of the civil liability arising from negligence, that is to say, the denial of the fault element, denial of the damage element, or the denial of causation element [15]. Which means that the denial or negation is not restricted or confined to causal link or relation between the fault and damage, as it is the case with the Iraqi civil law. The fault element can be denied in the civil liability from negligence in the English law, by the plea volenti non fit injuria, which means that the injured plaintiff (victim) accepts the suffering from the injury. Therefore, the acceptance of the risks by the plaintiff shall negate or deny the fault element from the civil liability of the defendant. The Act of God, is also used to deny the fault element. It is defined as a natural force, which can neither be expected nor prevented by human being. The force often takes place outside the human foresight [25]. The same is true for the inevitable accident. As far as the damage element is concerned, it can not be denied from the civil liability arising from the negligence, while it can be denied in other types of tortious liability (the civil liability arising from tort). The causation element can also be denied in the civil liability from negligence in the English law, by the afore-mentioned "Act of God", by inevitable accident, Act of a stranger and by the plaintiff's negligence. The latter is not used to deny the causation element totally, but to mitigate or alleviate the magnitude of civil liability of the defendant by contributory or common negligence. If the defendant succeeds in proving that the injured plaintiff has also participated or contributed by his or her common negligence in suffering from the damage [25]. Because he or she does not take the reasonable care of protecting him or herself. Understandably, this means that the defendant's negligence is not the only cause which led to the harm or injury, but it contributes with that of the plaintiff. It is worth-mentioning that the Act of God can be used to deny both the fault element and the causation element, as it is the case with the inevitable accident. An important question to be presented is that: what is the difference between the role of the Act of God as a defense to deny the fault element, and its role to deny the causation element? The answer of this question lies in the mechanism by which it works in these two roles. To begin with, the Act of God can be used to deny the fault element, in negligence action, when the defendant takes reasonable care, and does not commit any negligence. But in spite of this reasonable care, an Act of God or inevitable accident takes place and led him or her involuntarily to inflict the damage or injury on the plaintiff. This is from one hand, and from the other hand, the Act of God can also be used to deny the causation element [15]. when the defendant causes the damage by his or her negligence, but proves that the damage would have been realized, even though he or she had taken the reasonable care. In this case the function of the Act of God is to deny the causation element, and cut the chain of causation. The same is true for the inevitable accident. As far as the attitude of the Iraqi civil law is concerned, it has something in common with the English law, because it also considers the extraneous cause as a defense to deny or negate the causal link between the illegal act and the damage, and this extraneous cause includes the force majeure, Act of God, sudden accident, act of a stranger (third party), or the fault of the injured victim [5]. According to the article (211) of the Iraqi civil law, which provides that (A person who has established that the injury had arisen from an extraneous cause, that is to say, a cause beyond his control such as by an act of God, a sudden accident, a force majeure, by the act of a third party or the fault of the injured himself, shall not be liable on damages unless there is a provision (in the law) or an agreement otherwise). The extraneous cause can be considered as a point of similarity between both the English and Iraqi laws, because it denies or negates the causal link in both these laws. As the afore-mentioned article refers, the extraneous cause can be classified into the force majeure, Act of God, sudden accident, act of a stranger (third party), or the fault of the injured victim. It is to be noted that although this article distinguishes between the force majeure and the sudden accident. But most of the Iraqi civil law jurists [8] thinks that these two terms are synonymous. Because they lead to the same legal consequences. And the Act of God is no more than a form of the force majeure, but the legislator of the Iraqi civil law borrowed it from the Islamic Jurisprudence, which called it originally as the heavenly bane. It should also be noted that the force majeure, in conformity with the terms

