

Criminal Liability: Medical Malpractice

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In a recent case the Dubai Public Prosecution ('DPP') charged a medical practitioner with malpractice. This was pursuant to a criminal complaint filed by a patient who claimed he sustained injuries and permanent disabilities as a result of surgery performed by the medical practitioner.

Below we shed some light on the facts of this case along with our analysis.

Background

The patient ('Claimant') filed a criminal complaint against a doctor ('Defendant') accusing him of malpractice. The Claimant noted that:

1. the Defendant performed an operation to treat the Claimant's back as the latter suffered from a herniated disc in his spinal cord; and
2. the medical operation resulted in permanent disabilities and other repercussions to the Claimant, such as involuntary urination and defecation along with other injuries.

Pursuant to the Claimant's complaint, and following receipt of two reports from the Dubai Health Authority and the Higher Committee of Medical Liability ('HCML'), the DPP issued an indictment order against the Defendant for medical malpractice for not following standard medical procedures, which resulted in cutting some nerves in the spinal cord. The DPP relied on Articles 1, 3, 6 and 34/1 of the UAE's Federal Decree Law No. 4 of 2016 concerning Medical Liability ('ML Law').

The defence included, amongst other arguments that:

Article 34 of the ML Law only penalises a medical practitioner who commits a 'gross' medical error. An English translation of Article 34 states:

"Whoever is proven to have committed a gross medical error as set forth herein shall be punished with imprisonment for a period of not more than one year and/or a fine of not more than AED 200,000 ..."

The ML Law does not define 'gross' medical error. Under Article 6 of the ML Law, the criteria for 'gross' medical error are to be set out in the Executive Regulations of the ML Law (which have not yet been issued) ('Executive Regulations'). An English translation of Article 6 of the ML Law states:

"A medical error is an error committed by the practitioner of the profession for any of the following reasons:

1. *his ignorance of the technical issues that every practitioner of the profession of the same degree and specialisation is supposed to be aware of;*
2. *failure to follow the recognised professional and medical standards;*
3. *failure to act with necessary due diligence; and/or*
4. *negligence and failure to act carefully and with precaution.'*

The Executive Regulations of this Decree-Law shall set the standards of 'gross' medical errors."
[emphasis added]

The ML Law provides that a 'gross' error is to be determined by a final report from the Medical Liability Committee (which is to be established under the ML Law as per Article 18 of the ML Law) ('MLC'). An English translation of Article 18 states:

"Upon a resolution to be issued by the Minister or the health authority, as appropriate, a committee of experienced doctors specialised in all the medical fields shall be created and titled "Medical Liability Committee". The Executive Regulations shall set the way such committee is formed and the rules and procedures of its work.

Such committees shall be exclusively in charge of settling the complaints referred thereto by the health authority, the Public Prosecution or by the Court and shall decide whether or not a medical error has been committed and the seriousness of such error. In case of several liabilities, the Committee shall decide the percentage of every person who contributed in such error indicating its reasons, resulting damages, the relation between the error and the damage and the percentage of disability in the affected organ, if any. The Committee may seek the assistance of the experts and of whomever it deems fit to perform its duties.

This Committee shall be subject to the provisions of Federal Law No. (7) of 2012 referred to above as far as they do not conflict with the provisions of this Decree-Law.

The indemnification claims filed as a result of the medical liability shall not be accepted unless after their referral to the Medical Liability Committees under the provisions of this Decree-Law".

Given there was no evidence of a 'gross' medical error, it was contended by the Defendant he should not be found criminally liable.

However, the Court of First Instance rejected these arguments and found the Defendant guilty and the Defendant was ordered to pay a fine of AED 200,000.

The Defendant appealed and the Court of Appeal also rejected the defence arguments and upheld the initial judgment.

Dubai Court of Cassation

On appeal by the Defendant to the Dubai Court of Cassation found in favour of the Defendant and, in particular, that criminal liability (under Article 34 of the ML Law) only arises when there is a 'gross' medical error.

