

The Civil Liability of the Engineer's Representative from Professional Negligence in the Iraqi Law

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Abstract

The Iraqi civil law No. (40) of 1951 regulates the civil liability and sub-categorized it into two sub-branches: the contractual liability and the tortious non-contractual liability arising from wrongful or illegal act. It also regulates the civil liability of both the architect and the contractor, but it does not contain particular rules regulating the civil liability of the engineer's representative, or the so-called the resident engineer. despite the significant role he or she plays in supervising the civil engineering works. Therefore, we will make an effort in this research to shed light on tortious non-contractual liability of the engineer's representative arising from professional negligence. It is to be noted that the problem of this piece of research lies in the idea that the Iraqi civil legislator has not regulated the civil liability of the engineer's representative in particular, in spite of being important. Because his or her duties, authorities and powers can be changed from time to time by written notification and delegation from the engineer, besides the intervention between the engineer's representative's duties, authorities and powers with those of the original engineer, in conformity with the clauses of the general conditions for contract of civil engineering works of 1987 still in force. It is worth-bearing in mind that this research has followed the descriptive analytical methodology of scientific legal research. After discussing the topic, the study suggests some relevant recommendations to the Iraqi legislator, the most important of which is the suggestion of a legal regulation of the joint liability of both of the engineer and his or her representative.

Keywords: engineer's representative, civil liability, professional negligence, non-contractual liability, resident engineer, illegal act.

Introduction

The introduction includes the following points:

First: The Introductory Preface to the Topic: The Iraqi civil law No. (40) of 1951 regulates the general rules of the civil liability in general, as well as the civil liability of both the architect and the contractor in particular. But it does not regulate the civil liability of the engineer's representative arising from the professional negligence in particular, in spite of being important. Because his or her duties, authorities and powers can be changed from time to time by written notification and delegation from the engineer in conformity with the clauses of the general conditions for contract of civil engineering works of 1987 still in force.

Second: The importance of the research: The importance of this research is represented by the particularity of the civil liability of the engineer's representative arising from professional negligence, due to ever-changing duties, authorities and powers to be delegated to him or her by the main engineer, from time to time by written notification and delegation.

Third: The aim of the research: The aim of this research is to concentrate on the civil non-contractual (tort) liability of the engineer's representative, because of the intervention between his or her duties, authorities and powers with those of the original engineer .

Fourth: The problem and questions of the research: The problem which this research tries to solve is that the Iraqi civil law regulated the general rules of the civil liability in general, as well as the civil liability of both the architect and the contractor in particular. But it did not regulate the civil liability of the engineer's representative arising from the professional negligence in particular, despite its importance. And the research asks some questions to be answered: can the general rules of the tortious non-contractual liability of the Iraqi civil law be applied on the liability arising

from the professional negligence of the engineer's representative?. And what are its basic elements in the legal qualification in accordance with the general rules of the Iraqi civil law?.

Fifth: The methodology of the research: This research has followed the descriptive analytical method of scientific legal research, by studying the basic elements of the civil liability arising from the professional negligence of the engineer's representative. Besides the exoneration and immunity from this liability in the Iraqi law.

Sixth: The structure of the research: This research has been divided into three sections. The first section discusses the definition of the civil liability arising from professional negligence of the engineer's representative in the Iraqi civil law, whereas the second section is concerned with the basic elements of the civil liability arising from the professional negligence of the engineer's representative in the Iraqi civil law. And the third one is related to the proof of the engineer representative's civil liability arising from professional negligence and the exoneration and immunity from this liability in the Iraqi civil law, and as follows:

First Section

The definition of the civil liability arising from professional negligence of the engineer's representative in the Iraqi civil law

