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Compensation for moral damage resulting from the liability of the professional contractor (Comparative Study)

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Abstract

The issue of compensation in the responsibility of the professional contractor, one of the topics that have not received its luck from study and analysis, especially in its relationship to the rules of ethics of free professions on the one hand, and in the link to the status of the subject of responsibility within the legal system on the other hand, which is the millstone around which the conflict revolves for the litigants and determine their legal positions in all contemporary legal systems, and since a long time, civil liability occupied a large share of studies in the light of the texts of man-made laws, With the development of societies and their progress in all fields and fields, especially industry, trade and services, led to the emergence of what was called "free professions" along with public jobs, which contributed to the emergence and spread of obligations not arranged by law, or that he arranged them in general, and for this the provisions of the general civil laws were not sufficient to determine the legal responsibility of the professions, and the judiciary has expanded its mission, so its role is no longer limited to the interpretation and application of legal texts, But beyond that, and in front of these facts, the Iraqi judiciary is almost creative for legal provisions for compensation for moral damage, for the professional debtor in light of the contractual relationship despite the lack of organization of the Iraqi Civil Law, because the legal base is characterized by a degree of stability, aimed at maintaining the stability of the legal system, either professions are in progress amazingly, and this is what makes it difficult to link the legal base and the permanent development of these professions,

The judiciary is always facing contractual disputes that require harmonization between the reality of the contractual liability system and the development of contractual relations on professions, and in front of the lack of harmonization of the traditional rules of civil liability of the professional contractor to the tremendous development in the field of most professions on the other hand, all of this led to an imbalance between the parties, which led to the need to search for ways to restore balance to the parties to the relationship and provide the necessary protection for the weak non-professional contractor.

Keywords

Compensation – Moral damage – Professional contractor – Ethics of professions – Employers

Introduction

First: the subject of research

The topics of civil responsibility, no matter how much research and study, remain in need of more depth to find out what is happening to them from the development, whatever the scope in which they appear, and comes at the forefront of these topics the issue of compensation, which is the first and most important effect of proving civil liability, recognizing that this responsibility is rapidly evolving, which attracts researchers to follow these developments, by searching in order to find legal solutions to the problems raised by this responsibility, Perhaps professional responsibility is the most important concern of legal thought because of its importance and the seriousness of its effects, and the responsibility of the professional contractor is (responsibility for what happens from some people on the occasion of practicing their professions: such as the doctor if he made a mistake while performing surgery, the lawyer if he made a mistake in litigation procedures, and the pharmacist if he made a mistake in the composition of the drug).

The compensation resulting from professional responsibility of the legal topics that raised a jurisprudential controversy resulted in a division in views, and a difference in judicial rulings and legislative positions on it, and if the provision of compensation for material damage does not raise any forms, the compensation for moral damage raises a great controversy, which led to the existence of difficulties are not limited, in the field of estimating compensation, especially in the absence of legal text (under the Iraqi Civil Law).

Second: The importance of the subject of research

The importance of research on the subject of compensation resulting from the professional responsibility of the contractor stems from the importance of the issues related to it, no one denies the importance of professional responsibility, especially as it touches the interests of significant and important to the contractor,

whether these interests are represented by his body or his financial and non-financial rights, this on the one hand and on the other hand, we have seen special importance to research on the subject of study in Iraqi law, which is devoid of legal regulation of the most important manifestations of professional responsibility, Unlike many countries that are racing to regulate these parts to provide an acceptable degree of protection for the contractor with the professional, as the research will reveal.

Third: the problem of the research

The problem of the study was determined in the following main question: Is there a certain specificity of compensation within the framework of professional responsibility, and if there is this privacy, has it received its right to organize at least under the Iraqi Civil Law, and whether the will has limits equal to its limits in ordinary contractual liability, with regard to amending the provisions of compensation or professional liability in general.

Fourth: Objectives of the research

- 1- This study aims to provide the greatest degree of protection for the injured , the more comprehensive compensation in its estimation of all elements of compensation, the closer it is to justice.
- 2- The compensation resulting from professional responsibility privacy, stems from the privacy of professional responsibility, and did not receive this privacy luck from the research, so it will be the objectives of the research in this topic to highlight this privacy.

Fifth: Methodology

In this study, I followed a comparative analytical approach by reviewing the legislative texts in the laws of different countries.

