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Rating of Negligence in Legal System of Iran

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Abstract

In tort law negligence is the vital element of liability. Despite the fact that Gradation of negligence is not stated as a general rule in Iranian civil law, in the future laws and regulations, Including civil liability law, maritime law and others, it has been noted on several conditions. There have been some categories of negligence that it has been grouped under certain topics. Here we'll go deeply through these groupings and the well- reviewed categories of mentioned titles. Thus in this article we will review the examples of rating of fault in Iranian Legal system as well as some comparisons of Iranian legal system with other notable and major systems in the world. Maintain the importance of grouping negligence in the legal systems; we maintain the most important jurists' ideas as well as doctrine in the scope of this research.

Keywords: Negligence; Civil law; Commercial law; Liability; Maritime law

Introduction

In previous French legal system, based on Roman law of contracts, there was a gradation of torts. They've made distinction between voluntary negligence and involuntary negligence; also, they divided involuntary negligence to major negligence, minor negligence and trifle negligence[1]. But, in Iranian legal system, there is no gradation of torts; because the liability results from any kind of negligence. So, minor or trifle negligence will result to liability, just like major negligence. It is because that in Iranian legal system, there is a focus on remedy; and the final goal of tort law is compensation of damages. So, Gradation of fault is not matter; because, compensation should be in proportion with damages. Thus, in tort, negligence is an essential factor to set liability; and in absence of negligence, there will no liability. Concerning that even minor negligence may cause major damages; so, compensations should be in proportion with damages [1].

Iranian legislator in some cases, although, regards gradation of torts. For example, part 2 of article 4 of Iranian tort code –which is inspired by part 2 of article 4 of Swiss commitment act-provides that: "If the damage is resulted by such minor negligence that usually can be trifled and full remedy may cause hardship for person who is liable; court can reduce the amount of compensation."[2]

Article 165 of Iranian naval code passed 1964 regards gravity of negligence and provides that: "If two or more ships make a mistake, the liability of each ship would be in proportion with gravity of negligence of that ship. But, if recognition of negligence's gravity would be impossible or if negligence of both ships was same; the liability will be same too …"

There are more examples that Iranian legislator regards gradation of tort, and divides negligence to voluntary, major or minor. We will consider these examples, after defining grades of tort.

Minor Negligence

Minor negligence can be divided in minor negligence and trifling negligence. Minor negligence can be defined as: 'such kind of mistake that a usual person don't make it.'[3] Trifling negligence is such mistakes that a cautious and accurate person never may make it [2]. This gradation is originated from French law; where negligence is divided on voluntary and involuntary, while voluntary negligence is divided in major, minor and trifling.[4] Minor negligence may be considered as equivalent of mistake on Islamic legal system. Article 171 of Iranian constitutional law provides that: "If mistake or negligence of a judge on recognition of subject or legal provisions of case or on allocation of legal provisions, sustain a loss to somebody; in the case of voluntary negligence, the judge would be liable according to Islamic provisions, otherwise, remedy would be performed by government. In any case, accused should be rehabilitated." Iranian jurists suggest that mistake as mentioned above is equal to minor negligence. Negligence -which is graver than mistake, regardless of being voluntary or not- is equal to major negligence.[5]

Major Negligence

Black's law dictionary presents several definitions of major negligence involving: "1- arbitrary decline from an explicit duty or disrespect to its effect on other's life or property. Major negligence is basically more than carelessness which construct fault [3]. 2- Major negligence is a clear incautiousness or not to apply even minimum cares. 3- Major negligence is clear breach of legal duty to respect other's rights. In comparison with usual negligence, major negligence involved

[1]Safaei, seyyed Hossein; 'articles on civil law and comparative law', Mizan publications, 2007, p.425.

[2]Droudian; op.cit, p.192 and Katouzian, Nasser; 'law of tort', Tehran university publications, 2nd edition, 1990, p. 368.

[3]Sullivan, Ragger; 'ethics on Kant's philosophy', translated by fouladvand, 1st edition, Tarh-e-now publications, 2001, p. 127 and Jhaffari, Sarah & nour shargh, Djamshid; 'the role of ethics on tort law', journal of legal researches, vol.5, Issue 15, 2012, p.41.

[4]Jordon, Patris; 'principles of law of torts', translated by Adib, 2nd edition, Mizan publication, 2006, p.63.

[5]Katouzian, Nasser; 'law of tort', Tehran university publications, 2nd edition, 1990, p.198.

