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Evolution of Damage in Light of the Preventive Civil Liability Regime

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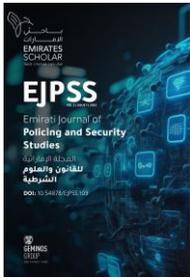
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Abstract

The issue of the connection of civil liability in the classical system with the necessity of the existence of damage has become a transcendental issue in view of the current developments in the concept of civil liability in itself. Given that the incorporation of the principle of prevention into the liability system allows for the latter to be realized even in the absence of damage, rather the basis for preventive responsibility is to anticipate and prevent the realization of damage.

Keywords:

Civil Liability, Damage, Risk of Damage, Preventive Responsibility



Introduction

The civil liability system is more than just a system of compensation for damages in society; this is due to its functional richness that goes beyond the limits of compensation to correct behavior in society, as a legal standard of behavior, and even extends to the prevention of damages. In order to confront the crisis witnessed by the classical system of therapeutic civil liability, modern legal principles have emerged, coupled with major and serious damage that may affect humans and their environment in which they live, away from the traditional rules of civil liability, through the development of alternative formulas that have multiple roles, which is to maintain the stability of the situation as it was by developing methods of prevention and precaution, and avoiding risks instead of focusing on the interventional therapeutic nature.

The study of this topic is of great importance , because the liability system was basically established in order to repara the damage, so there is no civil liability unless there is damage. This is because damage is not only a pillar, but rather a measure of estimating the compensation that the victim is entitled to. Not only that, but we note that the developments that have taken place in civil liability have increased the importance of the damage, as it has become the basis on which it is based.

The objectives of this paper are, first to examine and discuss issues arising in limitations of compensable damage clauses in classical rules ; and second to consider the Specificity of future damage, and to understand the difficulty of dropping the classical conditions on it. Especially when it comes to Moving from Certain Future damage to Transgenerational damage ; Finally, we

will try to address the possibility of removing the damage clause from the civil liability system completely, and replacing it with another concept, which is the “risk of damage”.

Discussion

I. Limitations of compensable damage clauses in classical rules :

It is necessary to repair the damage, to make it look like it was just a dream,” says Carbonier¹. This is the main purpose of civil liability. To this end, civil liability imposes on the person who causes harm to others an obligation to make amends (obligation of reparation).

In this context, damage must meet a set of conditions in order to be compensable under the classical rules, namely, it must be personal and direct, it must affects a legitimate right or interest protected by law.

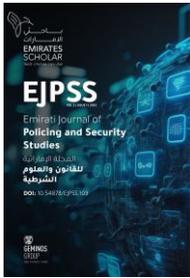
1. The damage must be personal:

According to this condition, the right to seek compensation is limited to the injured party himself, as a result of prejudice to personal rights and interests, which results in financial and moral loss, the right to claim compensation is determined only for those who have suffered personal injury².

However, if the principle is that the person himself claims compensation for the harm he has suffered, then this personal nature raises some difficulties if the infringement was against a specific group of people or collective interests, such as infringing the rights of workers or consumers... Is anyone of them entitled to claim compensation In his own name for such damages? Is there a personal nature in such damages?

¹J. CARBONNIER, Droit civil, les obligations, Paris : PUF, 2004, n° 1114, p. 2253.

² Reda Haddaj: Compensation as a Mechanism for Reparation for Environmental Damage, Algerian Journal of Legal and Political Sciences, Vol. 55, No. 4, p. 177.



2. The damage must be realised:

In order to be compensable, the damage must have already occurred, or its occurrence must be certain and inevitable, even if its effects extend to the future.

The current damage is the damage that actually occurred, so that its elements and manifestations have been formed that provide the judge with the data for his assessment, and it may be final since the occurrence of the harmful act or it becomes so at the time of awarding compensation after the situation of the victim has stabilized.

As for future damage, it is damage whose causes have been achieved but whose components have not been completed in the present, although something appears that makes it certain that it will occur in the future.

Uncertain or unrealized damage is merely a potential damage that may or may not occur, and therefore is not compensable unless it is actually realized.

