

**منهج قانون المعاملات المدنية الإماراتي في الفعل الضار
دراسة تحليلية مقارنة بالفقه الإسلامي**

***The Methodology of UAETrans Civil Actions Law
Concerning Tort:
An Analytical Comparative Study in Islamic
Jurisprudence***

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الملخص

يتناول هذا البحث موقف قانون المعاملات المدنية الإماراتي رقم ٥ لسنة ١٩٨٥ من الفعل الضار وكيف إنه عالج هذا الموضوع ، وكما نعلم ان المصدر التاريخي المباشر لقانون المعاملات المدنية هو القانون المدني الأردني، وبعض النصوص نقلت حرفياً من هذا القانون، ولكن المشرع الإماراتي وعند نقله المباشر أغفل ان القانون المدني الأردني تأثر بشكل واضح بالفقه الحنفي وبمجرة الأحكام العدلية ، في حين ان التوجه العام للمشرع الإماراتي هو الأخذ بأنسب الحلول في الفقه مع تقديم المذهب المالكي والحنبلي ثم الحنفي والشافعي، هذا في حال غياب التشريع لحكم المسألة ، إن واضعي القانون الإماراتي قد غيروا في بعض النصوص المنقولة على الأردني ، ولكنهم لا يتقيدوا بتعديل النصوص اللاحقة التي ينبغي أن تعدل وفقاً لتعديل ما قبلها، وقد تناولنا في هذا البحث المسائل التي نجد إنها الأهم فيما يتعلق بالفعل الضار، من الإضرار والمباشر والمتسبب واجتماعهما، والدية والتعويض والجمع بينهما أو عدم الجمع بينهما ، وموقف المحكمة الاتحادية العليا ومحكمة تمييز دبي من هذه المواضيع ، ثم خلصنا من هذه الدراسة بعدة نتائج مثل وجود تعارض بين احكام قانون المعاملات المدنية الإماراتي، وقاعدة إذا اجتمع المباشر والمتسبب يضاف الفعل إلى المباشر دون المتسبب هي قاعدة تحتاج الى تعديل وإضافة الكثير من الحالات التي تقتضي إضافة الفعل إلى المتسبب دون المباشر.

مشكلة البحث:

تكمن مشكلة البحث في نقل المشرع الإماراتي لنصوص قانون المعاملات المدنية من القانون المدني الأردني نقلاً حرفياً في بعض المواضع، وبذلك وقع في الخطأ الذي وقع به المشرع الأردني من عدم دقة بعض النصوص هذا من جهة ، ومن جهة أخرى فإنه اقتبس من المشرع الأردني مع تعديل بعض النصوص ولم يلاحظ بان هذا التعديل يقتضي بالضرورة التعديل في مواضع أخرى لاحقة بما يتلاءم مع وجهة نظر المشرع الإماراتي.

أهداف البحث:

تأتي أهمية البحث من أهمية أحكام الفعل الضار في الواقع العملي وكثرة تطبيقاته أمام محاكم دولة الإمارات، لاسيما إذا ما عرفنا أن الدستور الإماراتي سمح للقضاء الإماراتي بان يكون مزدوج فهو اتحادي ومحلي، اتحادي في إمارة الشارقة وعجمان والفجيرة و أم القيوين، إذا تختص المحكمة الاتحادية العليا في نظر الطعون التمييزية، وقضاء محلي في إمارة دبي وأبو ظبي ورأس الخيمة (تمييز دبي ، ونقض أبو ظبي ،

وتمييز رأس الخيمة) ، وقد جاءت أهمية القضاء المحلي لهاتين الإماراتيين من انفتاحهما على التجارة بشكل أوسع من بقية الإمارات وما أستتبع ذلك من كثرة النزاعات القضائية، وخصوصاً النزاعات المتعلقة بالفعل الضار.

منهجية البحث:

البحث أتبع المنهج التحليلي لنصوص قانون المعاملات المدنية الإماراتي، كما أتبع البحث المنهج المقارن، وكانت المقارنة بمصدرين الأول مصدر مباشر وهو القانون المدني الأردني، والثاني لأحكام الفقه الإسلامي، وأخيراً تم الاعتماد في المنهجية على الموقف التطبيقي لمحاكم دولة الإمارات التي كانت غنية فيما يتعلق بالفعل الضار والاجتهاد في كثير من المواضيع التي تحتاج إلى اجتهاد وبما تسمح به النصوص.

Abstract:

This paper deals with the position of the UAE Civil Transactions Law No. 5 of 1985 on the harmful act and how it dealt with this subject, and we know that the direct historical source of the civil transactions law is the Jordanian Civil Code. Some texts are quoted literally from this law. The Jordanian civil law is clearly influenced by the jurisprudence of Hanafi and the jurisprudential jurisprudence, while the general orientation of the UAE legislator is to adopt the most appropriate solutions in the jurisprudence with the introduction of the Maliki and Hanbali and Hanafi and Shafei, in the absence of legislation to rule the matter, the authors of the law The United Arab Emirates have changed some of the texts passed on to the Jordanian, but they do not abide by the amendment of the subsequent texts which should be amended in accordance with the previous amendment. In this paper, we dealt with the issues that we find most important in relation to the harmful act of harm, direct initiator and the cause of harm.

, The harmed gathering between the wergild and compensation, and the position of the Federal Supreme Court and the Court of Dubai discrimination of these topics,

and then concluded from this study several results such as a conflict between the provisions of the law of civil transactions UAE, and the base if met direct initiator and the cause of the addition of the act to the direct without the culprit is the basis You need to modify and add a lot of situations that require adding the verb to the sub-direct cause.

1- Introduction مقدمة

When discussing civil transactions law no. 85 of 1985, the Emirati legislator was keen to give priority to the jurisdiction rules which had been confirmed in the four doctrines, and which scholars had agreed upon. After that, the gate was open in terms of the issues that did not receive agreement, so that jurisdiction would say its word according to the latest incidents and events, which will help to renew the principles on which the Islamic jurisprudence was based¹.

