Determination of Damages in Medical Negligence Cases: An Overview of *Sharī'ah* & English Law

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Abstract

Medical profession is considered as one of the noblest professions of the world. Despite the wealth and social prestige that this profession enjoys, it attracts a large number of complaints too from patients and their families. Sometimes these complaints are genuine and medical practitioners are responsible for the harm thus caused. The NHS has a proper mechanism of payment and pays in billions for indemnification for medical errors. However, there is no uniform criteria for quantification of the loss. Pakistan follows English Law in cases of medical negligence. However, Pakistan lags way behind in compensating the claimants. *Sharī'ah*, on the other hand, has a complete tariff system *'Diyah'* for indemnification in cases of homicide and bodily injuries. Pakistan can learn from English law, NHS and *Sharī'ah* and adopt a uniform mechanism for monetary liability and manage it through proper institutions. This article aims at revisiting the mechanism of indemnification in both legal systems and scrutinizing the shortcomings and giving recommendations.

KeyWords: *Sharī'ah, Medicine, Liability, Malpractice, Indemnification,*

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English

1. Introduction

Medical malpractice is not only an issue of developing countries but of developed countries too. Every year thousands of precious human lives are lost due to medical malpractice. Statistics suggest that it is ranked amongst the first three causes leading to death in the United States. Each year there are more than four hundred thousand patients visiting hospitals in the United States, this number may be even more, who suffer from the harm caused to them by the medical negligence.[1] According to the data of The National Audit Office in 2005, there are up to 34,000 deaths a year in the National Health Service (NHS) in the United Kingdom due to medical errors.[2] Medical litigation claims and costs in the UK are rising.[3] Thus, payments of damages and legal costs rose significantly too. Cases related to medical malpractice are dealt with by courts under "Law of Torts".

According to NHS Resolution, NHS compensation payouts in 2021/22 amounted to £2.4 billion. This is an increase on the previous year's figure of £2.2 billion[4]. English law has a good system of bifurcation of the losses, and they pay huge amounts to redress the grievances of claimants for medical malpractice. However, they do not have a standard criterion for quantification. Thus, English Law lacks the uniformity in quantification and payments. Pakistan follows English Law for deciding the cases of medical malpractice. However, Pakistan lags way behind in compensating the

[1]John T James., "A New, Evidence-based Estimate of Patient Harms", *Journal of Patient Safety* (2013): 122-8.

[2]National Audit Office, *A Safer Place for Patients: Learning to Improve Patient Safety*, 2005.

[3]Lane J, Bhome R and Somani B. National trends and cost of litigation in UK National Health Service (NHS): a specialty-specific analysis from the past decade. *Scottish Medical Journal*. 2021; 66(4): 168-174. doi:10.1177/00369330211052627.

[4]https://businessinthenews.co.uk/2022/12/28/claims-against-the-nhs-have-increased-in-the-past-five-years-costing-billions/.

claimants. There have been few cases and that too with very meager indemnification. On the other hand, *Sharī'ah* doesn't bifurcate the different kinds of losses, rather provide a lump sum amount for the loss. The system of damages in *Sharī'ah* is very relevant in the matter of medical malpractice, *Sharī'ah* explicates ample rulings for monetary compensation of wrongful death. Alongside, it covers bodily injuries too in adequate detail. Pakistan can adopt an excellent system of indemnification if the *diyah* system is adopted and manage it well by following English procedures. For this reason, this article is divided into two parts. Part 1 discusses the system of damages in English Law while Part 2 elaborates the system of indemnification in *Sharī'ah.*

2. Damages in English Law

The UK's NHS[5] is considered and formally declared to be one of the safest and fastest charities providing health care support to patients in the country.[6] Although it strives hard to ensure quality care and high standard of health, despite these steps, medical negligence claims have a good share in NHS funding. According to NHS Resolution, NHS compensation payouts in 2021/22 amounted to £2.4 billion. This is an increase on the previous year's figure of £2.2 billion.[7] Thus, no Healthcare system can be perfect and without malpractice litigation and claims. Every good healthcare system not

[5]The National Health Service (NHS) came into being as a repercussion of the Second World War. It became functional on July 5th, 1948, when health secretary Aneurin Bevan opened Park Hospital in Manchester. All medical practitioners and staff i.e., hospitals, doctors, nurses, pharmacists, opticians, and dentists came together under one umbrella organization for the first time for the medical services that were intended to be free for all. The central idea was to establish a health care service that will provide services to all and funded entirely from taxation; thus, all people would not spend equally for gaining health services rather they will spend according to their means.

[6]https://www.theguardian.com/society/2017/jul/14/nhs-holds-on-to-top-spot-in-healthcare-survey (accessed July 14, 2017).

