Original Article: Review of Theories of Contractual Liability and Coercive Guarantee

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ABSTRACT

Damage does not follow a person's fault enough to establish a causal relationship, but it must be proven that the fault is the actual cause and cause of the damage and without it the damage would not have occurred. The meaning here is not the complete cause or the perfect cause, but the cause and the factor that the damage is documented in his action and the custom attributed to him. Recognizing the existence of a causal relationship is not always easy because different factors may have been involved in causing the damage. It is not possible to say exactly which one was the cause. In cases where several people are involved in causing damage, some of whom are guilty and some are not guilty, the custom attributes the damage to the person who was at fault, but if all the factors influencing the damage are to blame, it is difficult to identify the cause and establish the cause. Assuming someone is injured in an accident and dies in hospital, a number of factors may play a role in death: A car crash, delays in first aid, or the incompetence of the surgeon's illegitimate action, who overtakes him beyond legal hours. As a result, the victim left the workplace later than usual and crashed into a car that was passing by at the scene at that time. To answer the question of which one should be considered the real cause of the damage, four opinions were raised.

Introduction

According to Arman theory, any event that is a necessary condition for damage is considered a cause of damage. The necessary condition means that if it were not, there would be no damage. According to this theory, any necessary condition for damage plays an equal role in its realization. And like other causes, it causes damage and it does not matter how much it affects or how close to or far from the damage.

Although this theory is easy, it has two criticisms: Too much it is negligent and does not distinguish between different causes, and another criticism is that this theory confuses the judge because it remains in his mind whether the cause was the necessary condition for causing damage or not (1-5).

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Close Cause Theory

This theory pays attention only to the cause that the damage is their immediate consequence, that is, the cause that is closely related to the damage (6).

Cause theory prior to impact

This theory has been introduced in jurisprudence and since then it has been introduced to the Islamic Penal Code of Iran after the Islamic Revolution. According to this theory, if the involvement of several causes in causing damage is not simultaneous, it is considered a responsible cause that precedes the cause or other causes. This rule is stated in Article 535 of the Islamic Penal Code adopted in 2013 and in justifying this rule, the customary citation of loss due to the precedence of the effect and also the principle of extortion has been cited, but this rule has been criticized and criticized. It has been said that since each of them is transitive, there is no reason to prefer one over the other (7).

Acceptable theory in Iranian law

It seems that in Iranian law, according to the legal materials and legal logic and Islamic jurisprudence, the theory of cause and effect is acceptable and appropriate, and the Civil Code in Article 333 stipulates in this regard, "Whenever a person causes financial loss and "If another manager is lost, the manager is responsible, not the cause, unless he is strong in a way that is traditionally documented as a loss to him." Therefore, it can be said that the theory of appropriate and conventional cause has been accepted in Iranian law. As a result, it can be said that establishing a causal relationship in both branches of liability is necessary for the realization of liability. It is not the case that in contractual liability, there should be a causal relationship between breach of contract and loss, and in coercive guarantee, there should be a causal relationship between harmful acts. And the loss is realized and failure to achieve this relationship in both groups will result in exemption from liability.

Fault or Harmful Act

Legal responsibility in general and civil liability in particular cannot be realized without action, unlike moral responsibility, which can only be realized with wrong thoughts and ideas. For the realization of civil liability, the existence of fault along with other constituent elements of liability is a condition. There is a difference of opinion among jurists in defining guilt, Planiol, a French law professor, said: "It is the fault of the expression of a pre-existing breach of obligation." (8).