As we know, the direct historical source for the civil transactions law is the Jordanian civil law, where some texts were literally copied from this law, but the Emirati legislator during the direct copying missed that the Jordanian law has been clearly affect by the Hanafi jurisprudence and with the jurisdiction rules², whereas the general trend of the Emirati legislator is taking the most appropriate solutions in jurisprudence while giving priority to the Maliki, Hanbali and then the Shaf'i and Hanafi jurisprudence³. This applies in light of the absence of legislation to judge this issue⁴.

However, the Emirati legislator left space to jurisdiction to jurisprudence in some topics, while in many of the rules; it has surpassed the admissible jurisprudence reaching to prohibition region, and sometimes changes some pre-determined facts that were decided by a clear legislative text which caused some confusion...

Accordingly, we sought to conduct a study to analyze such issues, as we believe they need study and analysis and then to be amended to be consistent with the trends of the Emirati legislator. In this study, it was enough to present some rules of the harmful act, and therefore, we will handle the following topics:

Research Statement:

The main issue of this present paper is that the UAE legislator had taken literally the provisions of the Civil Transactions Law from the Jordanian Civil Code, this resulted in mistakes that the Jordanian legislator has made, such as the inaccuracy of some of these provisions on the one hand, and quoted the Jordanian legislator and amended some texts without observing that this amendment necessarily requires modification in other subsequent places in line with the view of the UAE legislator on the other hand.²

Research Aims:

The importance of this research paper comes from the importance of the provisions of tort in practice and the large number of its applications before the UAE courts, and in specific if we know that the UAE Constitution allowed the dualism of UAE judiciary, federal and local, federal in the Emirate of Sharjah, Ajman, Fujairah and Ras Al-Khaima, and the Union Supreme Court is competent to hear appeals, and a local judiciary in Dubai, Abu Dhabi and Ras Al-Khaima (Court of Cassation, Dubai and Court of Cassation in Abu Dhabi, Court of Cassation in Ras Al-Khaima). The importance of the local judiciary for both of these two Emirates came from their

²See, for example, articles (86, 343) of the Civil Transactions Law, where it seems that the fulfillment of the duty on the ground of idiocy or feeble-mindedness is different from that of other acts.

openness of trading more widely than the rest of the Emirates in the UAE and the consequent number of judicial disputes, especially disputes related to torts.

Research Methodology:

The research paper in place followed the analytical approach of the provisions of the UAE Civil Transactions Law. Also it followed the comparative method through the direct comparison with the first source which is the Jordanian Civil Code, and the second source the provisions of Islamic jurisprudence, and finally, the paper relied on its methodology on the practical position of the courts of the UAE, which is rich in relation to torts and reasoning (Ijtihad) when permitted by the texts.

2- tort in the Emirati law.

المبحث الأول: الإضرار في القانون الإماراتي

2-1 The concept of tort in uae civil transaction law.

المطلب الأول : مفهوم الإضرار في قانون المعاملات المدنية الإماراتي

2-2 The basis of guarantee for the harmful act in uae civil transaction law

المطلب الثاني أساس الضمان عن الفعل الضار في قانون المعاملات المدنية الإماراتي

2-3 Results of applying the rule of harm.

نتائج إطلاق قاعدة الإضرار المطلب الثالث

3- The rule of including the direct initiator, the cause and exceptions thereof.

المبحث الثاني: استثناءات على قاعدة اجتماع المباشر والمتسبب.

3-1 The rule of gathering the initiator and causer in uae civil transaction law.

المطلب الأول: مفهوم قاعدة اجتماع المباشر والمتسبب في قانون المعاملات المدنية الإماراتي

3-2 The exceptions that should be taken into account regarding the rule of direct initiator and the cause of harm.

المطلب الثاني: الاستثناءات التي يجب الأخذ بها على قاعدة اجتماع المباشر والمتسبب.

3-3 The position of Emirate Jurisdiction from the rule of direct initiator and the cause of harm.

المطلب الثالث: موقف القضاء الإماراتي من اجتماع قاعدة اجتماع المباشر والمتسبب.

4- The harmed gathering between the wergild and compensation in uae civil transaction law.

المبحث الثالث: جمع الضرور بين الدية والتعويض.

4-1 The agreement of jurisdiction in some issues.

المطلب الأول: إتفاق القضاء في بعض المسائل

4-2 Disagreement of jurisdiction in other issues

المطلب الثاني: اختلاف القضاء في مسائل أخرى.

4-2-1 The position of the Supreme Federal Court.

الفرع الأول: موقف المحكمة الاتحادية العليا

4-2-2 The position of Dubai Court of Cassation.

الفرع الثالث: موقف محكمة تمييز دبي

2- Tort in the Emirati Law

المبحث الأول: الإضرار في القانون الإماراتي.

In order to cover the topic entirely, it is necessary to divide this paper into various themes, namely: the concept of harm, basis of insurance against the harmful act, results of using the rule of harm. However, we have allocated a separate theme for each part, as follows:

2-1 The concept of Tort in uae civil transaction law

مفهوم الإضرار في قانون المعاملات المدنية الإماراتيالمطلب الأول:

Article (282) of the Emirate civic transactions law states that: (the subject of each harm against the other/s shall abide the subject even if he is not characterized to guarantee damage). This trend is quoted from the Islamic jurisprudence, and to remedy the damage is a legislative modern rule that was preceded by the Jordanian civic law According to the clarifying memo of the of Emirati Civil lawpreceded⁽⁵⁾.

According to the clarifying memo of the Emirate civil transactions law harm is defined at surpassing the limit which one should stop or upon negligence from the duty that should be reached, or refraining from the consequences of harm. However, the legislator used the term (harm) instead of all terms used in this context (e.g. illegal work, a work/job that violates laws or the action that is prohibited by law)⁽⁶⁾.

