Vicarious liability for the nosocomial infections

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Abstract

Undoubtedly, the nosocomial infections are considered as the most prominent problems in health centers of the world, and the healthcare personnel's lack of familiarity with infection control and infectious agents play the decisive roles in the rise of nosocomial infections. The nurses and legal entities can have the significant impact on the reduction of nosocomial infections through proper performance and the liability, respectively, and thus the more supervision and control. In the current era, shifting the criminal liability onto the other person rather than the material subject is not far-fetched, and this has affected most of the countries from England with its unwritten laws to France with its statutory laws. The existing research, entitled "the vicarious liability due to the nosocomial infections «first seeks to explain different theories for attributing the conduct and then the punishment of crime for legal and real people rather than the material subject of crime identified in Islamic Penal Code by descriptive-analytical method based on the library studies. On the other hand, this research offers the suggestions about the exposure to this type of indirect liability while facing the staff or nurses' negligence or fault due to the advancement of technology and new order and ways of new justice.

Keywords: Infection, negligence, liability, fault.
Introduction and History

The legal entities' dominance on various aspects of human social life particularly due to the growth of privatization in the late twentieth century is an undeniable fact. Due to the administrative and civil enforcements in curbing risky activities by legal entities, the legal systems such as England in the seventeenth century and recently Iran have recognized the difficulty of identifying the real individuals and their criminal responsibility by adoption of new penal code in 2013 based on the reasons such as the criminology fact, similar principles of civil and criminal liability acceptance in these individuals, hospitals take holders and members' more precision in choosing the managers. In the early years of the nineteenth century, the human tools were very simple and the people still used the dangerous tools for livestock and buildings. Since the nineteenth century, the use of machines was developed in various activities especially in the industry, and thus increased the frequency and severity of relevant accidents and damages including the physical damages. In the case that the machines caused the accident, it was very difficult proving the owner or operator's fault, and the damaged one was deprived from compensation. (Ranjbar, 2014) Due to the increasing emergence of private hospitals and the small and big boarding clinics and the more need of legal community to justice and then the compensation, the society used the modern theories of criminal law known the theory of error and risk. According to this theory and the topic of nosocomial infections which are often resulted from the authorities' negligence, we can provide a solution to reduce this type of damage and thus the compensation of this damaged person is well done due to this type of liability. Since a third of infections is preventable. According to the Centers for Disease Control and Prevention estimates (CDC), 2 million people are infected by nosocomial infections in the United States every year and result in 20,000 deaths (Ricks, 2007) In the United States, the Centers for Disease Control and Prevention (CDC) estimates approximately 1.7 million of nosocomial infections (from every types of bacteria) which cause or intensify 99000 deaths per year (Klevens, 2007). About 9000 people died by infection in France from 2004-2005 every year (Vasselle, 2006) The estimates suggest that the rate of infection was 6.7% in 450,000 to 700,000 patients in Italy since 2000 and it led to 4500 to 7000 deaths (Eric, 2007). According to a research in a Lombardy, it had the rate of 4.9% among patients in 2000 (Liziolia A, Privitera G, Alliata E, Antonietta Banfi EMBoselli L, Panceri ML, Perna MC, Porretta AD, Santini MG, Carreri V, 2000).

Statement of problem

The main questions of this research are as follows: What is the difference between the failure and guilt? What are the criteria for the attribution of crime to a legal person? How can we attribute the element of fault to this legal person? Can we attribute the material and mental elements of nurse's crime directly or indirectly to legal person or how can we indirectly and vicariously reach this goal? Is the legal individual's intention and criminal behavior necessarily attributed to its members' intention and criminal behavior? Can we achieve a structure of liability which seeks the criminal intention and behavior together with the legal person without just identifying the perpetrator? What is the penal system strategy for this issue? This research has the descriptive and library documentary method. Before investigating this issue, we provide the definitions of failure and vicarious liability.
Definitions

The liability means asking the questions and questioning and refers to the duty and task and what the humans are responsible for (Moin Dictionary, 2015). This meaning cannot solely explain various concepts of liability. To understand the true meaning of liability from different aspects, we should consider the commitment and obligation which is established by the authority as well as the task in performing or avoiding the action, the awareness and information about the task, and finally the ability to perform the task. According to the definition of criminal liability, it is a kind of personal obligation to respond to attacks on others either to support the personal rights or defend the society. In other words, the criminal liability means the individual commitment to respond for the personal and social results of crime. (Validi, 2009)

In civil affairs, the human is committed to compensate for loss or damage to other people. He is also liable for consequences of his criminal activities or omission of measures in criminal matters (Tavajjohi, 2005). Furthermore, the criminal liability means tolerating the punishment for criminal, but we cannot assume the responsibility just for the guilty one only for the commitment of crime, and he should be entitled to bear the burden before it. (Ranjbar, ibid)

Therefore, it can be concluded that criminal vicarious liability means the imposition of criminal behavior consequences on person on behalf of whom the material subject of crime has committed the crime. (Ranjbar, ibid)

Nosocomial infections

The nosocomial infection occurs when the patients is infected in the hospital. The nosocomial infections are the major causes of mortality and increased recovery time. The nosocomial Infections are created at least 48 to 72 hours after the patient admission to hospital and the patient should not have the obvious symptoms of infection and not be in incubation period during the admission. The accurate implementation of health protocols for clothing/sterilization/cleaning and other preventive measures like the medical personnel hand washing or using the alcohol to clean completely before and after contact with patient. (McBryde ES, Bradley LC, Whitby M, McElwain DL, 2004) More accurate use of antimicrobial agents such as antibiotics is also vital (Lautenbach, 2001).