To begin with, the Iraqi civil law regulated the general rules of the civil liability in general, as well as the civil liability of both the architect and the contractor in particular. But it did not regulate the liability of the engineer's representative arising from the professional negligence. Therefore, in order to get acquainted with the concept of civil liability arising from negligence of the engineer's representative, we should define or give the definitions of the following legal terms closely related to the topic of this research according to the Iraqi law: The civil liability, the contractual liability, the tortious non-contractual liability, the negligence. In addition to both the engineer and the engineer's representative. One of the jurists⁽¹⁾ of the Iraqi civil law defines the civil liability in general as the sanction of the breach of the obligation arising from the contract, or arising from the act causing an injury to the third party. Other jurists⁽²⁾ define the contractual liability as the sanction of the breach of a contractual obligation, which is different according to various obligations included in the contract. Whereas the tortious non-contractual liability from illegal or wrongful act is defined⁽³⁾ as the sanction of the breach of one unchangeable legal obligation arising from illegal act, and known as the obligation not inflict damage on the third party. The negligence is defined⁽⁴⁾ as a negative conduct represented by not taking the duty of care and caution imposed on someone. The careful and cautious person is that who conducts carefully and cautiously, in order not to inflict damage or injury on the interests and rights of the third party. And the degree of negligence is determined in accordance with the magnitude of attention and care. It is also defined⁽⁵⁾ as a negative situation represented by leaving a duty imposed on everyone in the same circumstances, and expressing the forbearance from taking the care and caution to preclude the occurrence of the harmful or injurious consequences. It is also worth-bearing in mind that the general conditions for contract of civil engineering works of 1987 defines⁽⁶⁾ the "Engineer" as the person or persons, firm or company named in part II of the conditions of contract or appointed from time to time by the employer, and notified in writing to the contractor to assume the authorities of the engineer set forth in the contract. It also defines⁽⁷⁾ the engineer's representative as any resident engineer or assistant of the engineer appointed from time to time

(1) Abdul Majeed Al Hakim. The concise of the explanation of the general theory of obligations. Part one, sources of Obligations. a comparison with Islamic Jurisprudence. Baghdad. 1963, P.401.

(2) Dr. Adnan Ibrahim Al-Sarhan and Dr. Noori Hamad Khatter. The Explanation of the Civil Law, Sources of Legal Rights A Comparative Study. First Edition . Dar Al-Thaqafa for publishing and distributing. Amman Jordan. 2009. p.301.

(3) Abdul Razaq Al Sanhoury. The Medium Commentary on the elucidation of the New Civil Code (Al Wasit in the Explanation of New Civil Law). part One. The theory of obligations in general. Sources of obligations. Contract-illegal act-Unjust enrichment-law. Al-Ma'arif Publishing house. Alexandria.2004. p.618.

(4) Dr. Ma'amoon Muhammad salamah. Penal Law, the General Part. Third Edition. Arab Renaissance Publishing House Cairo. 2001. P.334.

(5) Dr. Maher Abd shuwayyish. The Explanation of the Penal Law, The Private Part. Second Edition. The Books and documents Publishing House Baghdad. 1997. P.401.

(6) Clause (1.1.4) of the general conditions for contract of civil engineering works of 1987. P.15.

(7) Clause (1.1.5) of the general conditions for contract of civil engineering works of 1987. P.15.

by the employer or the engineer to perform the duties set forth in the contract and whose authorities shall be notified in writing to the contractor by the engineer.

Second Section

The basic elements of the civil liability arising from the professional negligence of the engineer's representative

It is worth-bearing in mind that two types of the civil liability may arise from the professional negligence of the engineer's representative, in conformity with the provisions of the Iraqi civil law. that is to say, the civil liability arising from personal acts, which will be the topic of our research, as well as the vicarious liability⁽¹⁾, because the engineer's representative or the resident engineer is not independent in taking decisions about the implementation of civil engineering works, but he or she is subordinated to the authority of the main engineer, who can confirm, reverse or vary such decision, in accordance with the clause (2.3.2) of the general conditions for contract of civil engineering works, which provides that (If the contractor shall be dissatisfied by reason of any decision of the engineer's representative, he shall be entitled to refer the matter to the engineer who shall thereupon confirm reverse or vary such decision). Therefore we will focus on the civil liability of the engineer's representative arising from personal acts based on three basic elements.

This means that the Iraqi civil law requires three basic elements for the civil liability arising from personal illegal act or wrongful act in general, that is to say, the trespass or transgression, the damage or injury suffered by the injured party and the causal link between them. As it is the case with most other laws which also require three basic elements for the civil liability arising from negligence⁽²⁾. The tortious liability or the liability arising from illegal or wrongful act is considered as one of the sources of obligations in the Iraqi civil law as well as other four sources, that is to say, the contract, unilateral will, the unjust enrichment and the law⁽³⁾.

Therefore we discuss the basic elements for the civil liability regulated by the Iraqi civil law in the following three sub-sections as follows:

First Topic

The trespass or transgression committed by the negligence of the engineer's representative

In order for us to explain the basic element of the trespass or transgression in general, and that trespass which is committed by the negligence of the engineer's representative in particular, according to the provisions of the Iraqi civil law. We should legally analyze the nature of the duty of reasonable care within the extent of the tortious liability arising from the wrongful or illegal act, before elucidating the basic element of the trespass or transgression.