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more sever fault. Major negligence has less intense carelessness to possible effects of an act than what is on voluntary negligence. Usual negligence and major negligence are same on carelessness; while, both of them are distinct from an intentional behavior that person is or should be aware from its damages."[6] These definitions are based on judicial practice of United States of America. As we can see in this paragraph, at first voluntary negligence is considered as major negligence. But, in other lines, these two terms are considered differently. These self-contradictions are because of different issues of USA courts, which issued both definitions. But, the most accepted theory is that major negligence is different from voluntary negligence.[7]

In comparison with Iranian legal system, it seems that major fault is equal to negligence on Islamic law. In Iranian civil code (article 953), the concept of negligence involves both of trespass and carelessness. Trespass, according to article 951 of that code, is to exceed from usual, legal or permitted actions and violate other's rights or damage other's property. Carelessness, also, according to article 952 of that code is to omit measures which are necessary for preservation of other's property, according to a contract or custom [4].

Voluntary Negligence

It is suggested by some jurists that negligence would be voluntary when a person acts in bad faith in order to cause a loss to another person. In voluntary negligence, there is a bad behavior which performed intently and there is an intention to achieve to damage as result, too. In some cases that a person do a behavior without intention to cause damages; but, he/she knows that this behavior probably will result in damage, and doesn't care about its effect; this behavior will be considered as voluntary.[8] The basic difference between major negligence and voluntary negligence is who perpetrate major negligence has not bad faith or intention of cause damages.

It is suggested, in approval of the theory mentioned above, that: '[voluntary negligence] is happened where the agent of damages has intention to cause loss or damage. The intention of agent should be proved before the court with due attention to circumstances and conditions. Concerning the essentiality of intention factor to establish voluntary negligence, it cannot be perpetrate by children or persons of unsound mind. Liability would not abrogate by any excuse, in the case of voluntary negligence. Because, in the case of voluntary negligence, the matter is risk of behavior's affects, not the amount of damages. Reluctance of lack of intention in children or persons of unsound mind in the case of voluntary negligence, there are methods to remedy damages caused by them in all legal system. In any case, a way to compensate should be provided.'[9]

Studying viewpoints of jurists, it is discovered that there is no consensus on whether both of bad faith and intention to cause damage are necessary or not. Some jurists suggest that only intention to cause damage is enough.

Degradation of Torts in Iranian Legal System

In Iranian legal system, in spite of the fact that Gradation of fault is not recognized as a general rule, there are examples of it in different codes. Thus, in this chapter, we will consider examples of legislator's reference to Gradation of fault on Iranian codes [5].

Gradation of tort in Iranian law of tort's code

Article 4 of tort's code provides that: "court may issue a reduction in amount of compensation in the case of:

a. If after sustaining of loss, damage effectively helps the person who is damaged.

b. If damage is caused by a customarily trifling negligence; and complete remedy of damages cause hardship on damager.

c. If the person who is damaged somehow, facilitated happening of damage or help the increasing of amount of loss or intensify the harmful situation."

d. Provisions of part 2 which states "if damage is caused by a customarily trifling negligence", demonstrates that Iranian legislator refer to Gradation of fault in this article. Also, customarily trifling negligence – which is equal to minor negligence or trifling negligence - is subject to reduction of compensation [6].

Gradation of fault on commercial act

Gradation of fault is concerned in two parts commercial act.

In transport: Article 391 of Iranian commercial act which is inspired by foreign codes provides that: "when merchandise is accepted without any provision and transport charges are paid, any institution of a lawsuit would not be admissible, unless in the case of hypocrisy or major trifling negligence. Transport agent, also, will be liable for unclear average, if the recipient see that average in a time period which according to circumstances and conditions is possible to happen; and announce the average to transport agent immediately. In any case, this announcement should be applied until 8 days after good's delivery" [7].

This article interprets major negligence as voluntary negligence. Such as it said: "if goods are accepted without any provision, and transport charges are paid, any institution of a lawsuit would not be admissible, unless in the case of hypocrisy or major trifling negligence…"

In bankruptcy: We will consider bankruptcy in three categories: simple bankruptcy, fraudulent bankruptcy and culpable bankruptcy.

Simple bankruptcy: According to articles 412 and 413 of Iranian commercial act, simple bankrupt is a trader or a commercial firm who cannot handle his/her financial undertakings. He/she should announce this suspension of payment to regional court until 3 days. Also, bill of proportions and all of trade registers, should be presented. This bill must involve date and signature of trader, while should list all of real states and cattle, debts and amount due and even personal charges in detail.