The traditional definition of fault is an illegal act that can be attributed to the perpetrator, which is sometimes interpreted as a reprehensible act. The definition of some French masters that is acceptable in our law is that "fault is a mistake in behavior that a prudent person who is in the same external situation does not commit." Articles 951 and 952 of the Iranian Civil Code are consistent with this definition. Article 953 stipulates that "fault includes debauchery or violation". The definitions of fault are consistent with the concept of fault in the coercive guarantee (specific concept of fault), but in contractual liability for the fault of the obligee, there is no need to commit an offense or misconduct in the act of Masharalieh, and mere non-fulfillment of the obligation by the obligee as fault. In contract, as a general concept of fault and according to the definition of contractual fault, it can be said that any violation of the provisions of the contract, even minor, is a breach of contract and fault in the general sense, and this concept can be considered from the provisions of Article 221 of the Civil Code, which stipulates that "if someone commits an act or undertakes to refrain from doing something, he is liable for damages to the other party in case of violation ....". In view of the above-mentioned statements, it can be concluded that in the case of coercive guarantee, in order to create liability for the cause of the loss, it is necessary to prove the fault in a specific sense (violation or misconduct) by the injured party, but in multiple contractual liability, the principal is obliged to prove fault.

Special fault is not required in non-performance of the obligation, except in exceptional and authorized cases, such as trust contracts, and the contractual obligor according to Articles 227 and 229 of the Civil Code, it is exempted from liability only if the involvement of an external accident in the occurrence of damage is proved.

Contrary to the coercive liability of the injured party, the contractor does not need to prove the fault of the obligor. Some scholars in this issue have considered the necessity of realizing the element of guilt for the realization of responsibility, although they consider its existence presupposed in the opinion of the legislator and consider many to be without the need to prove it (9). However, this legal situation seems to confirm the non-interference of the element of fault (in a special sense) in the stage of proving and fulfilling the civil liability of the contract in absolute obligation, although the necessity of realizing the element of fault in certain contracts (such as trust contracts). On the one hand, there are the application of special rules and principles (the rule of trustworthy trust) (Articles 614, 613 of the Civil Code). According to the concepts and definitions provided about the concept of fault, it can be concluded that in contractual liability, coercive guarantee is one of the pillars of the element of fault, but to achieve coercive civil liability, the realization of a specific concept of fault is needed (violation).

The agent of the loss and the proof of the fault of the agent of the loss is on the shoulders of the victim because it is in accordance with the principle of non-existence and the principle of innocence of the principle of not committing the fault. The interpretation is considered and therefore on this basis only non-fulfillment of obligation (in general or incomplete) by the obligor causes liability and as the obligation of the obligor and the obligor is exempted from responsibility only if the non-fulfillment of the obligation is proved by the intervention of the Cairo force.

Loss entry

Wherever there is a defect in the property or a definite benefit is lost or personal health, dignity and emotions are harmed, it is said that there is a loss. The purpose of the Civil Liability Rules is to compensate for the damage and there must be a loss in order to create that liability. A civil liability lawsuit can never be a means of profit, so the existence of damages should be considered the main pillar of civil liability. This is the privilege of this legal entity over moral liability (10) of the Iranian Civil Code in any context. It has not been explicitly stated and the reason for the silence should be considered as innocence, but the former Code of Civil Procedure in Article 728 and in the position of stating the elements of the claim for non-fulfillment of obligations, it is stated: This article has been changed, but Article 520 of the new Code of Civil Procedure states the same thing, and Article 1 of the Code of Civil Liability states the need for damages with the phrase "Anyone without legal permission ... causes damage that causes". If there is any other material or moral damage, he is responsible for compensating the damage caused by his action." Existence of loss is one of the pillars of fulfillment of liability in both groups of joint liability and the only difference that can be found in this pillar between contractual civil liability and coercive guarantee is where the contracts stipulate that the breach of contract must be a lump sum.

The contract party should be paid, even if no damage has been caused by his violation, and therefore in this lawsuit, which is known as the criminal condition of liability, it is not necessary to prove the damage, but where the parties in the contract condition the obligation in accordance with Article 230 of the Civil Code, attention should be paid to the element of loss in accordance with the principle of necessity of loss in civil liability. Existence of damage as one of the common pillars of contractual civil liability and coercive guarantee has conditions that we will mention as follows.

The loss must be certain

There is no provision in the Civil Liability Law in this regard, but it is inferred from Article 520 of the Code of Civil Procedure on non-

performance of damages that the plaintiff must prove that he has been harmed. It is certain in the past, so no one can be convicted of damages just because there is a possibility of loss, and the doubt about the possibility of claiming non-profit stems from the necessity of this rule; otherwise, there is a difference between lost property and profit. However, if the damage that is likely to be inflicted in the future, in the judge's view, is a continuation of the current situation, it should be considered as direct and current damage.