First of all, it is to be noted that the Iraqi civil law No. (40) of 1951 is affected by the Islamic jurisprudence, particularly, the Mejlle of juristic rules of 1869, which is considered as a European-style Ottoman codification of Islamic law of the hanafite school⁽⁴⁾, from which it borrows most of its rules. As well as being affected by the Egyptian civil law No.131 of 1948. The duty of reasonable care in itself is qualified, in the Iraqi civil law, as an obligation of conduct (Obligation to exercise a care), in the field of tortious liability, but not an obligation of result. And is not considered as an independent basic element of the civil liability arising from the illegal act. But only a legal obligation not to harm others, and emanates from perception and discrimination. It is to be noted that the source of this obligation is the law itself, as opposite to the obligations arising from the contract, and the breach of which may lead to the contractual liability. Some of the Iraqi

(1) The Iraqi civil law regulates the vicarious liability according to the article (219) which provides that (1-Government, municipalities and other institutions which perform a public service as well as every person who exploits an industrial or commercial enterprise are responsible for the damage (injury) caused by their employees if the injury resulted from an encroachment committed by them in the course of their service. 2-The employer will be able to relieve himself of the responsibility if he establishes that he had exercised the necessary care to prevent the injury or that the injury would have happened had he exercised the necessary care (caution)) .

(2) Abdul salam Al-Tirmanini. *The Comparative Law, The major legal curricula*. Kuwait University Publishing. Second Edition. 1982, p.225.

(3) Abdul Majeed Al Hakim. *The Medium Commentary on the theory of contract, with the comparison and balancing between the theories of the western jurisprudence and their equivalent theories in the Islamic Jurisprudence and the Iraqi civil law*. Part one. Conclusion of the contract. Al-Ahliyyah company for printing and publishing. Baghdad. 1967. P.56.

(4) Dan E. Stigall. *Iraqi Civil Law: Its Sources, Substance, and Sundering*. *Journal of Transnational Law & Policy*. Volume 16. Number 1.2006. P.7.

jurists⁽¹⁾. distinguish between the legal and contractual obligations, within the field of civil liability. In that the contractual obligation, the breach of which will lead to the contractual liability, can either be an obligation of result or an obligation of conduct. Whereas the legal obligation, the breach of which will lead to the tortious liability is always an obligation of conduct. And whether the obligation of conduct (Obligation to exercise a care) is contractual or legal, the debtor should take the reasonable care in performing his or her obligation. Which means the care of the normal or ordinary person, well-known as the reasonable person. Even though the intended object of the obligation has not been realized or materialized. In conformity with the article (251) of the Iraqi civil law, which provides that: (1-In case of an obligation to perform work: if the obligation stipulated that the debtor will safekeep (maintain) or manage the thing or if it was required of him to exercise caution in performing the obligation the debtor would have performed the obligation if he had exercised the care of an ordinary person even where the intended object has not been realized. 2- The debtor would however have performed the obligation if he had exercised the care he would customarily have exercised in carrying out his own affairs if it would be revealed from the circumstances that the intention of the contracting parties was directed to that end.). this means that the Iraqi civil law No. (40) of 1951 organized an objective standard to evaluate the conduct of the illegal act perpetrator or the wrongful act doer, and it is represented by the standard of the reasonable person⁽²⁾, devoid from his or her internal personal circumstances, and surrounded by the same external circumstances of the wrongful act doer according to the first paragraph of the afore-mentioned article. It is worth-bearing in mind that clause (2.1) of the general conditions for contract of civil engineering works of 1987 determines⁽³⁾ the duties of the engineer's representative as follows:

- 1- Watching and supervising the works to be performed.
- 2- Testing and examining any materials to be used.
- 3- Testing and examining the workmanship employed in connection with the works.

But the same clause stripes the engineer's representative from his or her authority to relieve the contractor of any of his duties or obligations under the contract. It stripes him or her from the authority to issue any order involving delay in the completion of the works, or to involve any increase in the contract price, or to make any variation of or in the work. But the powers and authorities principally vested in the engineer may be delegated, from time to time, to the engineer's representative by writing. And the engineer shall furnish to the contractor a copy of the written delegation⁽⁴⁾. The Iraqi civil law No. (40) of 1951 adopts the trespass or transgression as the basic element of the civil liability arising from the illegal act⁽⁵⁾, as well as the damage and the causal link between them. It does not adopt the basic element of the fault⁽⁶⁾, as it is the case with the Egyptian civil law No. (131) of 1948. This is clearly shown from the formulation of the article (204) which provides that (Every trespass or transgression which causes other than the injuries mentioned in the preceding Articles entails payment of compensation). The trespass is defined as the deviation from the limits to which the person shall adhere in his or her conduct. If we want to know the difference between the fault and the trespass, we can say that latter is only the material element of the former. Because the fault is made up of two basic elements: the material one, that is to say, the trespass, and the moral one, rationality (prudence and discernment). This deviation is measured by an objective standard or test, that is to say, the reasonable person test. It is worth-bearing in mind also that the trespass in the Iraqi civil law is sub-categorized into two aspects: the positive one which refers to the deviation of limits, and the negative one referring to