[7]https://businessinthenews.co.uk/2022/12/28/claims-against-the-nhs-have-increased-in-the-past-five-years-costing-billions/.

only has good structure and services but ought to have good legal system too for redresses of patient's claim. However, there is no uniform system of computing the indemnification for the loss of the patients. Medical malpractice claims are mostly brought in respect of death, personal injuries and financial loss suffered due to the negligence of the defendant. Principles applied for the estimation of damages in medical negligence cases are similar to the one applied in general cases of negligence in tort. New, systematically, and scientifically derived solutions are needed to what has now become an ageing problem for the NHS in England.[8]

The principle of 'restorative justice' is widely applicable in the Law of Torts where the complainant's previous position is restored.[9] Thus he/she should be fully compensated as far as it could be in terms of money. This principle was enunciated in the judgment of *Livingstone vs. Rawyards Coal Company*[10] by Lord Blackburn. The honorable judge clearly delineated that when assessing the harm caused to a complainant in terms of money, damages, or reparation, all efforts shall be made to bring such person to his/her previous position – before the person was wronged.

The principle of restorative justice is akin to the performance of a contract. This determines the position of the party before and after the specific performance of the contract. This principle can easily be invoked when the pecuniary loss is under consideration since this can easily be repaired to restore the previous position of the complainant, however, a difficult situation may arise when a pecuniary loss is not the focus, for

[8]Carter, Alexander W., Elias Mossialos, Julian Redhead, and Vassilios Papalois. "Clinical Negligence Cases in the English NHS: Uncertainty in Evidence as a Driver of Settlement Costs and Societal Outcomes." Health Economics, Policy and Law 17, no. 3 (2022): 266–81. doi:10.1017/S1744133121000177.

[9]Jo Samanta and Ash Samanta, *Medical Law* (Hampshire: Palgrave Macmillan, 2011), 114.

[10](1880) 5 App. Cas.25 at 39.

example, when someone's loved one is passed away due to the medical negligence of any doctor. The courts, for obvious reasons, cannot restore this position.[11] The courts, in such a situation have a completely different approach by applying a different principle called – the principle of reasonableness or fairness.[12] This is a difficult question to assess properly what would be just, fair, and reasonable. The courts look for similar situations and cases and find out what was previously paid, owing to the same level of harm caused to the complainant.[13] A claim for the damages usually includes:

a. Reasonable and fair monetary compensation for the injury caused.
b. Small amount of damages can be granted under the head of pain and suffering.
c. Loss of amenity can be demanded to be compensated. It is the loss of ability to participate in the activities which the claimant used to participate before the injury caused due to the medical negligence.
d. Medical expenses can be claimed.
e. Loss of earnings.
f. Future pecuniary losses.[14]

Brief details are discussed below:

2.1 Pecuniary Loss

A patient who is a victim of medical negligence usually suffers from two types of losses i.e., pecuniary, and non-pecuniary. Loss that can be calculated in monetary terms is called as pecuniary loss for example,

[11]Michael A. Jones, *Medical Negligence* (London: Sweet & Maxwell, 2010), 971.
[12]Jonathan Herring, *Medical Law and Ethics* (Oxford: Oxford University Press, 2012), 124.
[13]Jones, *Medical Negligence*, 971.
[14]Herring, *Medical Law and Ethics*, 124.

medical expenses, traveling expenses, the cost of equipment bought because of the injury, loss of earning, future loss of earning and cost of hiring someone else for performing chores which the patient is no longer able to perform due to the injury caused to him because of medical negligence.

2.2 Medical Expenses

In English law, a patient can recover medical and other expenses as damages.[15] If the patient had to avail private medical services, he will be compensated but if he utilized NHS facilities then he will not be awarded damages for this. However, claimants can be awarded damages under this head if the patient is compelled to live in a special care home like nursing home or he has to hire a special attendant for care at home. Likewise, damages can be granted for traveling costs and additional housing or adapting accommodation for the special needs of the patient.[16]

2.3 Loss of Earning

Loss of earning must be estimated for two periods. First: the lost incomes due to the medical malpractice till the date of estimation, secondly: Future loss of earnings. Calculating the prospective loss of earning is a difficult question for the court. It has to foretell what will be the future income of the patient and what would have been, had the injury not been caused to him due to medical negligence. The court will calculate the difference and grant the damages accordingly. Court may take account of future prospects of increased income. It was suggested in *Herring vs. Ministry of Defense*[17] that court may adopt a loss of chance model where there is strong likelihood that claimant's career would have taken a particular course which would have

[15]Ibid.
[16]Jones, *Medical Negligence*, 1001-1002.
[17][2003] EWCA Civ 528.

led to higher income, for instance promotions or shifting to a better place of work. If the injury caused by medical negligence has reduced the life expectancy of the patient, the court may consider pre-accident life expectancy and grant damages for the loss of earnings of those years. This rule was enshrined in the decision of the House of Lords in *Pickett vs. British Rail Engineering Ltd.*[18]

It becomes more difficult for courts to estimate future loss of earnings where no previous history of income or no record can be found. Court simply grants a lump sum. It mostly happens when injury is caused to young children.

2.4 Non-Pecuniary Loss

Non-pecuniary loss includes pain and suffering, and loss of amenity consequential upon the injury caused due to medical negligence. The principle for award of damages in this case would be that it must be just and reasonable as the principle of restoration is impossible in this case.

