

The Need for Prediction of Detriment in Iranian Civil Liability Law by looking at the Rule of Thin Skull

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ABSTRACT

Civil liability is one of the most important branches of private law, and it determines the cases in which one person must adequately compensate the other person. To create liability, it is necessary to have certain elements. The most important elements of civil liability are detriment, tortuous act and establishing a causal relationship between the two. There are different views on the need to predict detriment to create civil liability. The rule of thin skull in common law argues that not all detriments are necessary to create civil liability and that all detriments must be compensated. In Iranian law, which derives from Islamic law, it can be concluded that the predictability or non-predictability of a detriment in civil liability does not change using rule of prohibition of detriment and citation capability, and only the possibility of predicting a detriment due to a tortuous act in behavior of a normal human being is enough to make the perpetrator responsible for compensation.

Keywords: Civil liability, Detriment, Thin Skull, Predictability, Tortuous Act.

Introduction

1. The Concept of Civil Liability

The constructive liability is the obligation to compensate for detriments incurred without a contractual relationship and the litigants did not have a relationship before creating detriment (Tunc, 1981: 32). Liability means compensation for detriment to another. This rule has existed from the past until now, whoever harms another must compensate it, except in cases where the detriments is other than by law, or if the detriment done to a person does not appear to be improper and unusual, civil liability causes the creation of religion and the injured party can ask the court to return him to a state before committing the crime at the expense of the responsible person (Katoozian, 2010: 15). Non-contractual liability arises in cases where a person violates legal and public obligations and as a result harms another. Based on respect for the dignity of individuals, any kind of attack on the physical integrity, spiritual dignity, property and reputation of individuals is prohibited, and in principle, any kind of detriment, both material and spiritual, will be guaranteed (Hooshmand Firoozabadi, 2020: 275). Civil liability has many purposes and functions; Compensation for the victim and his consolation, punishment of the wrongdoer and preventing him and others from committing the tortuous act again, creating peace and stability and establishing justice in society are among them, but the most important purpose of civil liability is compensation. Compensation should put the victim in a situation where he would have been in a situation if the tortuous act did not occur (Nematollahi, 2020: 32) According to some jurists, compensation is the only justifiable goal of this branch of private law, as it seeks to balance and compensate for the lost position at the expense of the

responsible party. This function in civil liability law is generally provided by the principle of compensation, and its purpose is to pay detriments equivalent to the detriment and ultimately to compensate the injured party (Badini, 2004: 55; Katozian, 2016: 32; caggiano, 2016: 1)

2. Principles of Civil Liability

Several theories have been proposed as the basis for liability. The most important theories are fault theory, risk theory and right guarantee theory. Now, the theory of fault as an old theory forms the main basis of civil liability in Iranian law and two other theories are used in different parts of the law.

3. Theory of Fault

The oldest theory to be found in European law on the basis of civil liability is the theory of fault. Based on the theory that the detriment is emphasized by the individual, in order for the injured party to be able to claim detriments from someone, he must prove that the fault caused by the detriment. According to the theory of fault, the existence of a causal relationship between fault and detriment is necessary. In this system, the principle is the lack of fault and it is the liability of the victim. According to the theory of fault, in cases where the perpetrator has not committed a fault or his fault has not been proven, he will be exempt from compensation, although this is considered completely spiritual and fair by the proponents of this theory. However, by reducing the scope of civil liability, it restricts the principle of compensation, and this is the most important objection to this theory (Saadat Mostafavi, 2017: 169). Proponents of the fault theory in order to answer the question of what is the basis of liability for the cause of detriment and why he is required to compensate the detriments. They have tried to wear a moral cloak on the status of civil liability and bring rights as close as possible to morality (Hekmatnia, 2007: 62). In the theory of fault, fault is the basic element of liability and the existence of a causal relationship between detriments and fault is necessary. The opposite concept of this theory is that one who does not cause detriment intentionally and fault is not obliged to compensate because it is not fair for a person who has not committed a fault, but his legitimate actions have caused detriment to another to hold responsible. This theory, which dates back to the 13th century AD, became popular in Europe in the 18th century, and Articles 3831 and 1383 of the French Civil Code were developed based on it (Ior rasa, 1996: 41).