(1) Abdul Majeed Al-Hakkim, Abdul-Baki Al-Bakri, & Mohammed Taha Al-Basheer, The concise of the general theory of obligations in the Iraqi civil law. Part one, the source of Obligations, Baghdad, 1980. P.215.

(2) Munther Al-Fadhel, The Medium Commentary on the explanation of the civil law, A comparative study between Islamic Jurisprudence and Arab and foreign laws, A study reinforced by opinions of both the jurisprudence and judiciary. Aras Publishing house, Erbil, 2006. p.224.

(3) Clause (2.1) of the general conditions for contract of civil engineering works of 1987. P.17.

(4) Clause (2.2) of the general conditions for contract of civil engineering works of 1987. P.17.

(5) Ismat Abdul Majeed Baker. The general theory of obligations. Part one. in Arab civil laws. Al-Thakira Publishing house. Baghdad. 2011. P.613.

(6) Suleiman Morcos. A thorough commentary on the explanation of the civil law, on the obligations, the harmful act, and the civil liability. Part One. The general rules. Fifth Edition. Cairo university press. 1992. P.183.

the negligence and carelessness. The objective standard is more suitable than the subjective one. Because the latter, that is to say the subjective standard takes into account the tortfeasor or the illegal act perpetrator, who can be found liable, even though he or she perpetrates the smallest and simplest deviation of conduct. Therefore, it can be said that this standard is unjust, because it blames the prudent and careful perpetrator for the smallest and simplest perversion in conduct. While it may only blame the careless perpetrator for great perverse conducts. Whereas the objective standard is more equitable, because it measures the deviation or perversion of the conduct of the illegal act perpetrator, and compares it with the typical conduct of the reasonable person surrounded by same external circumstances of the perpetrator. Without taking into account the internal circumstances. The external circumstances include both the temporal (time) and spatial (place) circumstances. It is also worth-bearing in mind that the Iraqi civil law requires that the intentional malice or willfulness be available, as well as the trespass or transgression for the tortious liability to arise, and the transgressor will be obliged to compensate. But that is in the case of damaging the property or decreasing its value by the act of the transgressor. According to the first paragraph of the article (186) of the Iraqi civil law which provides that (A person who wilfully or by trespassing has directly or indirectly caused damage to or decreased the value of the property of another person shall be liable). Although the Iraqi civil law is highly affected by the Islamic jurisprudence, when borrowing the rules of civil liability on the one hand, as well as its being affected by Egyptian civil law on the other hand. But it has taken a different attitude from that of the Islamic jurisprudence in three points: the first is that the Iraqi legislator requires that the willfulness or purposefulness, as well as the trespass or transgression be available, for the compensation to be paid. As opposite to the Islamic jurisprudence, which does not require the availability of both of them in perpetrator. Secondly the Iraqi legislator requires that the deliberator or transgressor (trespasser) compensate, whether they be a perpetrator or an abettor. As opposite to the Islamic jurisprudence, which made the perpetrator alone liable, but not the abettor. Thirdly the Iraqi legislator permits the involvement of the both perpetrator and the abettor, and made them liable jointly and severally. As opposite to the Islamic jurisprudence, which does not permit their joint liability, because it does not imagine their joint involvement⁽¹⁾. All of these rules are provided for in the second paragraph of the article (186) of the Iraqi civil law which provides that (Where two persons - a perpetrator and an abettor - are involved (in committing the damage) the one who acted wilfully or by encroachment shall be liable; where both are liable the liability will be joint and several). It is worth-noting also that the intentional malice or willfulness, in conformity with the viewpoint of the Iraqi legislator means that 'deliberator' will, that is to say, the 'illegal act perpetrator' will is directed towards inflicting the damage on the victim. The 'perpetrator' will towards the illegal act itself does not suffice, it requires also that the bad result represented by the damage inflicted on the victim be involved in the mind of the perpetrator⁽²⁾.