Based on the above, harm does not necessarily mean damage, but it varies according to the difference of cause from result; harm is the act or refraining that causes harm. Consequently, we do not agree with the clarifying memo of the civil transactions law by saying: (in the Islamic jurisprudence, the responsibility of the one who causes harm to the other/s is a one which is not based on mistake but on

the harm)⁽⁷⁾, and we would agree with those who say that guarantee in the laws that are affected by Islamic jurisprudence do not abide the defendant to compensate the affected person/s unless a harm or damage seen on the plaintiff. However, saying that guarantee is based on the damage is an inaccurate trend and lacks many missing things⁽⁸⁾.

Harm does not necessarily mean causing damage to the others, but harm should be due to an act or as a result for an illegal refraining which comes from the fact that an act or refrain is not allowed by an authority, from one side. It is a kind of an attack against a preserved right, which disqualify it from the scope of harm in all cases where someone causes harm to other/s based on a legal license, such as when municipality employees damage expired goods, and to injure other by wounding for the purpose of receiving treatment by licensed doctors (from the other)⁽⁹⁾.

Article (282) of the Emirate Civil Law did not specify the need that harm should be illegal. This caused some scholars⁽¹⁰⁾ to say that this article have released harm and arranged a verdict thereof (namely: insuring the harm without and restriction). Here, we do not agree with the above opinion for a simple reason, namely: the Emirati legislator intended that the act should be is illegal. This meaning was stated in the clarifying memo of the law, when it clearly stated that: (the term harm replaces all adjectives and names that could be used when expressing the term) “illegal act” or (the act which violates law) or “the act that is prohibited by law ... etc). Accordingly, harm is not necessarily to be characterized in terms of illegality through the clear text of the law, but its capacity may be defined in the clarifying memo of the law or based on jurisprudence and jurisdiction.

2-2 The basis to guarantee the harmful act

المطلب الثاني: أساس الضمان عن الفعل الضار

Accordingly, we would say that the basis of guarantee for the harmful act in the Emirati Law is the damage but not the mistake; in the Islamic jurisprudence and laws taken thereof, guarantee will not be based on mistake⁽¹¹⁾, whereas: (in the Islamic jurisprudence, the responsibility of the one who harms others is a one that is not based on mistake..)⁽¹²⁾

As we knew, harm does not require the perception of the issue of the defendant, which means that harm as a basis for responsibility is a subjective type but not a personal one, as the case in the theory of mistake and therefore, conception is not required to shoulder responsibility by the one who caused harm. This is based on the perspective that guarantee in Islamic jurisprudence and the Emirate Transactions Law are pure reforming views that intend to remedy harm without reaching to a specific punishment since this is the task of the penal laws.

Accordingly, the responsibility of the minor (who does not distinguish) and the idiot person if they cause harm to others, whereas it is impossible to question those people about the theory of mistake⁽¹³⁾, and therefore, we would not be in agreement with those who state that harm is the basis for guarantee⁽¹⁴⁾; damage is not harm as we knew previously.

Although the Emirate law of civil transactions and the clarifying memo are clear, but the Emirati jurisdiction is still confusing in many of its rules between the concept and mistake and damage, and considers them as synonymous⁽¹⁵⁾. In this regard, we find that the Supreme Federal Court and Dubai Court of Cassation (as the highest judicial bodies) decide clearly that the harmful act is based on three aspects: the mistake, the damage and the casual relationship⁽¹⁶⁾. In addition, to

adapt the act or abandon demanding for compensation as a mistake and negate this description from the issues of law for which the verdict of this court is subject and is under the control of the Supreme Court⁽¹⁷⁾. Moreover, once the direct mistake and the caused one become together, then the act is added to the direct mistake⁽¹⁸⁾.

However, this confusion is still verbal and did not develop to the subjective rules; jurisdiction did not dare not to decide the responsibility of non-discrimination if a damage was inflicted on the others on a claim that no mistake has been committed, since the texts that decide the responsibility of non- cassation in the Emirati Law are clear.

2-3 The results of applying the rule of harmful act

المطلب الثالث: نتائج إطلاق قاعدة الإضرار

Among the results of applying this rule is establishing responsibility based on the damaging as mentioned in the Emirati Civil Transactions Law. This means that non- discrimination might be harmed and contributed in causing the harm. In this case, the judge should decrease the compensation or not to decide any kind of compensation as stipulated in article 290 of the Emirati Civil Transactions Law, which states: (the judge may decrease or increase the guarantee or not to decide it if the affected person has participated through his act in causing or increasing the harm).

This is a sole text and the term the affected includes the old and young, the one can distinguish and the one who can not (no difference). Various judicial verdicts have decided to decrease the guarantee since the affected is a minor, can not distinguish and contributed by his act in causing the damage.

We notice that such a trend does not work since the subjective responsibility stops on a specific limit for the benefit of the affected party who cant not distinguish but participated in his act in causing the damage⁽¹⁹⁾.

Consequently, we call the Emirati legislators to amend article 290 in a way that achieves the interest of the affected and protect the one who can not distinguish, by denying the effect of his act upon deciding his right to have complete compensation because of the damage, unless this act was committed due to mojure force (non-expectation and the inability to pay compensation), especially in terms of the physical damages for which this group of people are subjected.

3- Exceptions of the rule of gathering between the initiator and causer in uae civil transaction law

المبحث الثاني: استثناءات على قاعدة اجتماع المباشر والمتسبب في قانون المعاملات المدنية الإماراتي .

In this part we will examine the concept of the rule of gathering between the initiator and causer in a separate theme. Next we will discuss the exceptions that should be considered based on this rule. In the third theme, we will shed light upon the perspective of the Emirati Jurisdiction Law in terms of the rule of gathering between the initiator and the causer.

3-1 The rule of gathering the initiator and the causer

المطلب الأول: مفهوم قاعدة اجتماع المباشر والمتسبب في القانون الإماراتي.