3. The damage must be direct:

Direct damage is that which was a direct and ordinary result of the defendant's fault³; in other words, what was a direct result of the breach of obligation. The Moroccan judiciary has applied the rule of limiting compensation to direct damage on more than one occasion, as it distinguished between direct damage and obligated those responsible for it to compensate, and indirect damage, so it removed it from the scope of compensation, using various formulas to indicate the damage requiring compensation, including that "it was the direct result of the fault", "it is what has a direct causal relationship between it and the fault" or "it is what the fault was a direct cause of".

II. Specificity of future damage: the difficulty of dropping the classical conditions:

The future damage can be certain or probable (potential); However, if the certain future damage does not pose any difficulties under the classical rules of the civil liability system, as long as its realization is certain to occur (1), then the potential damage raises many problems, especially at the level of compensation, since it may or may not occur (2).

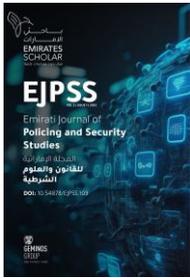
1) Certain Future Damage:

The damage that is certain to occur is the damage that has not occurred yet, but its occurrence is certain and inevitable to occur in the future, so the cause of the damage has been achieved and its effects are all or some of them appeared in the future, such as the victim's injury to pain and material damage that loses his gain in the future, so he is compensated for the damage that actually occurred as a result of his injury and for the damage that will inevitably occur as a result of his inability to work in the future, the compensation included the current damage and the future damage achieved to occur (if the injured party showed an increase in the physical damage, which is a certain damage), which deserves compensation.

2) Potential future damage :

Potential damage is the damage that occurs or may not occur, so there is no compensation for it unless it is proven that it occurred in the future. the damage may be material or physical, but its occurrence in the future is not verifiable or achieved. So, It is a damage that has not yet occurred, in addition to the fact that its future occurrence is also unrealized; it differs from future damage and classical civil liability is not based on it,

³ Youssef Bouknifi: The Judge's Power to Assess Compensation, PhD Thesis in Private Law, Mohammed V University in Rabat, Faculty of Legal, Economic and Social Sciences Agdal, 2014-2015, p. 19.



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therefore, there is no compensation for it unless it is actually achieved because it moves from potential damage to certain future damage and civil liability is based on it in the sense of waiting until the probability becomes certain, compensation for it is actually achieved and this amount is sufficient to achieve the damage that actually occurs, it is compensable.

Accordingly, the Moroccan jurisprudence has witnessed fluctuations in positions, as it sometimes refuses to recognize the potential damage, although, other times it recognizes and approves it, such as what the Administrative Court of Fez⁴ went to, where it rejected a request for compensation for the damages that could be caused to the plaintiff as a result of the National Electricity Office erecting poles and laying electrical wires over his property, represented in the effect of electromagnetic force on the profitability of land and fruit trees, and his fear of the rise of olive trees for fear of the electric current passing over his land, as well as the danger that these wires pose to his safety and the safety of his workers ; the court justified its rejection of the claim for compensation by stating that the plaintiff: "When he claims compensation for the damage that may occur to him as a result of the effect of the electromagnetic force of the electrical wires on the profitability of his property and the dangers posed by these wires, and the consequent fact that he may have to leave his property, he claims compensation for potential damage of uncertain occurrence and with which his claim is not founded and cannot be granted, and a judgment must be adjudicated. by rejecting it. »

This was confirmed by the Court of Appeal of Meknes⁵ in a decision issued on May 25, 2017, which stated:

« The damage to be eliminated is that which is certain or certain to occur in the future and is established for the court by means of proof.

As long as nothing proves that the health damage resulting from the frequencies and vibrations emitted by the collector in dispute is definitive, it remains in the judgment of probabilistic damage on which the court's judgment to remove the receiver cannot be based.