The loss must be direct

The law of civil liability does not provide for the necessity of this condition, but Article 520 of the Code of Civil Procedure provides for damages: "... the plaintiff must prove that the immediate damage was due to non-fulfillment or delay or non-submission of the claim. .... ". The meaning of immediate damage is that there is no other incident between the harmful act and the loss; as far as it can be said: The loss according to custom is caused by the same act. The example of the French jurist, Pothier, is commonly used to illustrate indirect and mediated losses. In this example, it is said that if someone sells a sick cow to a ranch and other buyers die as a result of the spread of the disease, he will not be able to fulfill his commitment to deliver milk to the factories and plow his farm, thus suffering damage. All these losses cannot be claimed from the seller of a sick cow. The sole reason for the death of a sick cow was the seller's mistake, and the causal relationship between the illness of other cows can also be considered as hiding this disease, but the buyer's negligence in not plowing the land and not fulfilling the farmer's commitment to another, and how contracts have been and therefore these losses are not direct.

The damage must not be compensated

The principle of prohibiting the collection of several means of compensation and the repetition of compensation is a common principle between us and coercive and contractual civil liability, as stated in Article 319 of the Civil Code after the expression of joint and several liability of usurpers: "If the owner of all or part of if he takes the confiscated property from one of the usurpers, he does not have the right to refer to the other usurpers."

In contractual liabilities, if the damage has been compensated, it is not possible to reclaim it several times. If the rule of custom and reason requires the same, and the meaning of Article 221 of the Civil Code also indicates the same meaning; "If someone undertakes or refuses to do something, in case of violation, the person responsible for daring will be compensated by the other party."

Loss should be predictable

In French law, contractual liability is equal to Article 1150 BC. The predictability of a loss is a condition; it is only a compensable loss that the party has foreseen at the time of concluding the contract.

It is not a condition and any loss must be compensated and the most important reason for this difference is that in the field of contracts, the predictions of the parties are important and everyone concludes a contract based on the loss and the risk of non-fulfillment of the obligation. In coercive liability because there is no agreement between the parties, predictability is not a condition and the principle of full compensation is damaged. But in Iranian law, civil law resides in this regard, but from some articles of civil law and Islamic penal code, the condition of predictability can be inferred in both types of liability. Regarding contractual liability, Articles 221 and 632 of the Civil Code have been cited.

And in explaining it, it can be said that according to article 221, damages are compensable that are specified in the contract or are customarily considered as specified or the law considers it compensable, while unpredictable damage does not have any of these characteristics and based on Article 632, the innkeeper and the owner of the guest house and the like consider them responsible for the objects and property of the importers, provided that the said objects and property have been invented with them or are customarily in the

order of invention; useful means that the damages to the property must be compensated.

In the Islamic Penal Code of 1991, there were several cases from which the condition of predictability in the field of coercive civil liability could be obtained. Articles 347, 349 to 353 are significant in this regard, especially from Articles 352 and 353 of the said law, the condition of predictability of loss is inferred. According to Article 352, "If a person lights a fire in his property to the extent necessary or in excess and knows that it does not spread to one place and does not normally spread, but accidentally spreads to another place and causes damage or loss, he will not be a guarantor."

However, Article 353 of the said law implies the opposite meaning of the previous article. It is clear from the above-mentioned materials that the lighter of fire is the guarantor of the damage caused by the spread of fire only if it either predicts the damage or at least the damage is normally predictable. In the new Penal Code, the same meaning can be deduced from Article 521.

Another important point is that in the mentioned articles both personal discipline and some kind of discipline are mentioned; if the same two rules are seen in Article 1150 of the French Civil Code, the knowledge of the party is the spread of personal discipline fire, but since it is difficult to prove the true science, it has also added a type that is easier to prove, so it is enough to prove that the loss was typically and customarily predictable, although the importer did not predict the loss.