Article (283) of this rule of the civil transactions' law stipulated that:

- 1- Damage can be by initiation or causing;

2- If it was by initiation, then the guarantee becomes necessary without conditions, while if it was by causing, then intention or attack is required and the act should result in causing the damage.

The rules of jurisdiction included many definitions for initiation and causing opposite to the case when discussing damage, since damage is a new concept in the laws, and one of the appeals issued by the Federal court stated: damage can be by initiation if there is a direct relationship between the harmful act and the place of damage, meaning that direct damage which caused responsibility is the one that happens as a result for a mistake⁽²⁰⁾, which took place. In other words, any act initiated by the attacker without a mediating other act that may cause the damage. Damage by cause takes place by an act between the initiator and another person that caused damage but the incident did not happen by itself but by combination...⁽²¹⁾

However, it is expected that a harmful act an initiator and a causer. Therefore, which of them will bear the guarantee? Can they both be guarantors?

The traditional rule in Islamic jurisdiction has been stipulated in the Judicial Verdicts' Journal and was considered in the Civil Transactions Law in the Emirates through article (284) that states: (if the initiator and the causer were together, then the verdict is added to the initiator).

For instance, if someone dug a well on the public road and someone else through an animal (that is owned by a third person) then the one who threw the animal will bear responsibility, and the digger will shoulder no responsibility since the process of digging the well does not require the death of the animal. However, if no the initiator did not throw the animal, then that animal will not die.

In this context, the guarantee is imposed on the thief but not the one who leads to something. This article decided a total rule of the Islamic jurisprudence, which firmly confirm that the Emirate legislator bias or preference to the theory of producing cause. This is the most appropriate theory in the comparative law⁽²²⁾. Furthermore, the Supreme Federal Court based some of its rules on this rule literally without any exception that require denying it while shouldering the causer but not the initiator in a case where the Supreme Federal Court stated that the person who did not give way to the car behind him and did not allow suitable access is the causer and the person who damaged his car- by deviation outside of the road and bumping a pile of sand- due to this act, is the initiator himself and thus the causer bears no responsibility if met with the initiator⁽²³⁾.

Accordingly, we would say this verdict was not successful when it builds the guarantee based on the rule of meeting between the initiator and causer which satisfied the conditions of guarantee, so if each of them was alone, then he should guarantee, and based on this rule, the causer should be left while the initiator should guarantee. However, if the causer was not proved as intending or attacking, then there will be no guarantee, as stated in the above said verdict.

3-2 Exceptions that should be considered within the rule that gathers the initiator and causer

المطلب الثاني: الاستثناءات التي يجب الأخذ بها على قاعدة اجتماع المباشر والمتسبب.

The rule for adding a guarantee to the initiator but not the causer in case they are together, did not receive the consent of Muslim scholars and they provided many exceptions⁽²⁴⁾ for which we call the Emirati legislator to take them into account. These exception are:

First: if initiation was built and generated from cause.

The rule have decided to inflict punishment against the one who testifies falsely; the judge is an initiator and the causer is the false witnesses and even though, the responsibility is held on the causer without the initiator. In a case of boys who stole a she camel and slaughtered it, The Prince of believers Omar Bin Al-Khatib (God may be satisfied with him) ruled to pay double of its price- knowing that he is (Omar) is the causer and forgiver of slaves in their capacity as initiators⁽²⁵⁾.

Second: it the incident require increasing or decreasing punishment against the initiator. For example on issuing a severe verdict against the causer who guides another to steal the monies of a third one and the first did steal the money. In such case, the thief is the initiator and the causer is the one who guided him, while the guarantee should be against the informant (the one who tells) and if he dies, then the guarantee will be taken from his inheritance⁽²⁶⁾. Of course this does not mean to forgive the initiator as we mostly may not find him (know his address or location).

Another example is an incident that requires decreasing punishment against the initiator if he uses a minor person- (who can not distinguish things) where the minor damaged the property of a third person. In this case, the minor is the initiator and he will be exempted from the guarantee, and the causer will be held responsible as a guarantor, since he was not supposed to use the minor. The journal included an explanation by Ali Haydar when he said: (if someone said to a boy go up to this tree and collect fruits for me; the boy went up the tree, fall down and died, then the causer shall pay a wergild to the boy's inheritors.⁽²⁷⁾

Third: if the causer is an attacker while the initiator is not. If a person says to another this is my food and you can eat it; the eater is the initiator and the who

cheated him is a causer. However, guarantee should be imposed on the causer but not upon the initiator. Similarly, if someone ate a food by force and he did not know that he forced to do so. In such case, the one who forced the other is the guarantor since he caused the act and the eater is the initiator unless the causer is a bankrupt- or escaping, and here, the guarantee is transferred to the initiator⁽²⁸⁾.

This trend was accepted by the Islamic Fiqh Council that emerged from the Islamic Conference Organization⁽²⁹⁾, where it issued a resolution regarding car accidents, stating:

- a. While considering the details that follow, the initiator is a guarantor even if he is not an attacker, whereas the causer is not a guarantor unless he is an attacker or neglecting.
- b. If the initiator and the causer are together, then responsibility is shouldered upon the initiator but not the causer unless if the causer is an attacker and the initiator is not so.
- c. If two different reasons exist and each of them affects harm, then each causer shall bear responsibility according to the percentage the harm he caused, and if they are even, and the participation percentage of each is unclear, then they shall be equally partners in compensation/ guaranteeing the damage.
- d. If it is not possible to make the initiator shoulder the damage, since he is escaping, bankrupt, or has no monies, then the guarantee shall be transferred to the causer.

Sheikh Ahmed Al-Qari⁽³⁰⁾, in Article (1427) (the Journal of the Hanbali Rules) states: “no use from shouldering the one who can not bear a responsibility, and thus the guarantee shall be shouldered by the causer, as if someone who pays or gives a tool to a slave or a prisoner whose hands are cuffed and he that slave or

prisoner managed to escape, then the one who paid money or gave a tool, shall be the guarantor).