Sixth: Research Plan

We dealt with the issue of compensation for moral damage resulting from the responsibility of the professional "comparative study" through two requirements as follows:

The first requirement: the concept of the professional contractor and the absence of an agreement on exemption or mitigation of his responsibility, while the second requirement: the legislative and judicial basis for compensation for moral damage in light of a contractual relationship with the professional.

The first requirement: the concept of the professional contractor and the absence of an agreement on exemption or mitigation of his responsibility

The economic, social and cultural development in modern societies has led to the emergence of groups practicing certain professions termed "liberal professions" and since these professions require in their practice to enter into legal relations with others, which entails civil responsibility on their shoulders and these categories must know the permissibility or inadmissibility of exemption or mitigation of their responsibility.

Which necessitates us to divide this requirement into two sections, we look at the definition of the professional contractor in (the first branch) and then we look at the lack of agreement on the exemption or mitigation of the responsibility of the professional contractor in (the second branch).

Subchapter One: Definition of the Professional Contractor

Some define the owner of the profession as "one who is qualified in a specialty related to the provision of services characterized mainly by their mental nature, with complete freedom to provide his advice to his clients, whom he freely chooses, while bearing the responsibility resulting from the exercise of his professional activity" (1).

Referring to the Iraqi Civil Law, it does not include a general definition of the professional and we may find the Iraqi legislator has manipulated the terminology, and systems in special laws that may apply to them the description of the professional, including the Consumer Protection Law, such as the term (supplier), which is "every natural or legal person producer, importer, exporter, distributor, commodity seller or service provider (2) .

The French jurist Jean Calais defined a professional as "a person who acts for his professional needs and also argues that a professional can be "a natural or legal person practicing a commercial, industrial or agricultural activity with the aim of making a profit" (3).

It is noted that this definition depends on the nature of the activity practiced by the person, if this activity is included in the profession of the person, he is considered professional, but if he does not enter his profession, the person is not considered a professional in connection with this act.

The Egyptian legislator defined the term "supplier" in the first article of the Consumer Protection Law as "any person who provides a service, produces, imports, distributes, displays, trades, trades in or deals with a product, with the aim of providing it to the consumer, contracting or dealing with him in any way (4).

We note that what is stated in the definition often applies to the term professional, because the professional often provides a service to the recipient of the service or the contractor, which means the difference only in terms.

A professional is defined as "any natural or legal person who is a producer or supplier of products or performs services, and who concludes contracts related to the practice of his industrial, commercial or craft activity or those contracts are related to the practice of one of the liberal professions" (5).

It is noted from these definitions that the concept of professional goes to

the producer, supplier and supplier, whether a natural or legal person, and also goes to self-employed, because they involve the characteristics of professional activities.

In light of the above definitions, we conclude that a professional is "every natural or legal person who practices a free profession, such as a doctor, lawyer, pharmacist, engineer and others, whether this person practices his free profession individually or jointly with others."

Subchapter Two: Lack of Agreement on Exemption or Mitigation of the Liability of the Professional Contractor

The agreement to amend the provisions of civil liability, either to be an agreement to exempt from civil liability, with the intention of lifting the responsibility of the official and preventing his claim for compensation, such as that the contractor requires acquittal of every defect that appears and leads to the fall of the building, or it may be an agreement to mitigate the liability by lifting part of it, and limiting the claim of the injured party to the remaining part, such as that the agreement includes reducing the amount of compensation to which the injured person is entitled, or that a maximum limit is set for it. or reducing the limitation period (6), and that the rule in force in the Iraqi and Egyptian Civil Law provides for the invalidity of agreements to exempt or mitigate tort liability, and this is stipulated in Article (259/3) of the Iraqi Civil Law, while the Iraqi and Egyptian legislators expressly allowed agreement on exemption or mitigation of contractual liability, with the exception of fraud and gross error, and this is what is stipulated in Article (259/2) of the Iraqi Civil Law. As for the French Civil Law, it did not contain a provision permitting the agreement On the exemption or mitigation of liability or not, which prompted the French jurisprudence and judiciary, to authorize the agreement to mitigate or exempt from contractual liability, with the consensus that it is not permissible to agree on mitigation or exemption from contractual or tort liability for intentional error, serious error and fraud, and that there are many legal obligations that are decided to protect individual interests, and these do not prevent agreement on mitigation or exemption from them, as for the obligations imposed to ensure The safety of third parties is related to public order and it is not permissible to agree on exemption or mitigation of liability resulting from breach thereof, whether it comes from the contract or the law, and that the prevailing opinion in jurisprudence went to support the courts' view of the inadmissibility of agreement or mitigation of tort liability, even if it was for a simple error and its permissibility in contractual liability, except in cases of fraud and gross error (7).