The appealed judgment is valid when it was decided to respond to the request to remove the telephone pole of the telecommunications carriers' interconnection devices above the roof, after it was proved that the continuous roar resulting from the operation of the antenna receiver causes discomfort to the residents of the neighborhood, especially in periods of rest when it is difficult to sleep in the presence of the sounds of constantly working engines. »

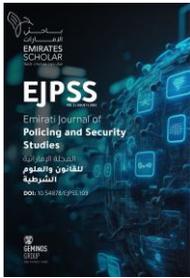
On the other hand, the Moroccan jurisprudence has gone in many of its rulings and decisions to recognize and even eliminate the potential damage, as the Commercial Court of Appeal in Casablanca⁶ explained its decision issued on 17/07/2018 to the following:

« ... Whereas the risk of serious bodily harm as a result of the installation of the antenna near the residence of the respondent remains possible as a result of the emitted radiation that affects human health, and the Court of First Instance reasoned its judgment that the state of fear that afflicted the plaintiffs - the respondent - as a result of the installation of an antenna receiver adjacent to their residence and the logic of scientific uncertainty that hovers over its safety on their health, and because of the impact of this situation on their psychological comfort, tranquility and good

⁴ Judgment No. 1467 in the administrative file No. 95 T/2002 dated 20/04/2004 published in the Journal of Administrative Courts, Second Issue, 2005, p. 375.

⁵ Appeal decision No. 909 issued on May 25, 2017 in the appeal file No. 3942/2015/1201 of the Court of Appeal of Meknes. - Published in the Journal of the In-depth Legal and Judicial Studies Series, No. 3, p. 147.

⁶ Decision of the Commercial Court of Appeal of Casablanca No. 3602 issued on 17/07/2018 in file No. 2238/8232/2018.



stability to constitute an excess of the usual limit, which The defendant company shall be sentenced to remove the antenna, which is an explanation that is in line with the reality of the file, and that maintaining the antenna receiver would also exceed the damages arising from the normal obligations of the neighborhood, given that these damages may be shown to have exceeded the usual limit stipulated in Article 71 of the Code of Rights in rem, regardless of The proportion of danger resulting from it as long as it primarily affects the public health of the neighboring population, which leaves the appellant's appeal document unfounded, and must be dismissed with the upholding of the appealed judgment, and held accountable. »

III. Moving from Certain Future damage to Transgenerational damage:

There are many forms of Transgenerational damage, depending on whether it is purely damage to the environment in particular or damage to the human self (human body and health). Besides, in all cases these damages are of gravity and irreversibility because they are often irreparable according to the traditional rules of compensation under the classical curative-civil liability (1). In addition, the transition from future confirmed damages to transgenerational damages poses

another problem related to the inadequacy and effectiveness of existing statutes of limitations in the face of transgenerational damage, especially since it is an injury of a sui generis nature (2).

1) Manifestations of Transgenerational damage :

The manifestations of transgenerational harm are mainly transgenerational damage to the environment (A) and transgenerational damage to health (B).

A) Transgenerational Damage to the Environment :

The transgenerational damage to the environment is considered one of the damages that time plays an important role in its appearance (a), also it is characterized by an irreversible nature, as it is often impossible to repair or compensate it (b).

a) The role of time in the emergence of pure ecological damage:

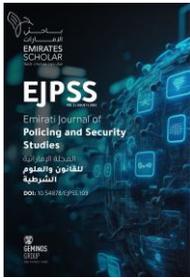
Purely ecological damage is difficult to identify⁷, If the general rules of civil liability require determining the magnitude of the damage, in the field of environmental pollution its effects do not appear at a specific time but continue to appear according to the degree of pollution resulting from the activity generating it⁸.

⁷ L'article 27 de la loi générale de l'environnement argentine du 27 novembre 2002 définit le dommage environnemental, comme : « tout changement important qui modifie négativement l'environnement, ses ressources, l'équilibre des écosystèmes ou les biens ou valeurs collectifs », pour le droit colombien, l'article 42.C de la loi 99 sur l'environnement dispose que le concept dommage écologique comprend : " ces événements qui affectent le fonctionnement normal des écosystèmes ou le renouvellement de ces ressources et composants ". Pour l'article 142 de la loi générale de l'environnement du Pérou, du 13 octobre 2005, le dommage environnemental correspond à « tout dégât matériel que subit l'environnement et/ou quelque de ces composants, qui peut être causé en contrevenant ou pas les dispositions juridiques, et qui provoque des effets négatifs actuels ou potentiels ». pour le droit Mexicain, la loi fédérale sur la responsabilité environnemental du 7 juin 2013, distingue techniquement le préjudice subi par l'environnement de celui que souffrent les