Second Topic

The damage caused by the negligence of the engineer's representative

The second basic element of the of the civil liability arising from personal acts, represented here by the professional negligence of the engineer's representative, is the damage from which the aggrieved or injured plaintiff employer suffers. And which is considered as the most vital and fundamental element of the civil liability, whether it be contractual or non-contractual. Therefore, no liability will arise, if no damage or injury takes place⁽³⁾. The damage is sub-classified in conformity with the rules of the Iraqi civil law into material and moral damage or injury. The material damage is the hurt or injury which befalls the person in his or her body, property, right or a legal interest. Whereas the moral damage is the hurt which befalls the person in his or her feelings, emotions, honour, reputation, social standing, financial position (credibility), or other affairs of moral importance. According to the first paragraph of the article (205) of the Iraqi civil law, which provides that (the right to compensation also covers moral injury: any encroachment

(1) Abdul Majeed Al-Hakim, Abdul-Baki Al-Bakri, & Mohammed Taha Al-Basheer. op. Cit. P.220.

(2) Hasan Ali Al-Thannon .The extensive commentary on the explanation of the Civil Code. Second part on the Fault. First Edition. Dar Wael for printing and publishing. 2006. P.225.

(3) Abdul Majeed Al Hakim. The concise of the explanation of the general theory of obligations. Part 1, op. Cit , P.455.

(assault) on the freedom, morality, honour, reputation, social standing, or financial position (credibility) of a third party renders the perpetrator liable for compensation (damages)). In order for the material damage to be compensated three conditions are required, and must be satisfied: 1- it must be certain: the certain damage means that it takes place immediately, that is to say, the immediate damage. or it is about to take place in the near future⁽¹⁾. 2-it must befalls a right or a legal interest. 3-it must be a direct damage, no matter whether it be expected or unexpected (foreseen or unforeseen). This means that it must be a natural consequence or result of the illegal act⁽²⁾, according to the first paragraph of the article (207) of the Iraqi civil law, which provides that (In all cases the court will estimate the damages commensurately with the injury and the loss of gain sustained by the victim provided that the same was a natural result of the unlawful act). It is to be noted that the right to compensate for the material damage can transfer to the third party, like the inheritor without the need to an agreement or judicial judgment, because it is a right of a financial value. The right to compensate for the moral damage, on the contrary, can not transfer to the third party, unless being determined by an agreement or a final judgment, in conformity with the third paragraph of the article (205) of the Iraqi civil law, which provides that (damages for moral injury do not pass to a third party, unless its value has been determined pursuant to an agreement or a final judgment). This is because the compensation for the moral damage is right closely related to the personality of the injured plaintiff or the creditor, and it requires that an agreement be concluded or a final judgment be taken, in order to transfer to inheritors⁽³⁾.

Third Topic

The causation or causal link between the negligence of the engineer's representative and the damage

The general rule in the Iraqi civil law as to the causal link in the field of the civil liability, whether it be contractual or tortious, is that no one is responsible for the results of the acts committed by the third party, because this is neither acceptable legally nor logically⁽⁴⁾. The human being is liable for compensating the damage made only his or her act. This rule is contained in the article (168) of the Iraqi civil law, although principally dedicated to the contractual liability, but its rule about cutting off the causal link by the extraneous cause may also apply to the tortious liability. It provides that (If it is impossible for the obligee of a contract to perform his obligation specifically he will be adjudged to pay damages for non-performance of his obligation unless he establishes that the impossibility of the performance was due to a cause beyond his control; the adjudication will be the same if the obligee has delayed (was late in) the performance of his obligation). This article is obvious that the obligee or the debtor of the obligation is usually burdened with the onus of proving the cutting off the causal link between the fault and the damage, or negating this link by proving the extraneous cause⁽⁵⁾. It is also worth-bearing in mind that the plaintiff is tasked with the burden of proving the causal link between the trespass and the damage or injury in the Iraqi civil law. And if he or she succeeds in this task, then the burden of proof will be transformed to the defendant, who tries to negate it⁽⁶⁾. And the defendant can negate the causal link by two ways: the first is direct, and in conformity to which he or she can prove that his or her fault is not the cause which inflicts the damage to the injured plaintiff. The second is an indirect way by which the defendant can negate or refute causal link by proving the extraneous cause which inflicts the damage directly to the plaintiff. We think that the Iraqi civil law has also adopted the direct consequence test or standard, to prove the causal link between the illegal act and the damage, when it decided that the damage or injury sustained by the injured plaintiff, should be a natural

(1) Samir Abd Al-Sayyed Tanaghou. Sources of obligations, Contract, Unilateral Will, Illegal Act, Enrichment without Cause, law and Two New Sources of obligations: Judgment and Administrative Decision. First Edition. Al-Wafa'a Legal Bookshop for Publishing Alexandria. 2009. P.247.