2.5 Pain and Suffering

Under this head, a patient can be awarded damages for the pain and suffering borne by claimant as a result of injury because of medical malpractice. If he faces humiliation, discomfort or any part of his body got disfigured, he can demand for damages. Likewise, if he realizes that his life expectancy has been significantly reduced because of the negligent behavior of the medical practitioner, he is entitled to damages. If this injury affects the marriage prospects, it will be taken into account in award of damages. This addresses the loss of companionship and comfort and not to the financial benefits of the marriage. Similarly, if a patient develops any

[18][1980] A.C. 136.

psychiatric condition due to the injury, it will be reflected in the award of damages.

2.6 Loss of Amenity

Loss of amenity includes the loss of activities of claimant, his job satisfaction, hobbies, and recreational activities. Court will consider all these losses during award of damages. This will include in the damage even if the patient is unconscious and does not realize the loss of all these activities.

Patients are not always granted damages according to the calculations made after taking into account the heads mentioned above. These damages can be reduced if the patient's own negligence contributed to the harm caused to the patient in addition to the negligence of the doctor.[19] Instances may arise when a patient does not disclose some of his medical history that may be instrumental for diagnoses and prescriptions. A patient was incorrectly diagnosed in *Ingram vs. Williams*[20] but it was held that the doctor was not negligent as the patient did not disclose that she was suffering from incontinence.[21] Likewise, if a patient did not take necessary steps that would have helped in mitigating the harm she is suffering, damages would be reduced. For example, where a patient should have followed up the necessary treatments, but she didn't, in this case compensation will be reduced. But if there was a negligence on the part of the patient that she didn't disclose a certain fact and inquiring about that fact was equally important for the doctor for making a correct diagnosis and prescription, but he failed to ask, in this case he will be liable and the negligence on the part of patient would not be counted as contributory

[19] Herring, *Medical Law and Ethics*, 125.
[20] [2010] EWHC 758 (QB).
[21] Unintentional Passing of Urine.

negligence. In *P vs. Sedar*[22] a patient was not held to be contributory negligent when she did not notify the doctor about not giving her follow up appointment.

2.7 Secondary Sufferers

Secondary victims are those people who didn't have directly suffered the injury due to the negligence of the doctor rather her beloved relative is the victim of medical negligence, and this secondary victim has suffered mental distress due to the harm inflicted on his beloved. Courts are quite hesitant in granting damages to the secondary victims for the distress they suffered due to harm to primary victims. But it's not completely impossible. There are certain exceptions where courts may overlook the position of secondary victim and recognize the causation between her and the defendant's negligence. For instance, what has been observed by the patient's relative is exceptionally awful or where the news was communicated in a negligent manner that caused psychological injury. Following cases may clarify the stance of the courts further:

In *Sion vs. Hampstead Health Authority*,[23] the son of the claimant met with an unfortunate accident. He was taken to the hospital. Defendant failed to make a diagnosis that the patient is bleeding from his kidney. He went into a coma after three days of accident and suffered a heart attack. He was kept under intensive care, but he couldn't survive and after fourteen days of accident, passed away. His father has been at his bed side throughout this period. He brought the claim in front of the court of Law for psychiatric illness that he developed due to these fourteen days when he witnessed the collapse of the condition of his son. Although there was proximity between

[22][2011] EWHC 1266 (QB).
[23][1994] 5 Med LR 170.

defendants' action and claimant's psychological illness, the learned court held that it was not a sudden horrifying event, unfortunately it was an expected outcome of the fatal accident and deterioration of his condition later on.[24]

In *Taylor vs. Somerset Health Authority*,[25] a patient died due to the heart attack that he suffered at his job's place. He did not die instantly, rather he was taken to the hospital after a heart attack. He died in the hospital after some time. His wife Mrs. Taylor was informed about his heart attack. She came to the hospital and after twenty minutes of her arrival, she was told about the death of her husband. She identified the dead body of her husband in the mortuary. As a result, she claimed that she has got a psychiatric illness thus she deserves damages. The House of Lord held that the claimant can only recover the damages when she has actually seen or heard the primary injury or death.

2.8 Bereavement

The Fatal Accidents Act grants damages for bereavement. Thus, an amount of £11,800 is awarded as bereavement damages to the spouse of the deceased, his parents, or children.[26] The sum amount is to be distributed equally between parents if both claim for bereavement damages. There is no need to prove financial dependency for bereavement damages.[27]

2.9 Dispensation of Award

Damages used to be awarded in lump sum form till recently for the suffered loss as well as future losses but now the court has got the authority to make

[24]Claudia Carr, *Unlocking Medical Law and Ethics*, New York: Routledge, 2013), 8.

[25][1993] 4 Med LR 34.

[26] "The Fatal Accidents Act" (1976), sec. 1(A).