propriétaires des ressources naturelles endommagées, établissant dans l'article 2° Il qu'il faut comprendre pour dommage écologique (en allusion au dommage environnemental pur), la : « perte, atteinte, dégradation, affectation, modification mesurables des conditions chimiques, biologiques des habitats, écosystèmes, éléments et ressources naturels autant que les interactions entre ces derniers et les services environnementaux qu'ils produisent. »

– Voir : Renzo Esteban Munita Marambio, la responsabilité civile liée aux activités scientifiques et technologiques : approche de droit comparé. Droit. Université Grenoble Alpes, 2017, Français, p 336.

⁸Ali Abbad: Legal rooting of civil liability in the field of environmental pollution - a study in the light of comparative legislation and international conventions - previous reference, p. 121.



In the sense that environmental damage is not achieved all at once, but its harmful effects do not appear, in most cases, until after periods of time, for example, the damage caused by atomic pollution, the damage caused by atomic radiation may not appear immediately after exposure to it, but may emerge after a period that can be prolonged and may extend to successive generations, and these damages may often not be traceable back to their true source⁹.

Perhaps the most important feature of pure ecological damage is that it is a lax damage where its effects are often not clear until after a long period of time, so it is called cumulative damage, where damage appears when polluting substances accumulate the environment. Time thus plays an important role in the emergence of this type of damage.

b) The irreversible nature of purely ecological damage:

Compensation for pure ecological damage faces many difficulties, which pose obstacles to its regulation, many of which are related to the material itself. This is because environmental problems are dominated by the complexity of living organisms, through the absence of both spatial and temporal boundaries¹⁰.

The irreparability of ecological damage is ambiguous: is it meant by physico-biological ircompensability (i.e., no return to the original state of a given physical system), or economic (effects cannot be compensated for), or declarative (limiting the freedom of future options to the lapse of time).

However, the damage is irreparable if it is not possible to return to the starting point and restore the situation to what it was before the damage occurred.

Therefore, the most important characteristic of purely ecological damage is that it is a serious damage characterized by an irreversible nature, as it is often irreparable because it focuses on the components of the environmental medium, leading to an imbalance in its balance by causing a harmful change in its physical or chemical nature, which affects the elements of the environment.

B) Transgenerational damage to Health :

Transgenerational damage to health is considered the most serious and lethal type of harm, as it is not limited to the direct victim alone, but can extend to his or her descendants as well.

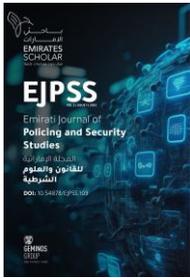
If the origin of the damage - whether physical or moral - is direct and realized, then there are some cases in which this damage does not appear immediately, but rather its appearance is delayed in time (a), and it can also extend to the victim's successor within the framework of the so-called genetic damage (b).

a) The role of time in the emergence of physical damage:

As is customary in classical systems, physical harm is the harm caused to man, and this harm either falls on the human right to life, so the soul is lost and the body is separated, or it falls on the principle of physical integration or the right to physical integrity and does not lose the soul. While the traditional system is limited to immediate/present damages, which are damages that become apparent to the person within a short period of time of the occurrence of the injurious act, the expansion of the concept of damage would extend to late or cumulative damages, the features of which become clear after a period of time, as well as genetic damage that may be caused to the family of the injured person.

⁹ Driss Barkaoui: The extent to which the elements of tort liability are understood by environmental pollution disputes, Journal of Legal and Judicial Affairs, first issue, February 2016, Dar es Salaam for Printing, Publishing and Distribution, Rabat, p. 139.

¹⁰ Anne Guégan-Lécuyer : Dommages de masse et responsabilité civile p 113.