In the theory of fault, the claimant must prove the fault of the cause of the detriment in the event of detriment because the principle is that there is no fault and if the injured party can not prove the fault of the cause of the detriment, he is exempt from liability and the detriment remains unrepaired. For this reason, many perpetrators of detriments are released from liability and the detriment resulting from the act or omission of his act is imposed on the injured party (Hekmatnia, 2007: 62)

4. Theory of Risk

According to this theory, fault is excluded from the category of creating liability and merely causing detriment is enough for liability. Proponents of this theory, in response to the question why and what is the main cause of the detriment is required to compensate the detriment done to others, because the requirement of justice and fairness is that everyone takes the risks and tortuous effects of their actions and is not fair to bear the detriments caused by the action of others. The theory of risk emerged from the late 19th century at the same time as the Industrial Revolution. According to the theory of risk, the criterion of liability is the causal relationship that exists between the activity of one person and the detriment to another. In this system, anyone who harms another by their actions is held responsible, regardless of whether their behavior was legitimate or not, in other words, everyone is responsible for compensating for the risk of their actions. The liability of individuals for detriment to objects under their protection is also the result of this theory (Benabent, 1991: 392).

5. Theory of Guarantee of Right

The founder of this theory is Boris Stark. He believes that everyone has the right to live in a healthy and secure society and to use their property, and that everyone has a duty to respect these rights. The law also protects these rights, and the guarantee of this protection is that if a right is lost, it must be compensated

by the perpetrator. According to this theory, it is the inalienable right of human beings to live in a healthy and secure society. This right is the law of protection and guarantee of its implementation, which it is known as civil liability. According to this theory, some rights do not have a guarantee of implementation, that is, if someone is harmed during their implementation, the owner does not have the right to guarantee, such as the right to trade competition and the right to strike workers. Civil liability in the implementation of such rights according to this theory occurs if the right owner is at fault in the implementation of them, but there are other rights that detriment to them is not permissible even under the pretext of exercising their right, including the right to life, the right to physical integrity and the right to property. These rights are guaranteed by the legislature against the activities of others, and fault does not play a role in liability for damaging these rights. According to some professors, the theory of guarantee of right implies accepting liability without fault in physical and material losses and liability based on fault in purely economic detriments and spiritual detriments (Bahrami Ahmadi, 2012: 124).

6. Elements of Civil Liability in Iranian Law

In order for a person to be recognized as responsible, it is necessary to have all the necessary elements of civil liability. Civil liability generally has three elements: 1- Detriment, 2- Tortuous act and 3- Causation relationship

1. Detriment: Wherever there is a defect in the property or a certain benefit is lost or the health and dignity of a person is harmed, the title of detriment is used. Today, in various legal texts, non-profit is also included in the number of detriments. Therefore, it can be said that there are two types of detriments: material and spiritual. The mean of material detriment is that the property or the obvious benefit is incomplete or lost. Spiritual detriment is detriment to a person's reputation or emotions. It is also possible to harm human physical health, which has both material and spiritual aspects.

2. Tortuous act: In the field of non-contractual obligations, the legislator has enacted regulations to regulate social relations and has obliged everyone not to cause detriment to others while exercising caution. The legislature has not listed tortuous acts. Article 1 of the Civil Liability Law states: Anyone who intentionally or unintentionally detriments the life or health or liberty or business reputation or any other right created for individuals under the law, which causes other material or spiritual detriment, without legal permission, shall be liable for detriments. The criterion for determining the tortuous of an action is the judgment of custom and the rational behavior of society, and tortuous behaviors can not be enumerated.

3. The causal relationship between detriment and tortuous action: To distinguish the causal relationship, several theories have been proposed, including the theory of causal precedence in effect, the theory of near cause, the theory of equality of causes and the theory of conventional cause. Each of these theories has been used in law in proportion to the subject, but in civil liability theory the normal cause theory has been considered as the basis and general rule. According to this theory, the person responsible for compensation is the same cause that, according to the custom of the society, the detriment is attributed to him, even though it is considered to be the most distant cause among the causes of a fault.

In order to create civil liability, the existence of the three mentioned elements as fixed elements is necessary, and in the absence of any of them, civil liability will be eliminated. Now the question arises if the perpetrator of the tortuous act acts on the present while the consequence was not predictable or the effects of the action due to special circumstances are more than what could have been predicted, can the subject be responsible for the predictive effects? In answer to this question, it should be said that in common law, the rule of thin skull is used to conclude that predictability will not have an effect on the final liability. In Islamic law, two rules of prohibition of detriment and the rule of attributability can be raised to answer this question. First, the concept of predictability of detriments must be clarified.