[27] Ibid.

decisions of periodical payments. These payments can be reviewed and increased after some time if it turns out that patient suffers greater loss then estimated earlier and it can be decreased if proved otherwise at a later date. Thus, the court has the power to grant a lump sum award and if it considers reasonable it can make it periodical.[28]

This concludes the brief of the damages in England for medical malpractice. Calculation of damages has been quite problematic for the judges.[29] It is challenging for the judges specially to estimate the appropriate compensation for the non-pecuniary losses. For example, what should be the appropriate compensation for loss of a limb, eye, or hand? Secondly, future losses are a kind of guesswork for the judges. Sometimes, a lump sum amount is awarded for future loss and care needed for the patient, but he unexpectedly doesn't survive that much and dies shortly. This issue was addressed by allowing the periodical payments but that mandates that both the parties will be hanging for a very long time because of the dispute.

The current system of medical malpractice compensation is not adequate according to the majority of the people. A significant percentage – 70% - shows that patients are dissatisfied with the system.[30] Main drawbacks of the system can be summed up as:

a. The litigation process is slow.
b. Legal cost is rather huge.
c. The procedure is stressful for both parties.
d. It leads to secretiveness instead of revelation.
e. This system discourages the process of learning lessons from mistakes.
f. Some claimants receive more compensation than they need, and some

[28]Jones, *Medical Negligence*, 980.
[29] Herring, *Medical Law and Ethics*, 56.
[30]Jonathan Herring, *Q & A Medical Law* (Oxon: Routledge, 2015), 16.

patients do not receive at all. Sometimes even for the same damage.[31]

There have been multiple proposals for reform in the system. One such proposal is the NHS Redress Act, 2006. The main proposition of the idea is to settle the claims under £20,000 out of court in a separate tribunal. It does not intend to replace the current court system, rather an alternative for the minor claims which would require explanation, apology or payment so that the litigation may be expedited at both forums along with low cost. This Act has not yet been translated into implementation.

Another proposal for the reform of the system is a no-fault scheme. This scheme proposed that every patient should be redressed who suffers with medical mishap without invoking the proof of negligence or labeling the doctor as negligent. This system is already implemented in New Zealand. There are pros and cons of the system. This system may reduce the legal cost; patients who suffer may be redressed as in current system two patients who suffer same medical mishap, may have two different fates in redress. One may get huge damages because he was fortunate enough to identify and prove the negligence, the other with the same mishap may not be lucky like the former and may be left with nothing after a long legal battle. Another benefit of the no-fault scheme is that it will remove enmity between doctors and patients which is an obvious result in case of litigation based on negligence. This system makes doctors more open about the mistakes and help them learn from it while the tort-based system tends to hide their mistakes. No fault scheme tends to find the fault in the system and not on the particular individual as in the case of tort-based litigation. Sometimes, it is the system who is to blame rather than the individual. It reduces the level of stress and anxiety that medical practitioners

[31]Ibid.

continuously complain about in the current system.

It's not all sunshine about this scheme; there are some real problems with it on the other side. No-fault scheme tends to redress the patients who suffer from medical mishap, but it will become pretty complex to distinguish between those who are facing the usual side-effects of the treatment which happens in the allopathic system and those who suffer from medical mishap. Obviously, this system does not intend to pay every single person who falls ill but the complications in this scenario are real. Moreover, this system lacks accountability. Tort based system requires to identify the tortfeasor and publicly brand him as negligent and require him to compensate but in the no fault scheme, it only announces that the patient has suffered a mishap without identifying the individual who caused this mishap through his negligence. This will obviously eliminate the factor of accountability that is mandatory for deterrence and improvement. Lastly, it is very costly and places a huge burden on the governments. But it is not about the cost; it's more about who bears the burden that the tort-based litigation system is borne by the disabled and ill people. No fault scheme can be proved as a better alternative to the current system if it is properly combined with the disciplinary orders by the health regulatory authorities.

3. Monetary Compensation in *Sharī'ah*

Sharī'ah has prescribed various punishments of diverse nature to safeguard the rights of individuals. Some penalties are retributive in nature while some are deterrent. Some aim at rehabilitation whereas others are preventive. Actions and omissions are declared crimes on the basis of the rights and interests violated. Thus crimes in *Sharī'ah* are classified by jurists in categories of *Ḥudūd* (fixed punishments), *qiṣāṣ and diyah* (Punishments for

killing and hurt) and *ta'zīr* (state prescribed meaning).[32] The topic of *diyah* includes culpable homicide, manslaughter, indirect homicide and bodily harms.

The last-mentioned types of punishments are relevant to medical negligence and its punishments. The topic of *qatl al-khatā* covers all the wrongful deaths that are caused unintentionally due to mistakes or misadventures including deaths that are results of the negligence, mistakes, or misadventures of the medical practitioners. Therefore, this Law is applicable to cases of medical malpractice in the same way as it is valid in other cases of unintentional homicide. *Sharī'ah* explicates ample rulings for monetary compensation of wrongful death. Alongside, it covers bodily injuries too in adequate detail. This entire realm of *diyah* and *arsh* is almost a complete tariff for estimating the damages for medical malpractice. If mindfully incorporated in the country's law, not much is left for judges to brainstorm for the adequate compensation, thus preventing the entire topic of capping that is hot debate in many non-Muslim countries. Pakistan can formulate a law for medical malpractice by setting the tariff on the basis of *diyah* thus ending the huge disparity between the damages decreed by courts and will spare judges from the laborious task of estimation of reasonable amount for damages. These concepts are not alien for Pakistan's legal system. But they are ineffective for medical malpractice for two reasons.