of the Iraqi civil law, is characterized by three features: it is an external event which is both irresistible (insurmountable) and unexpected. This means that it can not be attributed to the wrongdoer or trespasser [11] Although it is similar to the fortuitous event in that both of them are irresistible and unexpected. But the difference is that the force majeure renders the implementation of the obligation impossible, whereas fortuitous event renders it heavy, burdensome and expensive [2]. Another point of similarity between the English and Iraqi laws, is that both of them adopt the principle of the contributory negligence, or the common fault not to deny or negate the civil liability, but to mitigate or alleviate the magnitude of the liability and the compensation [3]. If the fault of the injured victim (injured plaintiff) is to be an extraneous cause leading to his or her damage, it should be characterized by the same features as theforce majeure, that is to say: the externality, irresistibility, and unexpectedness [8]. But sometimes both the wrongdoer and the injured victim commits a fault (trespass), and the Iraqi civil law adopted the principle of common fault in the article (210), which provides that (the court may reduce the sum of or refuse to adjudge payment of any compensation whatsoever if the injured person has contributed through his fault to causing or aggravating the injury or had worsened the debtor's situation). Therefore, the liability will be distributed between both the injured plaintiff and the defendant wrongdoer, according to the grossness or magnitude of the common fault of them [8]. But the difference can appear clearly between these two laws, in that the function of the extraneous cause in the English law is wider that that in the Iraqi civil law, because it can deny all the three basic elements of the liability: fault, damage and causation in the English law. While it denies only causation or the causal link, and cuts the chain of causation between the fault and damage in conformity with the Iraqi civil law. Finally, act of a stranger (third party) may also be classified as an extraneous cause. It is worth-mentioning here that the meaning the third party in the field of the tortious liability is different from that of the contractual liability. In that it refers in the former to any person other than the parties of the judicial action, the defendant wrongdoer is not responsible for his or her acts [8]. Whereas it refers in the latter to any person other than the contracting parties. The act of the third party must be characterized by two features: the first is the causality, that is to say, the cause-and-effect relationship between the act of the third party and the injury of the plaintiff. The second is that the act of the third party can not be attributed to that of the defendant him (or) herself [8].

4. Conclusions

The conclusion is made up of both the findings and recommendations and as follows:

4.1. Findings

The study has reached the following findings:

1) The English common law, based on judicial precedents and customs, requires three basic elements for the civil liability arising from medical negligence: the duty of reasonable care taken by the defendant doctor, the breach of the duty of care, and the damage inflicted to the plaintiff patient and causation. the Iraqi civil law requires also three basic elements for the civil liability arising from illegal act: the trespass (the material element of the fault), the damage, and the causal link.
2) The English law is different from the Iraqi civil law, in that the former is not based on general rules, but on the judicial precedents and customs included within the common law, which encompasses various types of torts, including the tort of negligence. Whereas the Iraqi civil law regulates the illegal acts within a general rule in the article (204), as well as articles (186) and (291).
3) It has also been concluded from this piece of research that another difference is found between the English law and the Iraqi civil law, in that the duty of reasonable care is considered as a basic element of the civil liability arising from negligence, whereas its counterpart in the Iraqi civil law, that is to say, the obligation of conduct, is only regarded as the legal obligation, the breach of which will lead to the availability of the basic element of the fault, which will lead, as well as, the elements of damage and causation to the civil liability from the illegal act.
4) The function of the extraneous cause in the English law is wider that that in the Iraqi civil law, because it can deny all the three basic elements of the liability: fault, damage and causation. While it denies only causation or the causal link, and cuts the chain of causation between the fault and damage in conformity with the Iraqi civil law.
5) The Iraqi and English laws are similar with each other, is that both of them adopt the principle of the contributory negligence, or the common fault not to deny or negate the civil liability, but to mitigate or alleviate the magnitude of the liability and the compensation.
6) They are also similar in considering the extraneous cause as a defense to deny or negate the causal link between the illegal act and the damage, and this extraneous cause includes the force majeure, Act of God, sudden or inevitable accident, act of a stranger (third party), or the fault of the injured victim.

4.2. Recommendations

After displaying these findings, the researcher suggests the following recommendations:

1) The researcher recommends that the Iraqi legislator should adopt the attitude taken by the English law, and let the Act of God deny both the fault element and the causation element of the civil liability arising from medical negligence. Therefore, the researcher suggests the following text to be added to the Iraqi civil law: (the extraneous cause of the Act of God may deny the fault element, in medical negligence actions, when the defendant doctor takes reasonable care, and does not

commit any negligence. But in spite of this reasonable care, an Act of God takes place and led him or her involuntarily to inflict the damage or injury on the plaintiff. The Act of God can also deny the causation element. when the defendant doctor causes the damage by his or her negligence, but proves that the damage would have been realized, even though he or she had taken the reasonable care).

2) The researcher recommends that the Iraqi legislator should adopt the attitude taken by the English law, and let the plea volenti non fit injuria, which means that the injured plaintiff (victim) accepts the suffering from the injury, deny both the fault element and the causation element of the civil liability of the defendant doctor arising from medical negligence. Therefore, the researcher suggests the following text to be added to the Iraqi civil law:(the extraneous cause of the plea volenti non fit injuria may deny the fault element, in medical negligence actions, whenthe defendant doctor takes reasonable care, and does not commit any negligence. But injured plaintiff (victim) accepts the suffering from the injury. The plea volenti non fit injuria can also deny the causation element. when the defendant doctor causes the damage by his or her negligence, but proves that the damage would have been realized, even though he or she had taken the reasonable care, because the injured plaintiff accepts the suffering from the injury).

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