Predicting the type and amount of losses

One of the questions raised about the predictability of losses is whether it is sufficient for liability that the cause and type of damage, in other words the nature of the damage, be predictable or the amount of damage should be predictable?

There is no text in Iranian law in this regard, but according to the application of the law and the principle of full compensation, it can be said that the ability to predict the cause or nature of damage is sufficient for liability and it is not necessary to predict the amount of damage. Loss of cause and type of loss, such as loss, predicts loss or defect, or this is traditionally predictable, and it is obliged to compensate the damage, although the amount is predictable, which is common in contractual and coercive liability. But, in French law, it has long held that the ability to predict the cause or nature of the damage is necessary, not the amount, so if the offender predicts the cause and nature of the damage based on the principle of full compensation, he must compensate the entire damage.

Some of the new rulings issued by the French Court of Cassation also stipulate that the amount of damages is conditional, meaning that the perpetrator of the damage is liable only to the extent that is foreseeable, although these rulings are related to contractual liability and the principle of compensation is full of damage.

Exceptions and justified causes

Cairo Force

If the cause of the damage, both in contractual and coercive liability, is an unpredictable and unavoidable external event, according to the definition in Article 229 of the Civil Code, it is considered as a justifying cause of the harmful act and the so-called order to pay damages. It will not be issued except in cases of legal expediency, such as usurpation or going beyond the limits of permission in trust contracts, and in response to the question of why the Cairo force causes liability to be removed, we can say that with a foreign incident, the causal relationship between us is harmful.

The damage is cut off, and therefore, with the above-mentioned assumption, civil liability is not realized, and the reason why the power of Cairo, as one of the reasons for exemption of the debtor, is mostly discussed in contractual obligations, is that it is usually only in such obligations that owes to the achievement of the result. Therefore, if the desired result is not achieved, he is presumed responsible and guilty and has to show to prove his innocence and how an external and unavoidable event has prevented the fulfillment of the obligation.

It is customary to exercise caution and care; the defendant does not need to prove the existence of Cairo force, and it is sufficient to prove in the lawsuit that he is not at fault; however, it should not be assumed that proving Cairo force in the field of coercive bail does not play a role in exemption. Because by enacting provisions such as article 1 of the compulsory insurance law, the person who is responsible for compensation under the law is obliged to attribute the damage to the Cairo force in order to be released from liability, or a doctor authorized by the patient in the same situation and if he cannot attribute the injury to the patient as a result of his treatment to a defect in medical knowledge and the patient's condition, he must take responsibility for it.

Third party verbs

In cases where the action of a third party causes harm, proving this makes the person seemingly responsible worse because in such a case, it turns out that there is no causal relationship between the act read and the harmful incident, and since the condition fulfillment of liability, both in coercive liability and in contractual liability, is the establishment of a causal relationship between a harmful act or a breach of contract and the incurrence of damage.

The contractors think of this factor as a clear cause of civil liability with a little skepticism, but we consider the factor of third-party interference in the entry of damages as a force majeure, assuming that the conditions of an external accident are already external without an accident and inevitable without an accident are available. Undoubtedly, in contractual responsibilities, it is also considered as one of the reasons for relieving liability.

Committed or damaged fault

When the victim has committed a fault and that fault has an effect on his own loss, the court must take this fault into account, and so reduce the damages owed to him to punish him, and sometimes even a claim for damages. It is completely rejected and it does not matter if the liability of the obligee is contractual or coercive, so in the assumption that the injured party and the joint perpetrator cause the loss, in fact, it is a special case of the assumption that 2 people they have also created and the responsibility is divided between the injured party and the cause of the loss. In fact, the reason for deprivation of responsibility in these cases is the cause between the harmful act and the damage (in whole or in part) (11)

Terms limiting liability

Liability condition

The condition of non-liability does not create liability, at least in the area of the contract. However, as mentioned, non-liability contracts, although primarily effective in terms of financial damages due to the principle of sovereignty, are first and foremost responsible for damages resulting from intentional fault and serious fault.