1. Clauses related to *diyah* are inserted in Pakistan Penal Code, whereas courts do not allow trying and charging the medical practitioners under criminal law unless there is gross negligence.

2. *Diyah* is calculated according to the rate of silver according to Pakistan's law and thus it is very less and does not fulfill the need.

[32]Abū Zahra, *Al-Uqūbah* (Cairo: Dār al-Fikr, n.d), 59.

Thus there is a dire need to revisit these concepts of *Sharī'ah* for the purpose of formulation of a law for medical malpractice for Pakistan. Following is the brief summary of the concept of *diyah* and the compensation fixed by *Sharī'ah* in terms of camels, *dirham* and *dinār*. For explanation, the amount is converted into Pakistani rupees to give a clear picture of the appropriate amount for compensation. It is proposed that this model be adopted for monetary compensation for medical malpractice in Pakistan.

3.1 *Diyah* (Blood Money)

The word "*diyah*" is used for the damages payable to the deceased's family. It may be defined as the "Liability for the financial compensation accrued due to causing homicide". In Islamic criminal law, *diyah* will be paid in cases of accidental and semi-intentional homicide. It may be fixed and paid in cases where retaliation *(qiṣāṣ*) was the original sentence, but it was dropped and the option of *diyah* was adopted for some reason.[33] Allah commands to pay the monetary compensation to the deceased's family in the case of wrongful death in the following verse:

> وَمَنْ قَتَلَ مُؤْمِنًا خَطَأً فَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ وَدِيَةٌ مُسَلَّمَةٌ إِلَى أَهْلِهِ إلا أَنْ يَصَّدَّقُوا...
>
> And whoever kills a believer by mistake - then the freeing of a believing slave and a compensation payment presented to the deceased's family [is required] .[34]

Likewise, many traditions of the Prophet (PBUH) explicate the rulings of *diyah*. For instance, it is narrated from Abdullah ibn Mas'ūd:

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[33]Abū Bakr ibn Mas'ūd al-Kāsānī, *Badā'i' al-Sanā'i'fī Tartīb al-Shar¯a'i,* vol.7 , (Beirut: Dār al-Kitāb al-'Arabī, 1974) 252; Abū Al-Walīd Muhammad Bin Aḥmad. Ibn Rushd, *Bidāyat al-Mujtahid,* vol. 4, Beirut: Dār Al-Gharab Al-Islāmī, 1988.192; Abū Muhammad Mawfiq Al-Dīn 'Abdullah Bin Aḥmad bin Muhammad Ibn Qudāmah, *Al-Mughnī,* vol. 8, Cairo: Maktabah Al- Qāhirah, 1968.261.

[34]Al-Qur 'ān 4:92.

قضَى رسول الله -صلي الله عليه وسلم- في دِية الخطأ عشرين بنت مَخاضٍ، وعشرين ابنَ مَخاض، وعشرين ابنةَ لبُون، وعشرين حقَّةً، وعشرين جَذعَةً.

The Messenger of Allah (PBUH) ruled that the *diyah* in the case of accidental killing should be twenty she-camels in their second year, twenty he-camels in their second year, twenty she-camels in their third year, twenty she-camels in their fourth year and twenty she-camels in their fifth year.[35]

3.2 Amount of *Diyah*

First topic that calls for discussion in this regard is about the type of property that is payable as *diyah.* Jurists are divided into three different camps about the types of property that can be paid as financial compensation for the loss of life.

According to Imam Abū Hanīfah[36], Imam Mālik[37] and early opinion of Imam al-Shāfi'ī[38] three types of properties can be given as monetary compensation for accidental homicide. These properties are camels, gold, and silver as it is mentioned in the *Ḥadīth* where Prophet (PBUH) sent a letter to the people of Yemen and explained different matters and wrote:

وَإِنَّ فِي النَّفْسِ الدِّيَةُ مِائَةٌ مِنَ الْإِبِلِ

Indeed, the damages, for the homicide is 100 camels, and

وَعَلَى أَهْلِ الذَّهَبِ أَلْفُ دِينَارٍ

[35]Aḥmed Ibn Hanbal, *Musnad,* vol. 4 (Cairo: Dār al-Ḥadīth, 1995), 210, Ḥadīth no. 4301.

[36]al-Kāsānī, *Badā'i'al-Sanā'i'fi Tartīb al-Sharā'ī',* vol.7 , 253.

[37] Ibn Rushd, *Bidāyat al-Mujtahid,* vol. 4, 194.

[38]Abū Isḥaq Ibrāhim Bin 'Alī Bin Yūsuf Shīrāzī, *Al-Muhadhdhab fī Fiqh Al-Imām Al-Shāf'ī.,* vol. 3, (Dār Al-Kutab Al-'Ilmīyyah,), 212.

