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Research Article

The Extent to Which the Fault Is Required as a Basic Element of the Tortious Liability in the Iraqi Civil Law: An Analytical Comparative Study

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Abstract

The Author has done his utmost to draw distinctions between the Iraqi civil law No. (40) of 1951 from one hand and the Islamic jurisprudence, the English common law and some other Arab comparative laws. Although the Iraqi civil law is affected by the Islamic jurisprudence, and borrows the term of guaranteeing the harmful act from the juristic maxims of this jurisprudence. But it adopts impliedly the concept of the fault in the first paragraph of the article (186), by stipulating the willfulness or encroachment of both the perpetrator and the abettor. Thus confusing between the system of the guarantee and that of the liability. Unlike the Islamic jurisprudence which adopts the idea of guaranteeing the harmful act, and distinguishes obviously between the guaranteeing of the perpetrator and that of the abettor. Or between the act done directly by perpetration and indirectly by causation, and does not recognize the idea of the fault. As far as the English common law is concerned, it adopts the fault-based liability as a general principle, the same is true for the Egyptian civil law No. 131 of 1948. Whereas both the Jordanian Civil Law No. 43 of 1976, and the Federal civil transactions law No. 5 of 1985 of the United Arab Emirates adopt the idea of guaranteeing the harm rather than the fault. The problem of the research lies in the confusion, embarrassment and perplexity in the situation of the Iraqi civil law concerning the basic element of the fault in the tortious liability. Therefore the author tries hard to solve confusion, remove both the embarrassment and perplexity by analyzing the true situation of the Iraqi civil law towards this basic element, and comparing it with the Islamic jurisprudence, which is considered as its original historical source, by which it is highly affected. As well as the English common law, considered as the leading legal system within the Anglo-American legal system, and different from the civil law system, led by the French civil code, by which the Iraqi civil law is indirectly affected, through being affected by the Egyptian civil law. The author suggests some relevant recommendations, the most important of which is thedistinction between the system of the liability and that of guaranteeing the harmful act, and adopt the former in the case of the damage done by perpetration, and the latter in the case of the damage done by causation.

Keywords

Fault, Guarantee, Tortious Liability, Willfulness, Encroachment, Perpetrator, Abettor

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1. Introduction

1.1. The Introductory Preface to the Topic

The Iraqi civil law No. (40) of 1951 adopts and embraces the concept of the "fault" in the article (186), in spite of not mentioning it expressly as a basic element of the tortious liability, particularly the civil liability from personal acts, in the article (204), and mentions, instead, the encroachment, which is considered as the material component of the fault. The article (186) embraces a well-established general rule that no liability without fault, by stipulating willfulness or the encroachment for the tortious liability of both the perpetrator and the abettor to arise. Although the Iraqi civil law is highly affected by the Islamic jurisprudence, in general, but the general rules regulating the liability by perpetration and causation contradict or run contrary to juristic maxims (Al-qawāʿid al-fiqhīyah) regulating the guarantee (ḍamān) of the harmful act by perpetration and causation in the Islamic jurisprudence. But the principle of the strict liability in the Iraqi civil law is restricted to the liability of the non-discerning person and those having the same status. The Islamic jurisprudence does not adopt the concept of the "fault". But adoptsthe idea of guaranteeing (ḍamān) the harm, and founds it onthe objective protection of the injured, based upon the element of the damage only. The liability in the English common law is, principally, fault-based, requiring three aspects characterizing the "state of mind" of the tortfeasor. But it adopts the strict liability to a limited extent. As far as other Arab laws chosen as a subject-matter of this study are concerned. The Jordanian Civil Law No. (43) of 1976, and the Federal civil transactions law No. 5 of 1985 of the United Arab Emirates adopt, as opposite to the Iraqi civil law, the strict liability as a general rule, and do not require the willfulness or the encroachment for the perpetrator to guarantee the harm. Finally the Egyptian civil law No. 131 of 1948adopts the idea of the "fault" as a general rule, but it excludes from this general rule the liability of the non-discerning person, and does not consider it as a fault-based liability, but establishes it on the basis of the strict liability.

1.2. The Importance of the Research

The importance of this piece of research lies in trying to deal with embarrassment and perplexity vitiating the situation of the Iraqi civil law as to the basic element of the fault in the tortious liability. As well as trying to treat and remove the contradiction between the Iraqi civil law and the Islamic jurisprudence as for the stipulation of the willfulness or encroachment in both the acts done by the perpetration and causation. And the contradiction within texts of the Iraqi civil lawitself, that is to say between the articles (186) and (191).

1.3. The Problem of the Research

The problem of this research is focused on the obvious confusion, embarrassment and perplexity in the situation of the Iraqi civil law concerning the basic element of the fault in the tortious liability. Considering that the article (204) establishes the liability from personal acts on the element of the encroachment instead of the element of the fault. But the article (186) stipulates the fault represented by both the willfulness and encroachment for the civil liability to arise, whether theact is being committed either byperpetration or by causation. contrary to the Islamic jurisprudence in this respect. In spite of being highly affected and deeply influenced by this jurisprudence, when borrowing the rules regulating the perpetration and causation of the harmful act from the juristic maxims (Al-qawāʿid al-fiqhīyah) ofthe journal of juristic rules (Mejelle-iAḥkāmAdlīye "Majallah"). This means that the liability according to the article (186) is based on fault, because no distinction is made between the perpetration and causation. Whereas the Islamic jurisprudence does not adopt the concept of the fault, as opposed to both the civil law and common law systems, and made a well-defined distinction between the perpetration and causation. Therefore, we can say that the main point of dispute between the Iraqi civil law and the Islamic jurisprudence lies in the idea that the liability of the perpetrator in the former embodies the concept of the fault, whereas the guaranteeing (ḍamān) by the perpetrator in the latter renounces and weighs light the fault.