As mentioned above, the nosocomial infections are usually created 48 hours after delivery of health care in therapeutic care units and during the hospitalization or after discharge (Smeltz M, Sosanna C, Bare G Brunner, 2004). These infections threaten not only the patients, but also the entire society. (Santana S, Rosemarie T, 2004) According to the studies, the nurses' negligence or faults are among the main causes of infection and sometimes these faults are created in line with the interests of hospitals by applying the low quality or non-sterile medical equipment, and this is among the most important problems of health centers around the world especially in developing countries. (Qayyum S, Sattar A, Waqas B, 2010) The nosocomial infections are generally caused by microbes which live in hospital environments and are grown and proliferated because of the favorable environmental conditions. This infection is created after the patient admission to the hospital, and usually 48 or 72 hours or over a certain period of 10 to 30 days after patient discharge and it has not existed during the
patient admission. If an external object is put inside the patient body by surgery, the nosocomial infections can occur up to a year later and infect the staff and visitors in addition to patients.

The nosocomial infections and their microbes can be transferred to patients by different methods. The injection by contaminated syringe or serum is among the ways which can transfer the germs to patients, and thus create the infection in other patients. Furthermore, improving the health and safety principles in surgical rooms and during the surgery provide the situations for growth of microbes and their transmission to patients.

The ambient air and use of shared equipment such as the water and food are also involved in the transmission of microbes. Other ways of transmitting the germs occur through direct contact with hospital personnel. The transmission of nosocomial microbes and infections by the hands is the most common way.

In this chapter, we outline the factors such as the negligence, recklessness, lack of skill and lack of government regulation of criminal liability by legal person. There is a major difference between the recklessness and negligence and this difference is due to the type of action. Therefore, the omission of action occurs in negligence, but the recklessness occurs by positive action, for instance, it is scientifically and technologically expected that the sterile head will sterile the required surgery equipment, but this expectation is not met. The lack of supplied necessary measures such as the tests and X-rays, and the lack of proper consultation and obtaining the patient background and physical examination before surgery, or lack of heart examination, and failure to record the Electrocardiogram before anesthesia are all among the negligence. Therefore, it can be argued that a measure should be done, but it is not performed and this shows the negligence which indicates a negative aspect. However, there is a positive aspect in recklessness; in other words, an action is done and it should not be scientifically and medically performed. Therefore, the physician or nurse has not paid sufficient attention to treatment and hospital duration, and made mistakes or excesses which have resulted in patient's infection. Sometimes leaving the surgical instruments or dressing inside the body, any improper manipulation of organs next to the operation organ, and more than the necessary medication may cause the infection.

The lack of skills includes the lack of technical and scientific expertise in physician or nurse to do a particular task such as the lack of timely decision making, lack of speed for surgery and avoiding the predictable complications. A physician and nurse skill refers to his/her ability to perform the task which undertakes; and his inability depends on the lack of skill to conduct the medical or surgical measures. The lack of skill may be practical and due to the inexperience, or has a scientific kind and due to the illiteracy and lack of sufficient utilization of knowledge and it cannot be an excuse for not taking the responsibility and failure. However, a member of medical staff is not expected to be aware of every minute of scientific and technical information; however, she/he should have the reasonable and appropriate information about the important advances of treatment. The experts are the criteria for determining this reasonable understanding in the relevant specialized field in the country.
Liability for prevention of nosocomial infections

The enough knowledge about direct and indirect methods of transmitting the infectious agents is one of the essential factors in providing the daily care for patients. The knowledge enables the nurses to play the important roles in prevention, surveillance and treatment of infectious diseases and limitation of transmitted infectious diseases (Bergogne, 2005). This correct decision is an essential part of nurses’ professional practices and leads to the identification of professional identity. This decision making is above all associated with the nurses’ knowledge and work skills and experience, but unfortunately the research results suggest that most of the nurses have insufficient knowledge in this field. (Taheri and Jokar, 2007) Therefore, continuous training and education seem essential for increasing the nurses ‘awareness and reducing the nosocomial infections. (White, 2003) The education can be considered as the hospital management and task; hence, can we transfer the liability of this act on the hospital? There are numerous scientific and legal theories based on which several judicial cases are in line with compensation and shifting the liability for another legal person.

Strict liability

All theories of guilt have consensus on the need to find the fault by the courts in legal circles. However, if the vicarious criminal liability is based on the strict liability theories, it is enough to find the commission of criminal behavior for realizing the liability regardless of the guilty one's fault. The strict liability is utilized for risky activities in some countries and it has vast risks, so that the parties involved in these activities commit not to neglect the damages and losses resulting from these activities. In some countries, the strict liability is the basis like the liability arising from the product. Furthermore, it should force the manufacturers to follow the safest possible plan and proper training in which they are skillful. In the hospital environment, we can seriously pursue this type of liability. There are different theories about shifting the fault on the superior. This fault is possible in three ways if it is assumed to be shifted based on the fault.