So, if a trader or commercial firm announces his/her suspension of payment to a court during that time period which is provided by law, presenting necessary documents; he/she would be a simple bankrupt.

Culpable bankruptcy: There four situations, are where issue the culpable bankruptcy award is obligatory:[10]

1. Personal charges of trader or his/her family exceed his/her income.

[6]Garner, Bryan, Black's law Dictionary, Thomson publication, USA, 8th edition 2004, p.539.

[7]Safaei, seyyed Hossein; 'articles on civil law and comparative law', Mizan publications, 2007, p.436.

[8]Katouzian, op.cit, p.356.

[9]Novin, Perviz, a civil liability adaptive Iran, France, Britain, Tehran, Ganjedanesh, 2011, p.100.

[10]Article 541 of Iranien commercial code.

2. Trader invest majority of his/her capital in such businesses that are fictitious on commercial custom, or in such businesses that are just accidently profitable.

3. Trader carry out a sale less than current price or a buy more than current price or resort to borrowing to achieve cash; in order to delay his/ her suspension of payment [8].

4. After announcement of suspension of payment, trader prefers one of his/her creditor to pay debt.

Fraudulent bankruptcy: According to article 549 of Iranian commercial act, if a trader intently and with a bad faith causes to loss his/her trade registers or hide part of his/her property or destroy it by fake contracts or announcer him/ herself more than what has really debt by false document; he/she would be fraudulent bankrupt. Fraudulent bankruptcy, like culpable bankruptcy is subject to criminal prosecution and will result to one to five years prison.[11] Concerning the grade of negligence, issue bankruptcy award would be obligatory or voluntary for court. First part of these measures which immediately result to issue culpable bankruptcy award and are not necessarily result of major negligence, involves:

1. Personal charges of trader or his/her family exceed his/ her income.
2. Trader invest majority of his/her capital in such businesses that are fictitious on commercial custom, or in such businesses that are just accidently profitable.
3. Trader carry out a sale less than current price or a buy more than current price or resort to borrowing to achieve cash; in order to delay his/her suspension of payment.
4. After announcement of suspension of payment, trader prefers one of his/her creditor to pay debt.

Second part is such measures that 'may' result to issue culpable bankruptcy award; and involves:

1. Trader accepted ex gratia an undertaking for other person that is extraordinary concerning his/her financial situation
2. Failure on behavior according to provisions of article 413 of commercial act, after suspension of payment.
3. Trader has no trade register or has uncompleted or altered trade registers.
4. Trader do not explicitly determine bill of his/her property and debts. (This provision is only, when this is not because of fraud.).[12]

Rating of negligence on Iranian marine code

Article 165 of marine code is one of examples of Gradation of fault in Iranian legal system.

This article provides that:

1. If two or more ships perpetrate a fault; the liability of each ship would be in proportion with its negligence. But, if determination of the grade of each ship's negligence was impossible according to circumstances and conditions; both parties would be liable equally.
2. Damages inflicted to ships, goods, ship's staff and passengers and their property should be remedied by that ship which perpetrates negligence in way mentioned on part 'a'.
3. Negligent ships jointly and severally will be liable for damages inflicted to their party.

This article can be explained as: 'thus, according to this article, court should determine at first grade of negligence of each ship which results to damage; and if this determination was possible, court will issue liabilities of ships to remedy damages, concerning grade of negligence of every ship. But, in cases that determination of grade of negligence of each ship is impossible, liability would be equally for both of them.'[13]

Thus, court may face one of following three situations:

1. One of ships is announced negligent.
2. Both ships are announced partly negligent. So, both of them are liable for remedy of damages.
3. Both ships are negligent; but, it is impossible to determine grade of negligence of each ship.
4. None of them are announced negligent.

The first situation is subject to article 164 of Iranian marine code which states: "if the accident was result of negligence of one of the ships, that ship would be liable for remedy." The other three situations can be considered on part of article 165 [9].

Gradation of fault in former code of financial convictions: Article 1 of this code provides that: "Everybody who is convicted in cash penalty or remedy damages result by a crime, during a criminology prosecution, if don't pay it or has no property to pay; with an award of public prosecutor or application of compliant, would be detained for one day per 500 Rials. If cash penalty was accompanied by imprisonment; it would be accounted after the end of imprisonment. In any case total years of imprisonment because of cash penalty should be less than five years.