(2) Abdul Majeed Al Hakim. Abdul Baqi Al Bakry and Mohammed Taha Al Bashir, Obligation Theory in Iraqi Civil Law, part One. The Sources Obligation. Ministry of Higher Education and Scientific research. Baghdad University. 1980. P.213.

(3) Abdul Majeed Al Hakim. The concise of the explanation of the general theory of obligations. Part 1, op. Cit , P.462.

(4) Hasan Ali Al-Thannon .The extensive commentary on the explanation of the Civil Code. Third part on the causal link. First Edition. Dar Wael for printing and publishing. 2006. P.6.

(5) Abdul Majeed Al-Hakkim, Abdul-Baki Al-Bakri, & Mohammed Taha Al-Basheer, part One. op. Cit. P.170.

(6) Abdul Majeed Al-Hakkim, Abdul-Baki Al-Bakri, & Mohammed Taha Al-Basheer, part One. ibid. P.240.

result of the unlawful act⁽¹⁾. In conformity with the article (207) which provides that (1-In all cases the court will estimate the damages commensurately with the injury and the loss of gain sustained by the victim provided that the same was a natural result of the unlawful act). If the damage is a natural result of the unlawful act, it means that it must be a direct consequence of the unlawful act⁽²⁾. It should also be noted that the scope of compensation within the field of the civil liability arising from the illegal act in the Iraqi civil law, encompasses the whole direct damage, whether it be foreseen (expected) or unforeseen (unexpected). As opposed to the scope of compensation within the field of the contractual liability, which is restricted to the foreseen (expected) direct damage merely. Unless the debtor of the obligation or the obligee commits cheating (fraud) or a grievous (gross) fault, in which case he or she will be liable for compensating both the foreseen and unforeseen types of the direct damage⁽³⁾. According to the article (168) of the Iraqi civil law, which provides that (Where the debtor had not committed cheating (fraud) or a grievous fault the compensation may not exceed the loss suffered or the amount of the lost profit which had been normally anticipated at the time of the contracting).

Third Section

The proof of the engineer representative's civil liability arising from professional negligence and the exoneration and immunity from it in the Iraqi civil law

As far as the legal adaptation of the engineer representative's liability is concerned, it should be said that basis of the engineer representative's civil non-contractual liability arising from the professional negligence is founded on the trespass or transgression in conformity with the article (204) of the Iraqi civil law, as well as considering it as the civil liability arising from personal acts, according to the article (186). And the proof of the civil liability arising from professional negligence can be realized in the Iraqi civil law by some important standards or tests, the most of which are objective. It adopts the objective standard or test, to help the judge ascertain the rise of the civil liability. And the exoneration and immunity from liability, can be materialized by some extraneous causes denying or negating one of the basic elements of the liability, and cutting off the causal link between the illegal act and the damage. Therefore, we explain study the proof of the civil liability arising from professional negligence and the exoneration and immunity from it in the Iraqi civil law in the following sub-sections and as follows:

First Topic

The proof of the engineer representative's civil liability arising from professional negligence in the Iraqi civil law

The Iraqi civil law No. (40) of 1951 has organized an objective standard to evaluate the conduct of the illegal act perpetrator or the wrongful act doer, and is represented by the standard of the reasonable person, devoid from his or her internal personal circumstances, and surrounded by the same external circumstances of the wrongful act doer⁽⁴⁾. In accordance with the first paragraph of the article (251) of the afore-mentioned law. It is worth-noting that the external circumstances, from one hand, refer to both the time and place factors. Examples of the former are the night and daytime. Whereas the latter is exemplified by place of the occurrence of the illegal act, whether it be downtown or outside the town in a remote and desolate place⁽⁵⁾. The internal circumstances, on the other hand, denotes the health, bodily and psychological states of the person, as well as his or her age, sex and mood⁽⁶⁾. This test or standard is often used to prove the civil liability arising from illegal or wrongful act. And this law has also adopted the direct consequence test or standard to prove the causal link between the illegal act represented by the professional negligence of the engineer's representative and the damage, by requiring that the damage or injury sustained by the injured plaintiff, should be a natural result of the unlawful act. According to the article (207) of this law.

(1) Hasan Ali Al-Thannon, sources of Obligations, Baghdad, 1970. P.245.

(2) Ahmed Salaman Shuhaib Al-Sa'adawi and Jawad Kadhum Jawad Sumaisem. The sources of Obligations, A comparative study with civil laws and Islamic jurisprudence. Second Edition. Zein juridique library. Beirut. 2017, P.283.