Forth: if the causer forces the initiator to commit a harmful act.

There many examples for this case; if some carries another and dropped him on the property of a third person. In this case, the one who threw is the causer, and even though, the initiator is the guarantor but not the causer. Or, if a car was driven quickly and hit another car and the second – due to the speed hit a third and caused damages, then the middle car is the initiator, and the last is a causer.

However, the causer shall be responsible for the damages that were caused to the three cars, in case the owner of the car that was in the middle left a safety space between his car and the first one. The Jordanian Court of Cassation applied this case literally without any amendment in the Jordanian Civil Law⁽³¹⁾. Accordingly, the Emirati Civil Transactions Law considered this case in article 289/1 which states: (the act shall be added to the commander but not to the subject unless the subject is forced to commit the act, provided that forcing in the actual acts and behaviors mean the real force to commit an act).

This means that the causer even if he used the initiator as a tool to inflict damage against the others, without the acceptance and choice of the initiator, then responsibility and full compensation shall be shouldered upon the causer but not the initiator.

3-3 The position of Emirati jurisdiction from the rule of gathering the initiator and causer

المطلب الثالث: موقف القضاء الإماراتي من قاعدة اجتماع المباشر والمتسبب.

Sometimes, the Emirati jurisdiction applies the text that stipulates punishing the initiator without the causer and without consider the above said exclusions, and in other times it exerts efforts to consider some exceptions, as follows:

If the Supreme Federal Court applied the rule of shouldering the initiator the responsibility in a case where a person was driving his car and did not give way to the cars behind him (a second car), then the second car deviated and was subject to damages due to hitting a pile of sand that was beside the road; Dubai Court of Cassation decided that the driver whose care deviated is the initiator and the one who did not give way is a causer. If both the initiator and causer were together, then verdict shall be added to the initiator. This means that the court did not decide compensation for the defendant claiming that he is a causer, while the guarantee is completely shouldered on the initiator as per the rule when the initiator is gathered with the causer⁽³²⁾.

The court was supposed to discuss whether the initiator was driving in his lane or was on the left lane- to pass and was delayed in getting back to the right side- and whether the initiator was driving the car within the speed limit or was driving too quickly more than the admitted speed? And whether the initiator has no choice except hitting the pile of sand on the side of the road?

Or did he have another choice... etc of the questions which we did not notice they were raised in the above said verdict. Consequently, we find that when the court applied this rule literally, was not successful for some extent.

In another case, Dubai Court of Cassation decided a guarantee upon the causer but not the initiator as the causer forced the initiator to commit an act. With that, the court has violated the rule mentioned in article 284 and was correct in the content of the case that the workers of insulating companies were treating and fixing the insulators between the walls using flame which resulted in burning the plastic materials. The civil defense workmen came and poured the materials to put off the fire causing a flood of the plastic material and were poured on the goods of a shop in the ground floor, causing damages for the goods. The owner of the goods submitted a complaint against the causer (the workers of the company) and the initiator (the civil defense who put off the fire). As a result, Dubai Court of Cassation decided to pay full compensation from the causer but not the initiator since the latter was forced to do his job and if was forced to do so since there is a fire that require treatment⁽³³⁾.

4- Gathering between the wergild and compensation in uae civil transactions law

المبحث الثالث: جمع المضرور بين الدية والتعويض في قانون المعاملات المدنية الإماراتي

Article 299 of the civil transactions law states that: (compensation shall be paid due to the harm that is inflicted on the soul. In the cases that require paying a wergild or inheritance, it is not admissible to gather between both (wergild) and the compensation unless both parties agree thereon).

In this context, Muslim scholars have agreed that the amount of wergild for a free male Muslim is 100 camels, and one thousand golden Dinars. However, they disagree on its amount in silver; some of them believe it should be 12,000 Dirhams and others think it should be 10,000 (the Hanafi scholars). As for the wergild of

the Muslim female, it is amounts to half of that above said amount, but some believe that it should be the same wergild as the man (based on a speech by Prophet Mohammed PBUH: (the wergild of the Muslim soul is one hundred camels). On the other hand, the wergild of the non-Muslim amounted between half the Muslim's to the third and reached only to 300 Dirhams. Moreover, the full wergild becomes a must for the murder in case of missing an intended benefit such as the ability to marry, taste, smell, touch, sitting and standing, or the ability to speak. As for the parts of the body, if the type of benefit and beauty were within one part of the body, such as nose or tongue, then the wergild for damaging such part is a full one, while if it consisted of two parts like eyes or hands, then the wergild of each part shall be half wergild. However, if consisting of four parts like lids, each one shall have a quarter wergild, while if consisting of ten like fingers, then the wergild of each shall be tenth of that wergild, the part of wergild is called (Arash)⁽³⁴⁾. The Emirate legislator issued law No. 9 of 2003 deciding the amount of wergild as of 200,000 Emirate Dirhams⁽³⁵⁾.

4-1 Agreement of jurisdiction on some issues

المطلب الأول: اتفاق القضاء في بعض المسائل.

The Emirati jurisdiction agreed on the nature of wergild as a punishment but also as a means of compensation. With this meaning, it is a compensation for the physical damage, and thus jurisdiction have agreed that wergild or Arsh does not cover the material damages caused by physical injury. Accordingly, it is admissible to gather between the wergild and Arsh and between the compensation of losing the source of Rizq since he was terminated from work due to the injury, or was deprived from the costs of treatment, medications or supporting his family members during his life after the incident.

This was stated by the Federal court stating: (the wergild in addition to the punishment, is a kind of compensation since it is considered the monies which the victim is entitled for. The purpose thereof is to satisfy him or his inheritors. Moreover, it covers the psychological and moral pains and sufferings. The material side is opposite to the one covered by wergild, as the one commits the harmful act shall compensation the victim in addition to paying the wergild. Therefore, no contrast between that and the text of article 299 of the Law of Civil Transaction; it means not to compensate the inflicted for damages that required wergild as a compensation thereof, and in this case, he gathered between two compensations for one damage, as this is unacceptable in legal terms⁽³⁶⁾.