Note 1: Principal, accomplice and abettor will be liable for remedy of damages in proportion of their responsibility. But, all of them have a joint liability to remedy damages result from crime. If some of principals and abettors was minor or persons of unsound mind, or being dead or pardoned; their portions would be decreased from total sum. In the case of detention, every criminal will be detained just for its portion.

Note 2: Any award issued by civil court to remedy damages result from crime, will be subject to this provision."

As we can see, this article provides the division of liability according to gradation of responsibility (or negligence) and note 4 develops these provisions to awards issued by civil court in remedy of damages result from criminal cases.

These provisions are not repeated on amendment of this code; but, article 17 of new act provides that: "the court considering insolvency will convict the person who perpetrates such negligence which results in insolvency in order to evasion of debt, to six months to 1 year imprisonment, considering the amount of debt and kind of negligence. Court, also, may convict that person to prohibitation from foreign journeys.

[11]Article 610 of Iranien penal code.

[12]Assadi, Abbass; 'Legal explanation of culpable bankruptcy in viewpoint of new Iranian penal code', http://www.yjc.ir.

[13]Raei, Masoud; sharifian, Safar ali; 'the factor of negligence on law of torts and justice', legal researches journal, issue 1, 2011, p.15.

As we can see, "kind of negligence" used on this article can interpreted as voluntary negligence and involuntary negligence. Thus, according to this article, one of factors which is important to determine punishment is grade of negligence perpetrate buy that person.

Dividing the joint liability in Iranian Laws

Dividing joint liability is done in Iranian laws through different ways as studied below.

a. Equitable division: According to this theory, among different causes, only one cause is damaging which yields to damage based on normal condition while the conditions which cause loss in exceptional and occasional conditions are not so. It is for long time that this theory is accepted by Islamic jurists and Faqihs and Islamic jurists have sometimes provided their ideas based on this theory since according to accepted norms and principles among most Islamic jurists, one should differ causes from conditions. Therefore, all conditions and events which lead to loss cannot be considered as cause; rather that event is cause which causes loss in a relevant manner. As a result, those events which lead to loss exceptionally are not seen as causes[14].

Article 352 of Islamic Punishment Act provides: "whenever someone prepares fire in his/her land for his/her need and knows that this fire will not penetrate to other locations but an event causes that it penetrates and yields to death or damage, he/she will not be responsible." This provision is a translation of problem 9 in Tahrir Alvasileh and accepted by most Islamic jurists. The author of Tahrir Alvasileh believes that he has found no disagreement with this theory and he believes that the cause of such verdict is concurrence and preventing excess and negligence. In other words, excess and negligence (fault) is the basis of liability. However, those damaging accidents which can be predicted and possible are seen as fault and are determined by fault as clarified by common arbitration. Therefore, if an event is not damaging in common sense, it causes no liability even though it leads into damage and loss.

b. The theory of close cause or latest cause: Jurists have justified close and direct cause in this way that before the occurrence of latest cause, everything has been remained in its normal and natural condition and has experienced no damage but by recent cause, this balance is scattered and damages are happened so it is liable[15]. Additionally, according to this theory, decision making is conducted easily for magistrate easily since he can easily select the latest cause as liable. This argument is mostly adapted to reality since the last cause has more impact than precedent causes and before that no event is happened and it is possible to avoid damages[16]. As predicted in article 232 of Islamic Punishment Act, if precedent cause is stronger than lag one, it is liable even though it is an exclusion of such article as says "otherwise it is due to stronger cause which can be attributed in common." The reality is that being close or far from cause is not the basis of liability; rather attribution and common assignment of losses due to cause is the main benchmark to determine liability. However, one can say that concerning the latest ones namely near cause has caused losses namely in common; one can justify the attribution of losses to close cause. If losses common attribution is more justified to precedent causes or, in other words, if precedent cause is stronger than close one, it is reliable. Although in clarifying this theory only losses attribution is respected for close or far causes but obviously if one cause especially a far cause is committed a fault and close one is conducted in the legal scope and has created losses for others by this action, fault cause will be introduced as liable and this precedent cause is liable not close one that has not committed any fault.

c. Division by gradation of fault: Some connoisseurs believe that liability should be divided among the people based on their share in damages[17]. It is compatible with our legal basics since, on the one hand, in Iranian laws; joint and several liability is contrary to this principle that anyone is liable for damages emanated from his acts and exceptional norms cannot be extended. On the other hand, articles 335 and 365 of the Islamic Punishment Law have not accepted joint and several liability.