Secondly, such contracts do not prevent the realization of liability in the event of damage to the person (physical and mental damage), but in civil liability in a special sense or the requirements outside the contract of the French jurisprudence, there are irresponsible contracts due to inconsistency with public order. It is considered invalid and ineffective, and although this view has been criticized by some prominent professors of French law, who have said that when the injured party can waive the claim for damages after the loss has occurred, we have no reason to say satisfaction and conclusion of non-liability contract. In Iranian law, it seems that a non-liability contract in the field of non-contractual liability has another objection other than inconsistency with public order, which can be justified, and that is the arrogance of the contract because the amount is not known before the loss. The non-liability contract is not clear and for this reason this contract may be considered invalid.

Some Iranian law thinkers have declared such contracts as contractual liability in the field of coercive liability and only exceptionally, they have been considered ineffective in general damages, intentionally, and in damages to the body and mind of a person.

Determining the damage in a piecemeal manner

A contract may be concluded between the injured party and the perpetrator of the loss, which determines the number of damages on a lump sum basis. In French law, both in the field of contractual liability and in coercive liability, it has a single name (criminal condition). In contractual liability, they have mentioned the obligation condition, and in non-contractual liability, such an agreement has been called a criminal condition, while they have confirmed that the criminal attribute in such agreements is a relic of Roman law.

The agreement on the amount of damages is made with two objectives: One is to get rid of the damage from proving the amount of damage and its evaluation, and the other is to guarantee the fulfillment of obligations and in others' views, by determining the obligation of the job seeker, there is no need to prove entry. There is no loss and its amount. However, accepting the condition of determining the damage on a part-time basis in the coercive guarantee may face the objection that determining the damage before the loss is due to the fact that when a harmful act does not occur, it is not known to be void in terms of arrogance.

Results

In French law, in non-contractual liability, the partners have a joint and several liability for a harmful act, while in contractual liability, joint and several liability is contrary to the principle and requires law, but in Iranian law, this issue is debatable. The provisions of Article 403 of the Commercial Code indicate this, but some authors have defended the joint and several liability of the perpetrators and declared it compatible with legal logic, although elsewhere they have stated that in coercive guarantee, like contractual liability, the principle of non-joint guarantee should be considered, which is more compatible with legal principles and jurisprudence.

General Theory

refusal to fulfill the obligation in the position of exercising the right to imprisonment and the

In French law, the period of lapse of time in contractual liability is 3 years and in coercive guarantee is basically 10 years, but in Iranian law this difference is not significant because the lapse of time in civil lawsuits has been declared illegal. In connection with the research hypotheses, it should be noted that in the field of contractual liability, fault is conceivable in two senses. First, the general concept of fault, which means "mere non-fulfillment of a contractual obligation as a contract", which includes at least six assumptions: Non-fulfillment of the obligation in general, non-fulfillment of the obligation with the promised quantity, non-fulfillment of the obligation with the quality Fulfillment of the obligation by the committed person, non-fulfillment of the obligation in the prescribed time and finally, non-fulfillment of the obligation in the prescribed place.

Second, the specific concept of guilt, which in fact includes failure to fulfill an obligation if it is accompanied by a minimal amount of morality or error. In coercive civil liability, guilt is in the sense of an act or omission that a normal human being, in the same circumstances, avoids. Hence, fault is essentially divided into action and omission. On the other hand, in terms of degree, fault can be intentional: Negligence, carelessness and carelessness. The criterion for determining the contractual fault in the first place is a personal criterion, and this means that in order to distinguish fault, one must first refer to the provisions of the contract between the two parties and interpret it as follows. It is important, but if the contract is silent or concise and ambiguous, it is necessary to refer to some kind of criterion to determine the fault.

The criterion for determining fault in coercive responsibilities is basically a typical and objective criterion. Thus, except in the case of intent, in which the circumstances and characteristics of the perpetrator are considered in terms of the nature of the offense, in other cases, the individual's behavior is compared with the behavior of a normal human being in the same circumstances. Also, the occurrence of the power of Cairo and, finally, the fault of the oblige is one of the cases whose

occurrence leads to the deterioration of the fault of the contractor.