And for the people of gold, it is 1000 Dinar.[39]

Imam Aḥmed ibn Ḥanbal and two companions Imam Ḥassan ibn Shaybānī and Abū Yūsuf of Abū Hanīfah are of the view that there are six types of properties that can be given as monetary compensation for accidental homicide. These properties are camels, gold, silver, goats, cattle and full clothing. They form their opinion on the basis of Hādīth of Prophet Muhammad (Peace be Upon Him) and *Āthār* of ‘Umar (may Allah be pleased with him) mentioned in Sunan abī Dāwūd. It says:

عَنْ عَمْرو بْنِ شُعَيْبٍ، عَنْ أَبِيهِ، عَنْ جَدِّهِ، قَالَ: " كَانَتْ قِيمَةُ الدِّيَةِ عَلَى عَهْدِ رَسُولِ اللَّهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ: ثَمَانَ مِائَةِ دِينَارٍ أَوْ ثَمَانِيَةَ آلَافِ دِرْهَمٍ، وَدِيَةُ أَهْلِ الْكِتَابِ يَوْمَئِذٍ النِّصْفُ مِنْ دِيَةِ الْمُسْلِمِينَ "، قَالَ: فَكَانَ ذَلِكَ كَذَلِكَ حَتَّى اسْتُخْلِفَ عُمَرُ رَحِمَهُ اللَّهُ، فَقَامَ خَطِيبًا فَقَالَ: أَلَا إِنَّ الْإِبِلَ قَدْ غَلَتْ، قَالَ: فَفَرَضَهَا عُمَرُ عَلَى أَهْلِ الذَّهَبِ أَلْفَ دِينَارٍ، وَعَلَى أَهْلِ الْوَرِقِ اثْنَيْ عَشَرَ أَلْفًا، وَعَلَى أَهْلِ الْبَقَرِ مِائَتَيْ بَقَرَةٍ، وَعَلَى أَهْلِ الشَّاءِ أَلْفَيْ شَاةٍ، وَعَلَى أَهْلِ الْحُلَلِ مِائَتَيْ حُلَّةٍ، قَالَ: وَتَرَكَ دِيَةَ أَهْلِ الذِّمَّةِ لَمْ يَرْفَعْهَا فِيمَا رَفَعَ مِنَ الدِّيَةِ.

‘Amr ibn Shu‘āib narrated from his father who narrated from his grandfather that: “The value of the blood-money at the time of the Apostle of Allah (Peace be Upon Him) was eight hundred dinars or eight thousand *dirhams*, and the blood-money for the people of the Book was half of that for Muslims. He said: This applied till Umar (Allah be pleased with him) became caliph and he made a speech in which he said: Take note! Camels have become expensive. So ‘Umar fixed the value for those who possessed gold at one thousand dinars, for those who possessed silver at twelve thousand

[39]Abū ‘Abd Allah Muḥammad ibn ‘Abd Allah al-Hākim al-Nīshāpūrī, *Al-Mustadrak ‘alā al-Saḥīḥayn*, vol. 4 (Beirut: Dār al-Kitāb al-‘Ilmiyyah, 1990), vol. 1, 552, Ḥadīth no. 1447.

> (*dirhams),* for those who possessed cattle at two hundred cows, for those who possessed sheep at two thousand sheep, and for those who possessed suits of clothing at two hundred suits. He left the blood-money for *dhimmis* (protected people) as it was, not raising it in proportion to the increase he made in the blood-wit.[40]

Imam Abū Hanīfah responded to this *athār* and maintained that ‘Umer only did it when they were the assets and wealth for people but when he introduced salaries for people; he retreated to the camels, gold and silver and declared them to be the property that will be used to pay blood money.[41]

Imam al-Shāfiʿī, according to his later opinion, maintained that original *Diyah* is 100 camels, and it is mandatory on the person who accidentally killed others that he should deliver him 100 camels. If he does not own, then he should strive to acquire them. And if he doesn’t find them, in this situation he will deliver their price to the deceased's legal heirs. He too based his opinion on the *athār* of ‘Umer mentioned earlier when he raised the amount of gold and silver coins to match with the value of camels. Thus, camels are the original property that should be a standard for tariff.[42]

As mentioned earlier, *diyah* for accidental homicide is 100 camels. These camels must be of different age and sex as mentioned in the *Ḥadīth* of Prophet (Peace Be Upon Him). All jurists are unanimous that it should be of five types as it was narrated that Ibn Masʻūd said: “The Messenger of Allah (Peace Be Upon Him) ruled that the *diyah* in the case of accidental killing should be twenty she-camels in their second year, twenty he-camels

[40]Abū Dāwūd, *Sunan*, vol. 4, 184, Ḥadīth no. 4542.

[41]Abū ‘Abd Allah Muḥammad ibn Hassan ibn Shaybānī, Kitāb *al-Aṣl,* vol. 4 (Karachi: Idārat al-Qurʻān wa al-ʻUlūm al-Islāmiyyah), 452.

[42]Shīrāzī, *Al-Muhadhdhab,* vol. 3, 212.

in their second year, twenty she-camels in their third year, twenty she-camels in their fourth year and twenty she-camels in their fifth year."[43] This is the standard amount of *diyah* according to Abū Ḥanīfah. Imam Mālik and Imam al-Shāfi'ī[44] only differ with him about one type of camel. They preferred twenty he-camels in their third year instead of twenty he-camels in their second year as this is also mentioned in another *Ḥadīth* narrated from Ibn Mas'ūd.