The foregoing is a brief presentation of the provisions of liability agreements as required by the general rules, but can these rules apply when one of the parties is professional? In other words, can a professional benefit from these rules and require mitigation or exemption from liability? In an attempt to answer this question, we say since we are dealing with a professional contractor and because of the obligations of the professional contractor of privacy, for example, the

professional breach of the obligation of confidentiality results in the establishment of his civil responsibility towards the owner of the secret, as well as the establishment of his criminal responsibility, but the professional's commitment to confidentiality is not absolute, but is affected by some reasons that allow him to disclose the secret, without entailing any responsibility and the cases that exempt the professional from his commitment to confidentiality are (the consent of the owner of the secret and the testimony in front of Judiciary and news about a crime and the state of necessity) either the conditions of exemption or mitigation of liability resulting from the breach of the obligation to ensure safety are invalid because the most correct opinion in French jurisprudence requires the invalidity of such conditions in the case of physical damage, in addition to that the breach of the obligation to ensure safety either results from a defect in the sale and this may not be exempted, or mitigated or resulted from the failure of the professional to inform the consumer (warning, method of use), which results in damage to consumer safety This is a serious error, under which liability may not be exempted or mitigated, as the professional, due to his experience and knowledge of the characteristics of the thing he manufactures or sells, must be fully aware of the damages that may result from the breach of this obligation, which necessitates the invalidity of the conditions set by the professional with the aim of dropping or mitigating the guarantee(8).

There are some provisions that stipulate the invalidity of mitigating or exempted conditions from the guarantee, including what is stipulated in Article (653) of the Egyptian Civil Law, which stipulates the invalidity of the conditions set by the contractor or engineer and which aims to exempt him from the guarantee or limit it, as well as what is stipulated in Article (10) of the Egyptian Consumer Protection Law No. 67 of 2006.

As for the Iraqi law, it is still adhering as a general rule to what is stated in the text of Article (259) of the Civil Law, according to the text of this article, the professional can require exemption or mitigation of his contractual responsibility, taking advantage of the consumer's lack of experience and lack of specialization in addition to his economic weakness, which the consumer cannot refer to the professional in the event of damage, and this is inconsistent with the requirements of public order and justice, especially if the goods or services that Provided by the professional, would cause physical damage, leading to the waste of the interests, lives and health of consumers, in order for the professional to offer products or provide services harmful to the consumer, and of course this is unacceptable and inconsistent with the requirements of social stability and stability of transactions.

Therefore, we call on the Iraqi legislator to develop a text that stipulates the invalidity of all conditions that.

that would mitigate or exempt the liability of the professional, when the buyer is a consumer or a professional dealing outside the scope of his specialty, especially those damages that occur to the safety or health of consumers

The second requirement: the legislative and judicial basis for compensation for moral damage under a contractual relationship with the professional

We will look at compensation for moral damage in three branches:

Section One: Iraqi Civil Law

The Iraqi legislator establishes compensation for moral damage within the scope of tort liability without contractual as in Article 205, and there is no text that contradicts the introduction of moral damage and compensation for it within the scope of contractual liability because the texts came absolutely.

It is worth noting that the Iraqi Civil Law was not the only law alone to provide for compensation for moral damage within the scope of tort or contractual liability, but we find other laws that have dealt with moral damage under the contractual relationship, the most important of which we will talk about briefly ⁽⁹⁾: Iraqi Transport Law No. 80 of 1983, Article 24 of this law provides for compensation for moral damage, And the Copyright Protection Law No. 3 of 1971, as amended, and this is what is stated in Article (44) of this law, and the Personal Status Law No. 188 of 1959, as amended, and this is what is stated in Article 39/3, the Iraqi Labor Law No. 37 of 2015 (Article 141 / II) and the Law of Criminal Procedure No. 23 of 1971: This law allows the claim for compensation for moral damage within the scope of contractual liability, Article (10) thereof.

Section Two: Egyptian Civil Law

Before the issuance of the Egyptian Civil Law of 1948, there was no text in Egypt providing for compensation for moral damage (9), and although there is no text, jurisprudence and the judiciary were stable on moral compensation (10), where the Egyptian Civil Law came and resolved the subject and stipulated the moral damage, as it was stated in one of its resources by saying:(Compensation for moral damage also includes...) (11), and through that we find that the text of the said article includes compensation for moral damage within the scope of contractual and tort liability, because this text is contained in the section of the effects of the obligation, and we also note that the Egyptian legislator has launched the phrase and did not specify the scope of this compensation in contractual or tort liability, and then we can say that compensation for moral damage in the said article falls in the circle of contractual liability and tort liability, Because the absolute is being released.