7. Predictability of Detriment

In order to compensate for the unjust detriment, it is necessary to obtain restrictions, which are:

1- The detriment is certain, 2- the detriment is direct, 3- the detriment is not compensated and, 4- the detriment is predictable. In some cases, common law does not accept the condition that the detriment is

predictable, and even in cases where the detriment is not predictable, it orders compensation for detriments. In Iranian law, unpredicted detriment is excluded from the realm of liability if, in the view of custom, it is unexpected and related to a sudden incident, and it is not enough for the defendant to consider it unlikely due to laziness or lack of awareness. In other words, the clean criterion of unpredicted detriment is conscious and normal human judgment in the circumstances in which the incident occurred (Katozian, 2016: 121) The importance of predicting the cause of detriment is due to the effect that in the realization of the fault and customary appointment of detriment is related to the tortuous act and is not related to the nature of the detriment In this respect, there is no significant difference between constructive and contractual liability. It should be said that the ability to predict the amount of detriment and its importance in the realm of the perpetrator guarantee does not have an effect, but the detriments can be compensated to the extent that it is not intentionally created. If there is an intentional fault, detriments outside the predictable range will also be claimed. In Iranian law, if the injured party is to blame, it is not necessary to compensate the person who caused the damage. Islamic jurists have cited the predictability of detriment in defining its causes and instances and sometimes in loss. As they have not accepted the realization of the cause and liability without it, because the attribution of detriment due to the cause is possible when he is guilty and the custom considers the person whose tortuous occurrence is not normally expected to be innocent and not responsible (Ghasemzadeh, 2009: 85). There is no place for predictable detriment in bodily harm. Article 5 of the Iranian Civil Liability Law states that if a person is found to have a defect in his body or health as a result of an injury to his body or health, the injured workforce is reduced or destroyed, or increase his living expenses, the perpetrator of the detriment is responsible for compensating all the mentioned detriments. If it is not possible to determine the consequences of bodily injuries definitively at the time of issuing the verdict, the court will have the right to appeal the verdict for two years from the date of issuing the verdict. It is also stated in Article 6 of this law that in case of an injured death, the detriment includes all costs, especially the cost of burial. If the death is not immediate, the cost of treatment and the detriment of the ability to work during the illness will also be considered as a detriment. According to these articles, the unpredicted consequences of tortuous acts must also be compensated (Fahimi, 2005: 55).

Some jurists believe that the ability to predict detriments is not necessary to hold a person liable, as there is no provision in the Civil Code and Civil Liability for a compulsory guarantee, but there are laws that provide otherwise. For example, Article 1216 of the Civil Code of Iran in the general regulations has entrusted the consequences of minor, insane and tortuous acts to them, while these groups can not predict the outcome of their tortuous behavior (Bigdeli 2014: 142).

8. Rule of Thin Skull

The rule of thin skull refers to certain fragile conditions, the presence of which in the injured person causes him to suffer more serious injuries, while ordinary people, that is, those who do not have those conditions, either do not receive such injuries as a result of the act or experience it less severely (Harpwood, 2006: 155). Thus, the special feature of lawsuits is the subject of the rule of thin skull, special fragility and abnormally vulnerable detriment, which leads to severe and unpredictable detriment as a result of the tortuous act (Gary and Graham, 1982: 410).

In common law, in cases where the tortuous act due to fragility and vulnerability, leads to unpredictable detriment. The rule of thin skulls or eggshells is used to justify liability for all injuries. This rule was first used in the 1901 world lawsuit against White and his sons. It is basically limited to bodily injury claims. Although the term thin skull is used in this case for the first time, most of the authors believe that the subject of this case is different from the cases of thin skull rule. The rule of thin skull can be invoked in cases where the injury was caused by the fragility and vulnerability of the object (Gary and Graham, 1982: 413). This rule has also been applied in American jurisprudence. The case of *Vosburg v. Putney* illustrates this well in 1891. The summary of this case is that 12-year-old Putney kicks 14-year-old Vosburg while playing at school, which aggravates his previous foot injury, the injured foot was injured 1 month ago and underwent surgery. Although Putney was unaware of Vosburg's previous foot injury, he was responsible for all damages. The court held that the offender was liable for all direct damages

resulting from the fault, and it did not matter whether the damages were predictable or not (Calandrillo, 2006: 6).