This system of *diyah* is still prevalent in Arab countries and is redressing the financial loss caused by the accidental homicide. Their Supreme judicial authority announces the value of *diyah* of a particular time. In 2011, the Kingdom's supreme judicial authority announced the amount of *diyah* is raised to SR300, 000 ($81,000) in cases of accidental deaths[45]. Same amount was ordered to be given to the martyrs that lost their lives in unfortunate crane crash accident in Grand Mosque[46]. As far as the amount of *diyah* is concerned in other commodities like gold and silver, it is one thousand gold coins unanimously. The standard weight of gold coins in Islamic caliphate was 4.25 grams.[47] Thus, one thousand dinars will be equivalent to 4250 grams of gold. At current market rate of gold, it amounts to approximately 247,747 USD[48]. This amount will mitigate the monetary loss for many years.

Jurists are divided in the exact amount of *diyah* in silver coins. Ḥanafī jurists consider the amount as 10,000 silver coins while *jamhūr* deem it to be 12,000 silver coins. One silver coin in Islamic caliphate was

[43]Aḥmed ibn Hanbal, *Musnad*, vol. 4, 210, Ḥadīth no. 4301.
[44]Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 4, 193.
[45]http://www.emirates247.com/news/region/saudi-arabia-triples-blood-money-to-sr300-000-2011-09-11-1.417796 (accessed March 7, 2016).
[46]http://www.arabnews.com/featured/news/806481(accessed March 7, 2016).
[47]The Encyclopedia of Islam, s.v. "Dinār".
[48] *Market prices as of May 14, 2022*

around 2.91 to 2.97 gram of silver[49]. At this weight, the standard amount of *diyah* will be around 2.0 to 2.5 million that is very less for the monetary compensation of loss of life.

When *qiṣāṣ* and *diyah* Laws were promulgated in Pakistan, Silver was adopted as the standard for calculation of *diyah* that is extremely low.[50] Each year finance division (internal finance wing) of Government of Pakistan announces the amount of *diyah* for that particular year according to the rate of silver[51]. For the year 2021-2022, *diyah* amount is fixed to be Rs. Rs.4,261,205/- (rupees four million two hundred sixty-one thousand, two hundred and five only)[52]

Silver is no longer a market indicator and the amount of *diyah* according to its rate defeats the very purpose of *diyah* that is to redress the financial loss of the family. Camels were adopted to evaluate the amount and those who wanted to pay through gold and silver, they had to pay according to the value of camels. At present, gold is the market indicator; it is a wealth and always will be. Therefore, gold should be adopted in Pakistan as *diyah* for accidental homicide. Thus, doctors or hospital administrations should pay according to the gold rate if a patient dies because of their mistake or negligence that will be sufficient for them for quite some time.

Another important matter regarding this issue is the time of payment. All jurists have unanimous opinion regarding the time of payment. It can be delayed for three years[53]. Every year one third of the *diyah* has to

[49]The Encyclopedia of Islam, s.v. "Dirham".

[50]Dr Mehmood Aḥmed Ghazi, *Mahazirat e fiqa* (Lahore: Al-Faisal Nashran, 2005), 421.

[51]http://www.finance.gov.pk/circulars.html.

[52]https://www.finance.gov.pk/circulars/circular_14072021.pdf.

[53]al-Kāsānī, *Badā'i' al-Sanā'i',* vol.7 , 256; Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 4, 196.

be paid.[54]

3.3 Who will pay the *diyah*?

Islamic law incurs the liability of payment of *diyah* on *'āqilah*[55]. This system wasn't initiated by Islam; rather it dated back to the pre-Islamic era. Islam regulated and refined this system. In pre-Islamic era *'āqilah* was defined as adult sturdy males who used to be responsible for safeguarding the entire tribe. There is a difference of opinion among jurists regarding the definition of this legal term. According to Ḥanafīs, those male, adult and free registered soldiers are *'āqilah* who are registered in same payroll (*dīwān*)[56].

الْعَقْلُ عَلَى أَهْلِ الدِّيوَانِ مِنْ الْعَاقِلَة.

(*Diyah* is upon the people of *dīwān* among *'āqilah)*[57]

They rely for their definition on the practice of 'Umer (may Allah be pleased with him). During the time of the Prophet (Peace be Upon Him), tribesmen used to pay the *diyah* but with the passage of time this tribal system did not remain intact as it was in the past. Many people moved to different cities and started living in areas other than their tribes.

فَلَمَّا كَانَ فِي زَمَنِ عُمَرَ - رَضِيَ اللَّهُ عَنْهُ - وَدَوَّنَ الدَّوَاوِينَ صَارَ التَّنَاصُرُ بَيْنَهُمْ بِالدِّيوَانِ فَكَانَ أَهْلُ دِيوَانٍ وَاحِدٍ يَنْصُرُ بَعْضُهُمْ بَعْضًا وَإِنْ كَانُوا مِنْ قَبَائِلَ شَتَّى فَجَعَلَ عُمَرُ الْعَاقِلَةَ أَهْلَ الدِّيوَانِ.