(3) Hasan Ali Al-Thannon .The extensive commentary on the explanation of the Civil Code. First part on the damage. First Edition. Dar Wael for printing and publishing. 2006. P.314.

(4) Abdul Majeed Al-Hakkim, Abdul-Baki Al-Bakri, & Mohammed Taha Al-Basheer, part One. op. Cit. P.216.

(5) Abdul Majeed Al Hakim. The concise of the explanation of the general theory of obligations. Part 1, op. Cit , P.432.

(6) Abdul Majeed Al-Hakkim, Abdul-Baki Al-Bakri, & Mohammed Taha Al-Basheer, part One. op. Cit. P.216.

Second Topic

The exoneration and immunity of the engineer's representative from the civil liability arising from professional negligence in the Iraqi civil law

The Iraqi civil law considers the extraneous cause as a defense to deny or negate the causal link between the illegal act and the damage, and this extraneous cause includes the force majeure, Act of God, sudden accident, act of a stranger (third party), or the fault of the injured victim⁽¹⁾. According to the article (211) of the Iraqi civil law, which provides that (A person who has established that the injury had arisen from an extraneous cause, that is to say, a cause beyond his control such as by an act of God, a sudden accident, a force majeure, by the act of a third party or the fault of the injured himself, shall not be liable on damages unless there is a provision (in the law) or an agreement otherwise). The extraneous cause can deny or negate the causal link in the Iraqi civil law. As the afore-mentioned article refers, the extraneous cause can be classified into the force majeure, Act of God, sudden accident, act of a stranger (third party), or the fault of the injured victim. It is to be noted that although this article distinguishes between the force majeure and the sudden accident. But most of the Iraqi civil law jurists⁽²⁾ think that these two terms are synonymous. Because they lead to the same legal consequences. And the Act of God is no more than a form of the force majeure, but the legislator of the Iraqi civil law borrowed it from the Islamic Jurisprudence, which called it originally as the heavenly bane. It should also be noted that the force majeure, in conformity with the terms of the Iraqi civil law, is characterized by three features: it is an external event which is both irresistible (insurmountable) and unexpected. This means that it can not be attributed to the wrongdoer or trespasser⁽³⁾ Although it is similar to the fortuitous event in that both of them are irresistible and unexpected. But the difference is that the force majeure renders the implementation of the obligation impossible, whereas fortuitous event renders it heavy, burdensome and expensive⁽⁴⁾. The Iraqi civil law also adopts the principle of the contributory negligence, or the common fault not to deny or negate the civil liability, but to mitigate or alleviate the magnitude of the liability and the compensation⁽⁵⁾. If the fault of the injured victim (injured plaintiff) is to be an extraneous cause leading to his or her damage, it should be characterized by the same features as the force majeure, that is to say: the externality, irresistibility, and unexpectedness⁽⁶⁾. But sometimes both the wrongdoer and the injured victim commits a fault (trespass), it is to be mentioned that the Iraqi civil law adopts the principle of common fault in the article (210), which provides that (the court may reduce the sum of or refuse to adjudge payment of any compensation whatsoever if the injured person has contributed through his fault to causing or aggravating the injury or had worsened the debtor's situation). Therefore, the liability will be distributed between both the injured plaintiff and the defendant wrongdoer, according to the grossness or magnitude of the common fault of them⁽⁷⁾. And Considering that the clause (1.1.1) of the general conditions for contract of civil engineering works has given the employer the authority to employ the contractor, therefore we shall recommend in the conclusion of this study that the Iraqi legislator consider both the employer and contractor as co-victims of the professional negligence of the engineer's representative, but if they jointly contribute by their fault in causing or aggravating the damage, the court shall have the discretionary power to reduce the sum of compensation or refuse to decide it at all. It should also be noted that the function of the extraneous cause in the Iraqi civil law is to deny the basic elements of causation or the causal link, and cut the chain of causation between the fault and

(1) Ahmed Salaman Shuhaib Al-Sa'adawi and Jawad Kadhum Jawad Sumaisem. op. Cit. P.317.

(2) Hasan Ali Al-Thannon .The extensive commentary on the explanation of the Civil Code. Third part on the causal link. op. Cit. P.56. see also Abdul Majeed Al-Hakkim, Abdul-Baki Al-Bakri, & Mohammed Taha Al-Basheer, op. Cit. P.241.

(3) Hasan Ali Al-Thannon .The extensive commentary on the explanation of the Civil Code. Fifth part on the things. First Edition. Dar Wael for printing and publishing. 2006. P.299.