In its rationale, the judgment referred to the above Article 6 of the ML Law.

The judgment further refers to Articles 34 (outlined above) and 36 of the ML Law. An English translation of Article 36 states:

"The penalties set forth in any other law shall not apply to the acts penalised under the provisions hereof."

"The key principle deduced from the judgment issued

in this case is that criminal liability (under Article 34 of the ML Law) arises against a medical practitioner only if the medical error (as referred to in Article 6 of the ML Law) is ‘gross’.”

The judgment noted that, based on the above, the UAE legislature had imposed a restriction on the Court while penalising an accused doctor (for medical error) by requiring it to rely only on the provisions of the ML Law. A medical professional can only be criminally liable (under Article 34 of the ML Law) where there is evidence of a ‘gross’ medical error committed by him. The legislature left the determination of the gross error criteria to the Executive Regulations of the ML Law and noted that the MLC is to decide whether a medical error was committed and, if so, to what extent.

The judgment further refers to Article 42 of the ML Law which superseded the previous Federal Law No. (10) of 2008 concerning Medical Liability (‘Former Law’). Article 42 further notes that the Cabinet Resolution No. (33) of 2009 of the Executive Regulations of the Former Law and the resolutions issued by virtue of that law shall remain in force until the Executive Regulations of the ML Law are issued, so long as it does not contradict the provisions of the ML Law.

The judgment further elaborates that Article 13 of the Executive Regulations of the Former Law provides that a committee is to be established under the name of the HCML which specialises in giving its technical opinion as to whether or not there is a medical error.

The judgment goes on to note that the HCML was responsible for preparing the report in this case (upon which the Court of Appeal relied in determining the Defendant guilty). As this report did not determine the extent of the error committed by the Defendant that resulted in the alleged disability, the judgment held that the Court of Appeal should have enquired of the HCML whether the Defendant’s lack of knowledge of the technical issues and not following the known medical procedures formed a ‘gross’ error or not.

On this basis, the Court of Cassation concluded that the appealed judgment did not address the deficiencies in the investigation procedures, which were not tackled by the DPP and the Court of First Instance despite the fact that the Defendant raised this issue in his original defence. The Court of Cassation referred the case back to the Court of Appeal to look into these deficiencies and confirm whether the medical error was ‘gross’ or not.

Dubai Court of Appeal

While reviewing the merits of the case for the second time, the Court of Appeal wrote to the HCML requesting it to determine whether the medical error committed by the Defendant was ‘gross’ or not. The HCML responded with a report concluding that the error was not ‘gross’.

In its judgment, the Court of Appeal followed the rationale of the Court of Cassation and also noted that the existing HCML concluded that there was no ‘gross’ error committed by the Defendant. Whilst there was evidence of an error, it was not ‘gross’ and consequently it was not considered to fall under the meaning of criminal liability as set out in Article 34 of the ML Law.

The Court of Appeal overturned the initial judgment and acquitted the Defendant of all charges.

Further to the above, the DPP challenged the judgment by way of an appeal and it is expected to be reviewed soon by the Court of Cassation.

Conclusion

The key principle deduced from the judgments issued in this case is that criminal liability (under Article 34 of the ML Law) arises against a medical practitioner only if the medical error (as referred to in Article 6 of the ML Law) is 'gross'.

In light of the above judgments, although the criteria for 'gross' medical error are yet to be defined by the Executive Regulations of the ML Law and the MLC is to decide whether or not a medical error was committed in addition to the extent of the gravity of such error, the existing HCML can still, for the time being, determine if the medical error is gross or not.

Al Tamimi & Company's [Litigation team](#) regularly advises on criminal and civil liability in connection with medical malpractice. For further information please contact [Ahmed Allouz \(a.allouz@tamimi.com\)](mailto:a.allouz@tamimi.com).