4-2 Disagreement of jurisdiction on other issues

المطلب الثاني: اختلاف القضاء في مسائل أخرى.

Gathering between wergild and Arsh and the compensation for the literally damage is an issue of debate before the courts of UAE especially Dubai Court of Cassation and the Supreme Federal Court, as follows:

4-2-1 The position of the Supreme Federal Court

الفرع الأول: موقف المحكمة الاتحادية العليا

The Supreme Federal Court - in some issues - tends to be distinguished from Dubai Court of Cassation can be summarized as follows:

First :the Supreme Federal Court refuses to gather between the wergild and Arsh and the compensation for literary damage

أولاً: رفض المحكمة الاتحادية جمع المضرور بين الدية او الارش وبين التعويض عن الضرر الأدبي

This is based on the fact that wergild or Arsh as deemed by the Supreme Federal Court covers all damages including compensation for the literary damages such as suffering from physical injury or distortion suffered due to the injury. If the injured was paid the wergild or Arsh and claims or demands for compensation due to the suffering, then a double compensation is unacceptable⁽³⁷⁾.

Similarly, if the Supreme Federal Court did not accept that the relatives of the deceased to demand for psychological damage they suffered due to the injury or death of their relative, in case wergild or Arsh was paid, then no double compensation shall be demanded for⁽³⁸⁾.

We also agree⁽³⁹⁾ with those who state that the court is not correct in this part; the relatives of the deceased are to accept compensation for the psychological damages they suffered as a result for the death of their relative since non-responding to their request nullifies article 239.2 that clearly states:

(It is admissible to guarantee the rights of spouses and relatives of the family for the literary damage resulting from the death of their relative).

Second: the acceptance of the Federal Court to gather between compensation for the physical damage based on the governance of justice and the compensation for literary damage.

ثانياً: قبول المحكمة الاتحادية الجمع بين التعويض عن الضرر الجسدي بموجب حكومة العدل والتعويض عن الضرر الأدبي

When the affected is not entitled for wergild nor Arsh, and there is a physical injury, then he is entitled for a compensation as decided by the and the judge upon with the need to consider respect for the principle of full compensation for the later damage. If this compensation was paid, then the affected party may demand for the literary damages due to the injury and this is not considered a double compensation⁽⁴⁰⁾.

Third: the acceptance of the Supreme Federal Court to gather between compensation for the physical injury and the literary damage relevant to this injury but not the one that was generated or produced by it.

ثالثاً: قبول المحكمة الاتحادية العليا الجمع بين التعويض عن الإصابة الجسدية والتعويض عن الضرر الأدبي المرتبط بهذه الإصابة وغير المتولد عنها.

It has been decided to compensate the mother of the injured for the literary damage due to her suffering for ten months- under treatment- not only for the injury- but for the result that prevented her from feeding her child as well as paying attention to the health of her child since she deprived her from the necessary care at a time he is in a very bad need thereof ⁽⁴¹⁾.

4-2-2 The position of Dubai Court of Cassation

الفرع الثاني: موقف محكمة تمييز دبي

This court tends is to accept gathering between wergild or the Arsh and the compensation for the literary damage caused by this injury, and the perspective of the court that wergild or Arsh are only compensation for the physical damages without the literary damages.

Accordingly, it is admissible to compensate for the individual psychological suffering fearing to miss a part of the aspects of the damage that was not covered⁽⁴²⁾.

For the same reason, Dubai Court of Cassation allowed the relatives of the deceased to demand for a compensation due to the literary damage for losing their relative, since it is an independent damage, in addition to the wergild that is paid as a compensation for the family members of the deceased (or the wergild paid to his inheritor/s). However, the compensation for the literary damage has no relationship with the inheritance of the deceased, as it is a right for the affect and thus is does not represent a double compensation for the damage⁽⁴³⁾.

In our part, we would say that the basis of this variation between the Supreme Federal Court and Dubai Court of Cassation is represented in adopting the wergild and Arsh; is the wergild a right for the infected and included in his inheritance then transferred to his inheritors after him, or is it a right for the inheritors and not included as a compensation for the deceased? If we consider it as a compensation for the life of the affected and then passed to his inheritors, then we would say that the inheritors' demand for any second compensation that affected them due to the injury or death of the affected, such as the compensation for the literary damages due to losing the injured, or the material damages resulting

from non paying their living costs... etc.. what if we say that it is a compensation that is directly paid for the inheritors and not included to the inheritor for the damages they suffered. In this case they may not gather between two compensations, and an accurate adaptation of the wergild in the judicial verdicts issued by the Supreme Federal Court⁽⁴⁴⁾ or the verdicts issued by Dubai Court of Cassation.

5- Conclusion

الخاتمة

After this discussion, we conclude with a set of results, then we will present the most important suggestions for the Emirate Civil Transactions Law.

5-1 Results

النتائج

¶The study concluded with various results, namely:

- 1- The Emirati legislator, while appreciating his efforts, considered the most appropriate solutions from the Maliki doctrine, but from the other side, he quoted many rules of the Jordanian Civil Law, which in turn, was influenced by the prevailing opinion in the Hanafi doctrine (presented in the Judicial Rules Journal). This resulted in the emergence of some rules that has a kind of contradiction between the two doctrines.
- 2- The Emirati legislator adopted the idea of guarantee which intends to pay the largest amount of compensation for the affected. However, this idea may cause negative results to those who do not distinguish; in harmful acts, the one who does not distinguish is bound to pay the guarantee, but what if he was in place of the affected and in his act contributed in causing the damage. The natural result is to decrease compensation with the amount/percentage

of his contribution in the damage. However, this has negative consequences in terms of decreasing the due compensation for this inflected person.