9. Rule of Prohibition of Detriment

To fulfill and apply the rule of prohibition of detriment; the elements must be realized. These elements are the realization of the detriment and the citation of the detriment to the sentence or action. In the first stage, the existence of an actual detriment must be proved. The rule of prohibition of detriment has been used by Shiite jurists in the past as a rule and basis for denying harmful rulings and the sanctity of tortuous acts. Detriment means loss of property or loss of an inalienable benefit or damage to the health and dignity of individuals. Proof of the detriment to the injured party, as well as the commission of the fault or the current occurrence by the defendant or those responsible for their actions, does not justify the claim for detriments alone, but it must be established that there is a causal relationship between the two factors of detriment and the tortuous act. Predicting detriment individually from the perpetrator or in some form is sufficient to establish liability. Accepting the personality of the prediction criterion does not mean that if the perpetrator of the detriment can not predict the detriment, he will be exempt from liability. What matters is the predictability of detriment, not its extent and importance. Therefore, if the principle of detriment is predictable, and as a result of a minor fault of the perpetrator, a heavy detriment is incurred, he can not use the expecting the amount of detriment as his excuse and request an exemption from compensation, because the predictability of the detriment is customarily enough, even in part, to realize the fault and attribute the detriment to the tortuous act. The amount of detriment does not interfere in it. In addition, the damaged person prediction does not interfere in the realization of liability, because it uses the above-mentioned rules and expressions of its legal provisions, which can be predicted to be a description or restriction for a tortuous act. Therefore, in Iranian law, it is not possible to add a condition to the legal provisions and add the ability to predict the detriment to other conditions (Ghasemzadeh, 2009: 88).

10. Rule of Attributability

Attributability means the attribution of the detriment to the perpetrator, which means that whenever a detriment occurs, the liability for compensation lies with the person whose action is documented. According to this theory, everyone is responsible for compensating the detriments that can be attributed to him and it does not matter if this detriment is the result of violation of contractual obligations or legal obligations, as a result of fault or legitimate action, illegitimacy of tortuous action is not a condition for fulfilling liability. And every act, although legitimate, creates liability provided that it causes unlawful detriment, therefore, this theory also justifies the liabilities without fault and does not consider them as an exception to the general rules of liability. This theory can justify all the jurisprudential rules of law regarding civil liability such as loss and causation, prohibition of detriment and arrogance, because in the mentioned rules, the causal relationship is always considered by the legislator, and even in the rules that invalidate the guarantee, such as the force majeure power is the reason for the failure to guarantee the termination of the relationship or attributability (Ansari, 2011: 19)

The theory of attributability in terms of compliance with justice and the philosophy of civil liability, the ability to respond to social needs and necessities, emphasizing the principle of compensation, facilitating liability claims and removing the distinction between contractual and non-contractual liability. This theory can be used as the sole basis of civil liability in a legal system.

Conclusion

According to what was stated in this study, it can be said that the theory of fault as the oldest basis in civil liability is still the main rule in the field of civil liability law in Iran. Despite the position of the theory of fault in civil liability, it should be known that civil liability, whether based on the theory of fault or theories of risk and guarantee of right, in any case this liability is rooted in the rules of social and civil ethics. Ethics limits the ranges of this liability to the expected and predictable consequences of normal human actions. The rule of predictability of detriment in both Western and Iranian law and Islamic law

states that in order to have civil liability, the loser must be aware of the detriment being of his act, as if a normal human were in his place, could have predicted such detriment. According to this definition, it is clear that the ability to predict detriment is not an absolute concept but is limited to the range of normal actions and relationships in society because all people are expected to behave normally in society otherwise they are responsible. Although examining rules such as the thin skull in the common law may create the illusion that even unpredictable detriments can be claimed under this legal system, but on the contrary, it should be said that what is the criterion in predictability, is the predicting detriment being of the first tortuous act that occurs and not its subsequent consequences. The rule of attributability in Islamic law is also in line with this view, and based on it, as soon as a person commits an act that could be predicted to be detriment and the detriment is attributed to it, liability will be created. As a result, it should be said that in addition to the fixed elements of civil liability, which is detriment, tortuous act and causal relationship between detriment and tortuous act, another element should be considered that can predict the tortuous being of the act from the perspective of a normal human being. In this case, if from the point of view of the common and rational sense of society, an act does not normally cause detriment but accidentally causes detriment, it will not create liability for the person.

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