Physical harm can take many forms: an injured person may develop a specific disease, such as cancer, as a result of inhaling toxic gases emitted from a laboratory, facility or hospital that deals with radioactive materials, or a landfill for toxic or radioactive waste in the vicinity - and even loss of reproductive capacity as a result. The effects of the damage may not be limited to the injured person who inhaled these gases and was exposed to these radiations, as his children who are born after being damaged may suffer from genetic congenital malformations as a result of the damage caused to their families, and the physical damage may reach the extent of death of the person immediately after inhaling the gases or radiation emanating from a neighboring place.

The idea of transgenerational damage is closely related to the element of time, as the latter plays an important role in the emergence of pathological conditions on the human body, so the symptoms of the disease begin to appear on the person or his descendants after a period of time from the date of the first exposure to the damage, so it takes a long time to discover the pathological phenomenon, taking into account that in some cases a person may not suffer visible physical damage, although his offspring are affected by genetic damage that extends in time, and perhaps The most prominent example of this is what cases of cancer cause.

b) The time extension of the damage to the human race "genetic damage ":

Genetic damage that can be inflicted on the original victim's successor is one of the most important effects of transgenerational damage in time, and the time span of this type of damage can be manifested in the form of physical harm (1) or it can also be moral damage (2).

b.1 Time extension of hereditary physical damage:

Chromosomes are known to be located in the nucleus of a living cell and are made up of genes or genes located in the deoxyribonucleic acid called genetic material, that is, that which carries the genetic traits and basic information of each cell. This genetic material is passed down from one generation to another during the reproductive process, and a rapid change in genetic information may occur as a result of external factors, and thus the genetic traits or information that determine the function of the cell change and may turn it into a cancer cell or cause unwanted changes in the embryo. Massive genetic damage can occur in the body exposed to nuclear radiation, as occurred after the atomic bombings of Hiroshima and Nagasaki by the Pentagon in 1945 and the Chernobyl disaster in 1986¹¹.

Thus, genetic damage is considered a special kind, as its importance is highlighted by the multiplicity of victims on whom it occurs, and genetic damage is broadly defined as: "infringement, whatever its origin, on the integrity or diversity of the gene, affecting the injury of an individual or collective interest."¹²

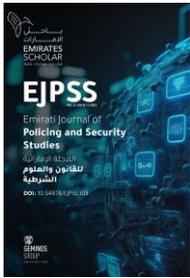
Genetic damage is presented as a witness to a social context characterized by increased concern for living organisms, which confuses concerns related to both the environment and health. This type of damage seems to be concerned with aspects of bodily injury, and also has the advantage of revealing the seriousness of environmental damage¹³.

As a prime example, the time span of damage caused by cancer is a major public health issue, as cancer treatments reduce a man's reproductive function by targeting sperm composition, not to

¹¹ Kazem Miqdadi: Environmental and Health Impacts of Radioactive Pollution on the Choices of Future Generations, "Man and the Environment: Dynamic Approaches to Preventing the Risks of Climate Change", Studies of the Moroccan Observatory for Future Generations, First Edition, 2018, p. 264.

¹² Anne Guégan-Lécuyer : Dommages de masse et responsabilité civile, LGDJ, E.J.A, 31; rue Falguière, Paris, 2006, p 114.

¹³ Anne Guégan-Lécuyer : Dommages de masse et responsabilité civile, LGDJ, E.J.A, 31; rue Falguière, Paris, 2006, p 114.



mention the changes they can cause in sperm DNA, chromatin and genomes in cancer survivors. Therefore, the question of whether cancer and incoming treatments can affect the health of their offspring remains a concern question for these patients, which can only be ascertained by gathering empirical and epidemiological evidence of the effects observed on immediate descendants over several generations, by examining the effects of receiving radiation therapies and chemotherapy drugs that prescribe parental exposure based on the type of treatment, dose and time of exposure.