- 3- The rule if the initiator and causer are together, then the act is added to the initiator. This rule needs amendment and to consider many exclusions that require adding the act to the causer in the case that we discussed in this paper.
- 4- Gathering between the wergild and compensation or inadmissibility to gather thereof is considered a debate issue between the Supreme Federal Court and Dubai Court of Cassation, which needs a clear decision, especially in terms of the wergild and showing its nature since the law did not show clearly.

5-2 Recommendations

لتوصيات

Most of the above said remarks can be solved as follows:

- 1- To add some amendments based on the rule of gathering both the initiator and the causer in terms of adding the act only to the initiator, unless the causer is found responsible for the harm, and therefore, the last phrase will leave a wide space for jurisprudence to issue appropriate rules for each case according to its circumstance.
- 2- The need to provide more care to the group of those who do not distinguish, especially if they are in place of the damaged and contributed in making the damage. Accordingly, this requires amending of article 290 of the Law of Civil Transactions and to state on paying a compensation that will not be decreased unless of the affected person contributes-by his mistake- in causing the damage (making an amending phrase) and linking it with his fault. In addition, this will contribute in excluding the non-discriminating

person/s from the scope of those who are included in decreasing the compensation if they are in place of the affected and contributed by their mistakes in causing the damage.

هوامش البحث

Endnotes

¹ The clarifying memo of the UAE Civic Transaction Law No. (5 of 1985), issued by the Ministry of Justice, no publishing year, p. 273.

² This magazine is considered as a standardization of the Hanafi doctrine which was prevailing during the Ottoman state and the other countries under its rule.

³ See article (1) of the Law of Civic Transaction, UAE.

⁴ See for example: articles (86 and 343) of the Law of Civic Transaction, UAD, which shows that the handicapped (mentally retarded) has a power that is different from his other actions.

⁵ Article 256 of the Jordanian civic Law.

⁶ The clarifying memo of the Emirate civic transactions Law No. 5 of 1985, while commenting on articles 282, 274 and others.

⁷ The clarifying memo of the Jordanian civil Law. Prepared by the Technical Office of the Jordanian Layers' Association, V. 1, 1992, p. 279, Omar Al-Sayyid Ahmed Abdulla, the responsibility of the person for his act under the Emirate Civil Law compared with the Egyptian Law, Dar Al-Nahda Al-Arabiay, Cairo, 1995, p. 31.

⁸ In this context, see Dr. Adnan Al-Sirhan, the illegal act (damage) as a basis for the neglect responsibility (compliance with the guarantee) in the Islamic jurisprudence and the Jordanian Civic Law, Al-Manarah Magazine, Al- Bayt University, Vol. 2, No. 2, 1997, p. 103.

⁹ For more examples on the allowed violation, see Izzidin Bin Adulsalam, Rules of the Judgments, P. 2, p. 74.

¹⁰Mustafa Al-Zarqa, the harmful act and guarantee thereof: a study and a legal formula based on the text of Islamic Shari'a and its jurisprudence based on the texts of the Jordanian civil law, Dar Al-Amm, Damascus, 1988,

¹¹See Dr. Adnan Sirhan, *ibid*, p. 103.

¹²The clarifying memo of the Civil Transactions Law, p. 277, as decided in the Jordanian clarifying memo, *ibid*, p. 279.

¹³See Dr. Adnan Sirhan, papers in the bases of responsibility for the harmful act in the Emirate Law, based on its origins in the Islamic jurisprudence – a comparative study- Hilwan Legal and Economic Journal rights. Hilwan University, Vol. 13, 2005, Mohammed Sharif Ahmed, sources of commitment in the civil law, a comparative study with the Islamic jurisprudence, Dar Al-Thaqafa Publishing & Distribution, Amman, 1999, p. 210.

¹⁴Mohammed Wahid Al-Din Siwar, General Trends in the Jordanian civic law, a comparative study with the Islamic jurisprudence and Arabic forms, Dar Al-Thaqafa Publishing & Distribution, Amman, 1996, p. 133, Omar Al-Sayyid A. Abdullah, *ibid*, p. 31.

¹⁵Except some verdicts that did not confuse. See for example the verdict issued by the Supreme Federal Court in the appeal No. 219 of 18, dated 26/10/1997, published in <http://www.eastlaws.com/> date of visit 26/09/2017.

¹⁶Appeal No. 386 jurisdiction, issued by the Supreme Federal Court, dated 28/09/1999 and appeal No. 7 of the 7th year, issued by the Supreme Federal Court, dated 10/04/1990, and appeal No. 70 issued by the Supreme Federal Court, dated 31/10/1989, and appeal No. 290 of 2001 issued by issued by the Supreme Federal Court, dated 18/11/2011 and other appeals published on the network of eastern laws <http://www.eastlaws.com> , visit date: 26/09/2017.

¹⁷Appeal No. 79 of 2001 issued by Dubai Court of Cassation on 14/04/2001, and appeal No. 265 of 2001/ rights, issued by Dubai Court of Cassation on 20/01/2002, all appeals are published on <http://www.eastlaws.com> .

¹⁸Appeal No. 45 of the year 24, issued by the Supreme Federal Court on 1/6/2004 and appeal No. 66 of the year 22 issued by the Supreme Federal Court on 20/11/2001 all appeals are published on <http://www.eastlaws.com>.

¹⁹See article 3 of law No. 1985 relevant to the French car accidents for those who are bellow 16. in explaining this article, see: G. viney. L'indemnisation des vitimes d'accidents de la cieulation,LGDJ, 1992: F. CHABAS, le droit des accidents de la circulation apr'es la reforme du 5Juillet 1985. Litec.2e ed. 1985 . p160 ets

²⁰The Supreme Federal Court should not use the term mistake but damage. Since damage is consistent with the trend of the Emirate legislator and with the initiation and causing.