Section Three: French law

By reviewing the texts of the amended French Civil Law of 2016, we find that the French legislator has included provisions on contractual liability, and that these texts have a general and comprehensive character, which made

jurisprudence and the judiciary there tend recently to take compensation for moral damage within the scope of the contract guarantee (or contractual liability), and this is what is stated in Article (1231/1) (12).

The Conclusion

At the end of our research, we reached the following conclusions and proposals:

First: Results

- 1- We were able to develop a comprehensive definition that prevents the responsibility of the professional contractor, as well as we reached the definition of the professional contractor.
- 2- We found that the Iraqi law is still adhering as a general rule to what is stated in the text of Article (259) of the Civil Law, according to the text of this article, the professional can require exemption or mitigation of his contractual responsibility, taking advantage of the lack of experience of the consumer and his lack of specialization in addition to his economic weakness, which the consumer cannot refer to the professional in the event of damage, and this is inconsistent with the requirements of public order and rejection of justice.
- 3- We found that the professional's commitment to confidentiality is not absolute, but is affected by some reasons that allow him to disclose the secret, without entailing any responsibility and the cases that exempt the professional from his commitment to confidentiality are (the consent of the owner of the secret and testimony before the judiciary and news about a crime and the state of necessity) and either the conditions of exemption or mitigation of responsibility resulting from the breach of the obligation to ensure safety are invalid because such conditions lead to physical harm.
- 4- It became clear to us that Iraqi law is devoid of legal regulation of the responsibility of the professional, and in front of this fact, the Iraqi judiciary is almost creative for legal provisions for compensation for moral damage.

Second: Proposals

- 1- We call on the Iraqi legislator to develop a text that stipulates the invalidity of all conditions that would mitigate or exempt from the responsibility of the professional, especially those damages that occur to the safety or health of consumers
- 2- The need to review the rules of civil liability for professionals, by including special provisions for the system of compensation for occupational damages.
- 3- The need to add a study subject in the name of professional ethics within the study materials of colleges

Margins

1. This definition, developed by the National Union of Free Professions in France, is referred to in Dr. Mahmoud Mokhtar Barbary, Commercial Transactions Law, Part One, Dar Al-Nahda Al-Arabiya, Cairo, 2000, p. 63.
2. Dr. Mahmoud Mokhtar Barbary, Commercial Transactions Law, Part One, Dar Al-Nahda Al-Arabiya, Cairo, 2000.
3. See: Article I, paragraph six of the Iraqi Consumer Protection Law No. 1 of 2010.
4. Quoted in, Dr. Khaled Abdel Fattah, Consumer Protection in Private International Law, Dar Al-Nahda Al-Arabiya, Cairo, 2002, p. 35.
5. See: Article I, paragraph six of the Egyptian Consumer Protection Law No. 67 of 2006.
6. Hussein Amer, The binding force of the contract, 1st edition, without printing place, 1949. p. 557 ff.
7. Suleiman Markus, Al-Wafi fi Sharh Al-Qalun Al-Civil, Civil Liability, Volume Two, 5th Edition, 1992, p. 622.
8. Dr. Ashraf Gaber, Contractual Liability for the Things Used in the Implementation of the Contract, Dar Al-Nahda Al-Arabiya, Cairo, p. 182.
9. Also, the judiciary in Egypt did not settle on this until after hesitation, see the many rulings mentioned by professors Hussein Amer, Abdul Rahim Amer, Civil Responsibility, 11th Edition, Dar Al-Maaref, 1957, p. 346.
10. Dr. Tharwat Fathy Ismail, Civil Liability of the Professional Seller, Manufacturer-Distributor, A Comparative Study, PhD Thesis, Ain Shams University, 1987, p. 72 and beyond.
11. Article (222/1) of the Egyptian Civil Law.
12. The French Civil Law before the amendment and under Article (1142) stipulates (that every obligation to do an act or the obligation to refrain from an act leads to compensation in the event of non-performance of the obligation by the debtor) but replaced by the text of Article 1231/1, see: Dr. Nafi Bahr Sultan, previous source, p. 58