It should be noted that the emergence of some types of cancer is mainly due to the presence of misexpression of certain genes and therefore these types can be considered as hereditary diseases. Recent research in genetics has begun to enter this field to show the possibility of resisting cancer by transferring healthy genes to the human body¹⁴.

b.2 Time extension of moral damage:

In order for an applicant to claim to be a victim of a violation that caused him moral or psychological harm under the classic rules of civil liability, there must be a sufficiently direct link between the applicant and the damage. Therefore, the effect of the act in question should be direct on the applicant; However, the criterion of direct association is not applied in an inflexible manner, as the Human Rights Court has already recognized in its jurisprudence the expansion of the concept of victim by accepting so-called potential victim.

Potential victims are therefore those who are affected in a probable way and who may bear its immediate effects;

It should be noted that article 34 of the European Convention on Human Rights is limited to naming the victim to any person directly affected by the violation, although the latter can be

conceivable in the total absence of harm; This possibility, which has already been accepted in the case law of Strasbourg, nothing prevents the Court of Human Rights from recognizing it in the field of the environment, for example, in the case where the applicant claims to be a potential victim of environmental legislation that does not recognize his right to be Aware of the event of a nuclear test in his area, which in this case may expose him to danger or achieve his psychological suffering from the effects of this measure¹⁵.

It should be noted that moral damage or the so-called psychological damage is damage that can be extended to the immediate offspring of the victim.

IV. Towards civil liability without damage:

1) "removal/deletion of damage clause ":

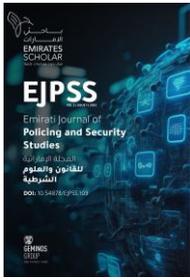
Damage is an essential element for the establishment of civil liability, whether contractual or tort, and it is its mandate, it is not sufficient for the fault committed by the person, but it is necessary for the other party to cause damage that affects a legitimate interest for him established and protected by law.

Part of the jurisprudence has advocated the possibility of liability without damage as a result of the incorporation of the principle of precaution into the tort system, and it appears that this trend must be supported in view of the current developments in the concept of civil liability ; since the statement that no civil liability may exist apart from all damage goes back to the time when the latter was recognized with a compensatory function only. without damage as it was exclusively compensatory liability.

Therefore, if the condition of damage is required in the light of the classical system of civil liability - as a compensatory liability par excellence - to say that it exists, then in the light of preventive liability

¹⁴ Mohammed Al-Yashiwi: Where are biological technologies going? Genetic Engineering and Cloning as a Model, "Human Rights and Gene Management", Subject of the Second Session of 1997, Series of Courses, New Knowledge Press-Rabat, p. 60.

¹⁵ Rahma BENTIROU MATHLOUTHI : le droit a un environnement sain en droit européen, thèse pour obtenir le grade de docteur de la communauté, université Grenoble Alpes, 2018, p299- 300.



it is no longer an exclusive condition for the realization of this liability, especially in light of the existence of new bases for the latter such as the concept of "risk of damage", where it is largely related to the concept of risk.

The development of concepts has led to the statement that civil liability has other functions that must be discovered, some of which were previously known but were not given importance and were marginalized, and others that were recently discovered in the form of the preventive function that precedes the existence of damage but works in its complete absence to create preventive responsibility.

2) Moving from the element of damage to the risk of damage:

Civil liability is a legal system concerned with the correctional function and it is not possible to talk about the existence of this responsibility except by achieving damage, while the principle of precaution is based on the preventive function and has nothing to do with damage. In this context a fundamental question should be raised, can civil liability be raised in the light of precaution / prevention in the total absence of damage?

It should be noted at the outset that damage is the cornerstone of the classical system of remedial civil liability, where the idea of compensation cannot be conceived in the absence of the "damage" element.

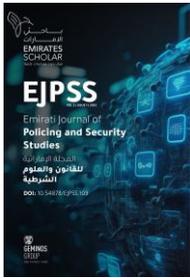
The term risk of damage largely reflects the evolution of the notions of risk and damage together at the present time, the diversity of the latter two has been taking an upward curve, whether in quantity, type or even gravity; after the emergence of what is known as industrial accidents to mass disasters, humanity is now confronted with technological, environmental, nuclear, health, climatic and so on disasters, knowing that within a

century society has moved from focusing its attention on individual dangers to collective dangers¹⁶.

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