²¹Appeal No. 252 of 25, judicial, issued by the Supreme Federal Court on 24/06/2006; appeal No. 131 of 25 judicial, issued by the Supreme Federal Court on 24/6/2006; appeal No. 1301 issued by Abu Dhabi Court of Appeal dated 17/01/2010; Appeal No. 769 of 2010, issued by Abu Dhabi Court of Appeal dated 9/7/1995. All verdicts are published on the website: [http://www.eastlaw.com /AhkamSearch.aspx?tab=divSearchCustom#1369985](http://www.eastlaw.com/AhkamSearch.aspx?tab=divSearchCustom#1369985). Date of visit: 1/10/2017.

²²Article 90 of the Judicial verdicts, Jordan.

²³Appeal No. 45 of 24, jurisdiction, issued by the Supreme Federal Court on 1/6/2004.

²⁴Mustafa Zarqa, the harmful act and guarantee thereof, *ibid*, p. p. 90-91 and the reference he indicates to; Mohammed Yousef Al-Zu'bi, The responsibility of the initiator and causer in the Jordanian Law, a paper published in Mu'ta Studies' Journal, Mu'ta University, Jordan, Vol. 2, No. 1, 1987; p. 201, Ghazi Abu Orabi, The direct damages and causing the civil responsibility for car accidents, a paper presented to the Traffic Safety Conference convened in cooperation between the Faculty of Law- Sharjah University and Sharjah Police Dept. 13-15/3/2006, published in the papers of the conference, the legal theme, p. 489 and the following pages.

²⁵The verdict to compensate the affected with more than he deserves is called the punishment compensation which is admissible as an exception if there was an intention and the determination by the one who is in charge for compensation or careless about the rights of the creditor. For more details, see Dr. Adnan I. Sirhan, the punishment compensation, a comparative study, Yarmouk Research Journal/ Jordan, Vol. 13, No. 4, 1997, p. 95; Osama Abu Al-Hassan Mujahid, the idea of punishment compensation, a paper presented to the 1st conference of Dubai Police Academy on the victims of crime, Dubai, 2004, p. 177 and following.

²⁶The explanation in the journal by Ali Haydar, quoted from Adnan Sirhan, commentary notes on the 1st and second books that organize obligations (the personal rights), and contract from the Law of Civil Transactions of EAE. Shari'a and Law Magazine, issued by Emirate University, Faculty of Law, year 19, Vol. 23, 2005, p. 619.

²⁷ibid, p. 219.

²⁸Examples referred to by Dr. Mustafa Al-Zarqa, ibid, p. 89.

²⁹See verdict No. 71 (2/8) issued by the 8th conference convened in Brunei 1-7 Moharram, 1414 A.H (21-27 June, 1993). Published in the resolutions and recommendation of the forum. Publications of Qatar Ministry of Awqaf, coordinated and commented by: Dr. Abdul Sattar Abu Guddah, Doha, 2002, p. 244.

³⁰By Mustafa Zarqa, ibid, p. 89.

³¹Appeal No. 245/86 issued by the Jordanian Court of Cassation, published in the journal of the Jordanian lawyers association, 1986, taken from Dr. Adnan Sirhan, the un-intentional resources for obligation, ibid, p. 11.

³²Appeal No. 45 issued by Dubai Court of Cassation, year: 24, dated 1/6/2004 published in <http://www.eastlaws.com/AhkamSearch.aspx?tab=divSearchCustom#1369985>.

³³Appeal No. 245 of 2003/ Rights, issued by Dubai Court of Cassation, 12/10/2003, published in <http://www.eastlaws.com/AhkamSearch.aspx?tab=divSearchCustom#1369985>.

³⁴Regarding the details of wergild, see Awad Ahmed Edris, Wergild between punishment and compensation in the comparative Islamic jurisprudence, Al-Hilal Library, Beirut, Lebanon, 1986, p. 228 and follows.

³⁵See the amended article (1) of Law No. 9 of 2003.

³⁶Appeal No. 160 of 14 Penal, issued by the Supreme Federal Court on 17/3/1993; Appeal No. 171 of 15 penal, issued by the Supreme Federal Court on 2/1/1994; all appeals are published on the website: <http://www.eastlaws.com/AhkamSearch.aspx?tab=divSearchCustom#1369985>.

³⁷Appeal No. 581 issued by the Supreme Federal Court on 18/1/1998; Appeal No. 365 issued by the Supreme Federal Court on 22/2/1998; Appeal No. 177 issued by the Supreme Federal Court

on 13/3/2002; Appeal No. 704 issued by the Supreme Federal Court on 17/2/2007. all appeals are published on the website: <http://www.eastlaws.com/AhkamSearch.aspx?tab=divSearchCustom#1369985>.

³⁸Appeals No. 171 and 324 issued by the Supreme Federal Court dated 2/1/1994 and 19/3/1996 published on the website: <http://www.eastlaws.com/AhkamSearch.aspx?tab=divSearchCustom#1369985>.

³⁹Dr. Adnan Sirhan, the harmful act, *ibid*, p. 57.

⁴⁰Appeal No. 104 issued by the Supreme Federal Court on 30/9/2001.

⁴¹Appeal No. 312, year 23 judicial, issued by the Supreme Federal Court on 16/5/2004, published in the website: <http://www.eastlaws.com/AhkamSearch.aspx?tab=divSearchCustom#1369985>.

⁴²Appeal No. 345 issued by Dubai Court of Cassation dated 22/1/2002, published in the website: <http://www.eastlaws.com/AhkamSearch.aspx?tab=divSearchCustom#1369985>.

⁴³Appeal No. 252 issued by Dubai Court of Cassation dated 15.10/2000, published in the website: <http://www.eastlaws.com/AhkamSearch.aspx?tab=divSearchCustom#1369985>.

⁴⁴See for example, appeal No. 424 issued by the Supreme Federal Court dated 5/6/2001, which considered the wergild as a compensation for the damaged/ inflicted and included in his custody then to his inheritors. On the same appeal, the court stated that inheritors may not demand for any compensation due to the literary damage they suffered from.

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