1. The superior may normally have not taken any measure to prevent crime by the material subject.
2. He may have not taken any measure to prevent crime despite the likelihood of crime.
3. He may indirectly create the preparations of crime. (Ranjbar, ibid)

According to a little attention to these three cases, we find that the superior either legal or real is guilty in all cases, and this fault is more tangible based on the following theories.

New theories on the liability based on the fault

There are numerous theories about finding the responsible superior or legal person such as the theories of acceptance, non-interference, equality, voluntary passivity, succession, and preceded fault. According to the acceptance theory, any person, who takes the responsibility for a work to someone else, accepts himself the consequences of his criminal behavior and this acceptance guarantees the superior person for violating the rules and regulations governing the society. According to this theory, if the superior nurse has not sterilized the surgical supplies and caused the patient death as a result of infection, she is responsible for this fault. According to the theory of superior's non-interference in subordinate, the crime committed by the material subject is due to the superior's non-interference. Perhaps the
superior's intervention can prevent the crime by influence on the superiors and subordinates. This crime shows implies the superiors ‘failure in management. In other words, the failure in management by committing the wrong action in planning or executing actually or potentially causes a crime.

According to the equality theory, the subordinates' actions and behavior is along with the superiors' actions and behavior. In other words, if the physicians and nurses are imagined as the person's hands, the hospital management is as his brain and boss. Therefore, this theory is also called the theory of brains. According to the voluntary passivity theory, as implied by its name, the superior does not take efforts to prevent the crime and he is neutral against the subordinates 'criminal behavior. This voluntary passivity leads to the subordinates ‘refusal and thus repeated crime by them. The failure to report a crime by the superior and no legal action for him are due to the tacit consent for committing the crime and even encouraging the subordinate to recommit the crime. Finally, it should be concluded that the theory of preceded fault is based on the employer’s attention to choose the worker. According to this theory, the criminal behavior, which is done by a physician or nurse, is assigned to hospital management because he had to be careful in selecting and employing him.

**New theory on the strict liability**

One of the most important criminal liabilities is based on the non-fault of risk-based vicarious criminal liability which should be considered on the basis under which the individuals and institutions that have provided an environment prone to commitment of a crime are entitled to vicarious liability for material subjects of that criminal behavior because the work is the primary cause of incident and two groups benefit from the performed work: the worker and employer (Joharian, 2014). Therefore, the employer should participate to compensate the loss and take this responsibility. It should be noted that according to the fairness, the one, who benefits from the criminal act by his worker, should accept the consequences of its loss. According to Brodie Douglas, everyone, who benefits from the risk for the acquisition, should compensate the loss of that risk according to the fairness. (Brodie, 2010)

**Article 142 of the new Penal Code of Iran and vicarious criminal liability**

We should investigate the Article 141 in order to analyze the Article 142 of Islamic Penal Code in order to understand this article which explicitly identifies the vicarious criminal liability. According to Article 141, the criminal liability is personal; and according to Article 142, the criminal liability due to another person's behavior is proved only if a person is legally responsible for the actions by another person or he is responsible for the fault due to the another person's action.

According to the vicarious criminal liability in the Article 141, the personal criminal liability implies that the vicarious criminal liability is an exception to the personal criminal liability. The above argument confirms it if only the vicarious criminal liability is not accepted as a general rule (Ranjbar, ibid). Obviously, it can be understood that this article has two parts: According to the first part, if a person is legally responsible for the other person's fault, this is based on the absolute liability and the existence or lack of fault does not affect it. According to the second part, according to which he is responsible for another person's fault, it is based on the fault liability; then we can conclude that the legislator has utilized a combination of

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error and risk in this article. Therefore, a physician, who is responsible for the whole medical staff, has the strict liability, and the hospital management may increase the duration of hospitalization to make the benefit, and thus the patient will get the nosocomial infections; here the topic of fault is raised.

**Conclusion**

According to the legal article, we should note that if a person is legally responsible for the other person's action, we should consider the law or consider the legislator as the superior to subordinate. Is seems that if we obey the first view, we will reduce the inclusion domain of vicarious criminal liability and this is insufficient for preventing the neglect and lack of proper supervision by management and physician who is responsible for medical staff. Therefore, according to the second interpretation, we can consider the superior as the person responsible for subordinate's behavior as mentioned above because the more and better supervision and safety will be created by this way as this liability was identified by rulers without mentioning in any law in France. According to the legal article, if the crime, committed by the material subject, is ordered by the superior, then the superior is liable for vicarious punishment, but if there is not any order, but the superior has made the fault, he has the vicarious liability according to the second part of article. In general, we should consider a combination of error and risk for identifying the hospital managers and real person's liabilities in order to implement this main measure in current society even though the criminal vicarious liability is now an exemption, and the crime, for which the vicarious punishment should be considered, have to be within the organization of in line with it.
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