(4) Abdul Majeed Al-Hakkim, Abdul-Baki Al-Bakri, & Mohammed Taha Al-Basheer, op. Cit. P.163.

(5) Abdul Razaq Al Sanhoury. The Medium Commentary on the elucidation of the New Civil Code (Al Wasit in the Explanation of New Civil Law). part One. The theory of obligations in general. Sources of obligations. Contract-illegal act-Unjust enrichment-law. Al-Ma'arif Publishing house. Alexandria.2004. p.734.

(6) Hasan Ali Al-Thannon .The extensive commentary on the explanation of the Civil Code. Third part on the causal link. op. Cit. P.110.

(7) Hasan Ali Al-Thannon .The extensive commentary on the explanation of the Civil Code. Third part on the causal link. op. Cit. P.106.

damage. Finally, act of a stranger (third party) may also be classified as an extraneous cause. It is worth-mentioning here that the meaning the third party in the field of the tortious liability is different from that of the contractual liability. In that it refers in the former to any person other than the parties of the judicial action, the defendant wrongdoer is not responsible for his or her acts⁽¹⁾. Whereas it refers in the latter to any person other than the contracting parties. The act of the third party must be characterized by two features: the first is the causality, that is to say, the cause-and-effect relationship between the act of the third party and the injury of the plaintiff. The second is that the act of the third party can not be attributed to that of the defendant him (or) herself⁽²⁾.

In short, the exoneration and immunity from the civil liability arising from illegal or wrongful act can only be realized by the negating or refuting the cause and effect relationship between the fault (trespass) and the damage in Iraqi civil law, through denying the causal link, and proving the extraneous cause.

Conclusions

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

First: Findings: The study has reached the following findings:

- 1- The Iraqi civil law requires three basic elements for the civil liability arising from illegal act: the trespass (the material element of the fault), the damage, and the causal link.
- 2- The engineer's representative is not independent in taking decisions about the implementation of civil engineering works, but he or she is subordinated to the authority of the main engineer, who can confirm, reverse or vary such decision.
- 3- The Iraqi civil law considers the obligation of conduct as the legal obligation, the breach of which will lead to the availability of the basic element of the fault, which will lead, as well as, the elements of damage and causation to the civil liability from the illegal act.
- 4- The function of the extraneous cause in the Iraqi civil law is only to deny the basic element of causation or the causal link, and cuts the chain of causation between the fault and damage.
- 5- The Iraqi civil law adopts the principle of the contributory negligence, or the common fault not to deny or negate the civil liability, but to mitigate or alleviate the magnitude of the liability and the compensation.
- 6- The Iraqi civil law considers the extraneous cause as a defense to deny or negate the causal link between the illegal act and the damage, and this extraneous cause includes the force majeure, Act of God, sudden or inevitable accident, act of a stranger (third party), or the fault of the injured victim.

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

- 1- Considering that the clause (1.1.1) of the general conditions for contract of civil engineering works has given the employer the authority to employ the contractor, therefore we the researcher recommends that the Iraqi legislator should consider both the employer and contractor as co-victims of the professional negligence of the engineer's representative, but if they jointly contribute by their fault in causing or aggravating the damage, the court shall have the discretionary power to reduce the sum of compensation or refuse to decide it at all. Therefore, the researcher suggests the following text to be added to the article (210) of the Iraqi civil law: (court shall have the discretionary power to reduce the sum of compensation or refuse to decide it at all, if the co-plaintiffs, that is to say, both the employer and contractor jointly contribute by their common fault in causing or aggravating the damage befalling to them by the professional negligence of the engineer's representative).
- 2- Considering that the clause (2.3.2) of the general conditions for contract of civil engineering works has vested the main engineer the authority to confirm reverse or vary any decision

(1) Hasan Ali Al-Thannon .The extensive commentary on the explanation of the Civil Code. Third part on the causal link. op. Cit. P.179.

(2) Hasan Ali Al-Thannon .The extensive commentary on the explanation of the Civil Code. Third part on the causal link. op. Cit. P.183.

of the engineer's representative, if the contractor shall be dissatisfied by any of which. The researcher recommends that the Iraqi legislator should apply the principle of the joint liability arising from professional negligence between the defendant engineer's representative and main engineer. Therefore, the researcher suggests the following text to be added to the general conditions for contract of civil engineering works: (Considering that the main engineer has the authority to confirm reverse or vary any decision of the engineer's representative, therefore both of them are jointly liable for the professional negligence of the engineer's representative. The former is considered as perpetrator or an abettor, while the latter is a perpetrator).

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