At that time, 'Umer (may Allah be pleased with him) had

[54]Ibn Qudāmah, *Al-Mughnī,* vol. 8, 376.
[55]Ibn Rushd, *Bidāyat* vol. 4, 209.
[56]Muḥammad ibn Aḥmed ibn 'Arafah al-Dusūqī, *Hāshiyat 'āla al-sharh al-Kabīr li- abī al-Barakāt sīdī Aḥmed al-Dardīr 'āla al-Khalīl*, vol. 4 (Dār al-Fikr), 282.
[57]al-Sarakhasī, *Al- Mabsūt,* Vol. 27, 125.

> launched the system of *dīwān*. All the names of soldiers working in one unit were registered in it for the purpose of administration. This unit has to pay the *diyyah* if anyone mistakenly killed anyone or caused injury. If no such unit is available for a person, then his tribesmen will be *'āqilah.*[58]

An opinion of Mālikī *fiqh* is similar to the notion of Ḥanafīs. It is narrated in some of the classical books on Mālikī *fiqh.*[59] According to this opinion,

أَنَّ الْعَاقِلَةَ عِدَّةُ أُمُورٍ الْعَصَبَةُ وَأَهْلُ الدِّيوَانِ وَالْمَوَالِي وَبَيْتُ الْمَال

> *'Āqilah* would be *'aṣabah* (agnatic male tribesmen), people of *dīwān*, *mawālī* (slaves) and then *bait al-māl.*

However, if the wrongdoer is from the people of *dīwān* and he is still getting stipend from *dīwān*, in this case his *dīwān* will pay the *diyah.*[60] It says:

لَكِنْ أَهْلُ الدِّيوَانِ مُقَدَّمُونَ عَلَى الْعَصَبَةِ إنْ كَانَ لَهُمْ جَوَامِكُ تُصْرَفُ لَهُم

According to an opinion of Mālik[61], Shāfi'ī and Ḥanbalī, Agnatic male tribesmen are *'āqilah* and thus liable to pay for *diyah.*[62] Imam Shāfi'ī did not accept *ahl al-dīwān* as *'āqilah* because at the time of the Prophet (peace be upon him), clans of offenders used to pay and this practice was not abrogated or extended by him.[63]

والعاقلة هم العصبات الذين يرثون بالنسب أو الولاء غير الأب والجد والابن وابن الابن

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[58]Ibid.

[59]Muḥammad ibn 'Abdullah al-Kharshī, *Sharḥ Mukhtasir Khalīl li- al-Kharshī*, vol. 8, 45.

[60] Ibid.

[61]An opinion of Mālikī *fiqh* negates the stance of *'āqilah* being *ahl al-dīwān* and stresses upon the original rule of *'āqilah* being *'aṣabah.*

[62]Ibn Qudāmah al-Maqdisī, *Al-Mughnī,* vol. 8, 390.

[63]Shīrāzī, *Al-Muhadhdhab*, vol. 3, 239.

Imam Sarakhsī responding to this objection, remarked that the decision of ‘Umer was made in front of the companion of the Prophet (Peace be Upon Him) and none objected or rejected his decree. Thus, this decision has the sanction of *ijmā‘*.[64]

With respect to the medical negligence claims and its payments, the option of *‘aṣabah* is not very practical. However, the example of *dīwān* can be followed. Associations of medical practitioners may mandate payment of premium in order to pay medical negligence claims. Likewise, the Pakistan Medical Commission can run such programs on the basis of *Ta’mīn*.

4. Conclusion

English Law has an excellent system of bifurcation of the loss and NHS has paid huge amounts to claimants to redress for medical malpractice but there are no criteria of quantification of the loss. Thus, there is no standard tariff to follow. On the other hand, *Sharī‘ah* doesn’t bifurcate the different kinds of losses, rather provide a lump sum amount for the loss. The system of damages in *Sharī‘ah* is very relevant in the matter of medical malpractice, *Sharī‘ah* explicates ample rulings for monetary compensation of wrongful death. Alongside, it covers bodily injuries too in adequate detail. This entire realm of *diyah* and *arsh* is almost a complete tariff for estimating the damages for medical malpractice. If mindfully incorporated in a country's law, not much is left for judges to brainstorm for the adequate compensation, thus preventing the entire topic of capping that is hot debate in many countries. Pakistan can formulate a law for medical malpractice by setting the tariff on the basis of *diyah* thus ending the huge disparity between the damages decreed by courts and will spare judges from the laborious task

[64]al-Sarakhasī, *Al- Mabsūt,* Vol. 27, 125-126.

of estimation of reasonable amount for damages. As the damages are huge, the system of *āqilah* can be employed and the entire institution can take part in compensating the loss in order to lessen the burden of the defendant. The example of *dīwān* can be followed. Associations of medical practitioners may mandate payment of premium in order to pay medical negligence claims. Likewise, PMC can run such programs based on *ta'mīn*.

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