Although article 365 of Islamic Punishment Law reads practically that "whenever several people cause a damage or loss, they are equally responsible" and it may be said that Iranian law has accepted gradation of fault equally, one can say that the provisions of article 35 is not in contrary to this norm and one may not able to prove the impact of such causes by these provisions.

Followers of this theory are looking for distinguishing the impact of each causes in losses and believe that each cause should be liable based on its impact in losses[18]. This theory seems fair since it is looking for distinguishing the impact of each cause in losses even though some deficits are mentioned. It is no logic to degrade losses of a joint action since each cause is effective in total loss especially when the loss is death, injure, damaging the respect and repute. The degree of impact by each cause may be more than total losses in which it is disproportionate with cause which cannot be justified[19]. However, it seems that the message of this theory is justice and fair liability division justifies legal logic. Article 14 of civil liability law selects the same route and reads: "in this case, the degree of liability of each person will be determined by court based on the way of their involvement." The spirit of civil law provisions on referring to various usurpers is inferred that the liability of usurpers is determined by their impact degree in creating damages.

Article 165(c) of Maritime Law (1965) accepts ultimate liability distribution among those ones who have damaged others in a collective manner. However, in distinguishing this impact, the severity and weakness of fault is an important and effective factor[20]. However, penal liability degree is determined proportionate to losses among various criminals even though the losses are demanded from legal courts[21].

As a result, although civil liability jurists and connoisseurs have not concurred on current solution on causality and disputes are still kept on. However, some contemporary jurists attempt to introduce original causality theory as their acceptable opinion[22]. However, they are not going to clarify it fully; rather they believe that such exploration does not accept any norm and judge should make his judgment in any special case based on the condition of damaging event. Each theory is among with some part of reality and is a fruitful guidance even though one cannot rely upon one decisively[23]. As observed which may be in

[14]Safaei (1971), preliminary courses of civil laws: commitments and agreements, vol. 1, Tehran, Accounting Higher Center Journal, p. 564

[15]Katuzain, ibid, p. 457; Dorudian, ibid, p. 69

[16]Seraj, ibid, p. 245

[17]Safaei, ibid, vol. 2, p. 568; Emami, ibid, vol. 1, p. 395

[18]Seraj, ibid, p. 248 and 249

[19]Katuzian, ibid, p. 499

[20]Katuzian, ibid, p. 499

[21]Article 1 (2)(4) of Financial Convictions Law

[22]Safaei, ibid, p. 56;, Dorudian, ibid, p. 103; Katuzian, ibid, 465

[23]Katuzian, ibid, p. 44

contrary to accepted opinions, the fact is that in all theories, fault plays a radical and determinant role. If one cannot consider fault as decisive basis of liability, at least one can say in brief: "fault is an important and radical factor in determining the liable person. Noteworthy, all existing theories especially in main cause theory, the fault plays a vital role in determining liable since common judgment is based on such pillar. Therefore, important issue in all theories of losses common assignment is the creator and no theory has integrity alone; rather, all attempts are toward losses common assignment through common fault benchmark (excessive and common faults) and the important factor in determining liable person is the same common forcibility adapted and coordinated with fault theory.

Conclusion

Negligence can be divided as voluntary based on existence or lack of intention. Involuntary negligence may be divided as major, minor and trifle. We consider on this thesis that, this division is originated in roman law and is developed on French law; but, today in majority of legal systems involving common law countries we can see some refer to this division. Iranian legal system is not an exception. However, Gradation of fault is not a rule on Iranian legal system; but, Iranian legislator in several codes refer to this gradation and concerned being voluntary or not and grade of negligence, as we studied before. Thus, as we said on primary hypothesis of this thesis, although article 954 of civil code doesn't involved gradation of negligence; but, this article does not deny this rule. We can see refers to this rule in several codes involving Iranian criminal code, commercial act, marine code and tort code. On the other hand, we considered in detailed, minor negligence is equal to error on Islamic law, and this theory is suggested by Iranian jurists. This rule has basis and consequences involving increase or decrease in amount of compensation in cases of extra contractual responsibilities, inadmissibility of no liability clauses and concerning grade of negligence in determination of amount of compensation. We can conclude from this thesis that rating of fault can be effective on recognition of civil or criminal liability, such that in some cases trifling negligence will be except of liability. On the other hand, rating of negligence can be effective and key factor on determination of amount of compensation. In fact, rating of fault is effective on admissibility of restriction of liability clauses, insurance covering and distribution of liability among several causes of damages.

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