Urgency, legitimate defense, Cairo force and third-party involvement are the most important exceptions and justifiable causes of fault in coercive liability. In contractual civil liability, the realization of fault in its general sense is a condition of liability, but fault in a specific sense, in principle, does not play a role in the realization of the guarantee. The authority does not fulfill the obligation except in special and prescribed cases where the legislator has introduced the realization of the fault as a condition of the obligation of the obligor. Like trust contracts, fault in coercive civil liability in a specific sense (loss and causation) has a dual status and role. Therefore, proving the innocence of the perpetrator is ineffective in his guarantee, but in principle, fault is a condition of liability and without fault, the culprit is the guarantor, otherwise, explicitly provided for by the legislature. As a result, the first hypothesis cannot be accepted because the concept of fault in the two responsibilities of the contract and coercive guarantee were different. In connection with the second hypothesis, it should be noted that compensation is in accordance with the rules of civil liability on the basis of:

1- Although the injured party has doubts in choosing the basis of the lawsuit, the combination of the rules of two responsibilities in a lawsuit is not allowed and the injured party does not have the right to make a lawsuit based on coercive and contractual rules according to his interests. This action by the injured party is doomed to be rejected due to the repeated claim for damages and the impossibility of combining the characteristics of the two types of liability and re-initiating the liability lawsuit and the principle of validity of the convicted case.

2- In coercive liability, fault is a condition for creating liability, and accordingly, the injured party must firstly prove the damage done to himself, secondly, the perpetrator commits fault, and thirdly, the causal relationship between the two, while in contractual liability, only non-fulfillment of obligation, statistics on the commission of guilt and in this regard do not need to be proven.

3- Considering that the obligation whose violation has become the source of liability in contractual liability is an obligation arising from the contract and in coercive liability is a legal obligation arising from the rule of law, so with the difference in origin between the two systems of liability, they are essentially separated from each other. Therefore, in principle, the rules related to each of the two responsibilities cannot be transmitted to the other.

4- Despite the differences between the two systems of responsibility in terms of nature and basis, having competence in contractual liability is not one of the conditions for fulfilling liability like coercive liability and the condition of knowing competence in contractual liability is the condition of mixing the concept of contractual obligation and liability. It is non-contractual.

5- Although there is no legal prohibition on the choice of liability by the injured party, in view of the fact that, first, the person entering into the contract implicitly relinquishes the regime of coercive liability and imposes the rules of contractual liability on the relationship. It rules with the party to the contract, and secondly, due to the separation of the rules related to coercive guarantee from the special rules of contractual liability in the text of existing laws and also due to maintaining the balance of relations between the parties, it seems to exist between the two responsibilities. He does not and he cannot assign responsibility to the regime at will.

6- Although the contractual liability is affected by the violation and disregard of the contract that has been created as a result of compromise and in this respect should be considered in the scope of the contract and among the legal acts, according to its effect from the contract and legal action this liability, a contractual obligation is in nature separated from a contract and legal act.

7- In a general conclusion, the following can be considered: Whenever the breach of contract is also a violation of public duties, the injured party is free to choose either of the two bases, provided that the contract is not in

vain and the provisions of compromise do not work. As a result, the second hypothesis can be considered as follows:

- If the contract and the terms of the agreement are not in vain based on the principles of coercive guarantee, the injured party can leave the contract and rely on coercive guarantee to compensate his loss.
- In this case, the contract cannot be abandoned to compensate the damage and go to the coercive guarantee and only in this case the second hypothesis is approved. But regarding the third hypothesis: In coercive liability, duties are determined by law, while in the contract, the duties are determined by the parties themselves, and the difference in the nature and basis of these two liabilities has created the doctrine of the relative effect of contracts.

Research Suggestions

1- The legislature should articulate more clearly the common principles and aspects of the difference between contractual liability and coercive guarantee so that the nature of liability is clear in legal matters and compensation.

2- Exemptions from liability should be dealt with more transparently and for different cases (such as education environment, etc.) their special conditions for relieving liability should be stated.

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