1.4. The Methodology of the Research

This research has followed up the analytical comparative methodology of thelegal research, by studying the concept of the fault as a basic element of the tortiousliability, in the Iraqi civil law, then analyzing the situation of the Iraqi civil law towards the fault-Based liability because of embracing the concept of the encroachment or willfulness, and towards the strict liability in because of renouncing this concept. Andcomparing this situation with that of the Islamic jurisprudence and the comparative law, represented in this research by the English common law, the Egyptian civil law No. (131) of 1948, the Jordanian Civil Law No. (43) of 1976, and the Federal civil transactions law No. 5 of 1985 of the United Arab Emirates.

1.5. The Plan of the Research

In conformity with the above-mentioned methodology, this research has been divided into three sections. The first discusses the concept of the fault as a basic element of the tortious liability. The second studies the fault-Based liability Iraqi civil law because of embracing the concept of the encroachment or willfulness compared with the Islamic jurisprudence and the comparative law. whereas the third is concerned with the strict liability in the Iraqi civil law because

of renouncing the concept of the encroachment or willfulness compared with the Islamic jurisprudence and the comparative law and as follows:

2. The Concept of the Fault as a Basic Element in the Tortious Liability

To begin with the Iraqi civil law No. (40) of 1951 as opposite to the Egyptian civil law No. (131) of 1948, and other Arab civil laws affected by the French civil code of 1804, does not mention expressly the fault as a basic element of the tortliability (tortious liability), particularly the civil liability arising from personal acts. But mentions instead the encroachment in conformity with the article (204) of this law which provides that (Every encroachment which causes other than the injuries mentioned in the preceding Articles entails payment of compensation). Whereas the Egyptian civil law adopts expressly the fault as a basic element of the tortious liability. The reason why the Iraqi civil law adopts the term "encroachment" rather than the "fault", is, in fact, itsbeing highly affected by Islamic jurisprudence, particularly the journal of juristic rules of 1869 (Mejelle-iAḥkāmAdlīye"Majallah"), which is considered as a European-style Ottoman codification of Islamic law of the hanafite school [16], from which it borrows most of its rules. As well as being affected by the Egyptian civil law No. 131 of 1948. The Islamic jurisprudence. Therefore we should study the definition of the fault and its basic components, in order for thecomparisonto be made between the situation of the Iraqi civil law and both the Islamic jurisprudence and the comparative law of this study in the following two sub-sections:

2.1. The Definition of the Fault

Simply put, the fault is definedterminologically by Some Iraqi jurists [3] as the violation of the preceding legal obligation to respect the rights of the public and not to injure or harm them. This is an obligation of care, and the required care is represented by taking precautions to avoid harming others. It has also been defined [19] as the violation of the preceding legal obligation committed or perpetrated with cognition and discernment (discretion) strictly speaking, we can say that all these definitions of the fault are similar in context.

As far as the Islamic jurisprudence is concerned, the Islamic jurists do not adopt the term of the fault, instead they used the terms of the willfulness and encroachment. The willfulness is the intention to do harm, and the encroachment which means the violation perpetrated by the harmful act doer on victim's body or rights in the case of the perpetration, or the violation on the limits determined by sharia, which leads to the damage in the case of causation [31]. We shall discuss in details the concept of both the willfulness and the encroachmentin the following sub-section.

The English common law, which is based on judicial precedents and customs [5] adopts the concept of the fault within the scope of the tort liability, and uses the term "tort" to denote the fault. It considers mainly this type of liability as a fault-based liability. One of the English jurists [25] defines the "tort" as a civil wrong which is perpetrated or committed against an individual rather than the state. Another jurist [15] defines it as a civil wrong leading to possible compensation. It is primarily committed against a duty mainly fixed by law, the breach of which leads to the tortious liability. It is also defined [32] as a civil wrong used to describe the defendant's behavior which is legally classified as wrongful or tortious, in order to entitle the plaintiff remedies. Originally the "tort" is a French word which means "wrong", and derived from the latin term "Tortum" which means the "fault" [14]. The adjective "tortious" can be derived from this root, as well as the adverb "tortiously". But the term "wrong" is more comprehensive than that of the "tort", since all torts are considered as wrongs, but not all wrongs are torts [10]. Tort is done intentionally or negligently, and brings about an action for compensation or damages filed by the injured against the tortfeasor [27]. It should also be noted that the idea of the fault in the English law dates back to the nineteenth century. It has developed proportionately with the ever-developing industries [25]. Consequently the English courts established the legal system of tort, and made it a fault-based civil liability, which needed the proof of the fault as a basic element of this liability, in order for the plaintiff to succeed in the tort action. It has been thought at that time that evolution of the fault-based liability would deter people from anti-social behavior. But this led to unexpected bad consequences, because the difficulty of the proof of the fault, mostly deprived of compensationworkers in the field of industry suffering from industrial accidents [25]. The compensation is usually paid by the perpetrator of the tort, known as the "tortfeasor", to compensate for the commission of the tort [13].

The Egyptian civil law No. (131) of 1948, highly affected by the French civil code, adopts expressly the idea of the fault [41], in accordance with itsarticle (163) which provides that (Every fault which causes an injury to another, imposes an obligation to make reparation upon the person by whom it is committed). Jurist Al Sanhouri [4] defines the fault as the violation of the legal obligation, which is always an obligation of conduct or an obligation to take care. As opposite to the obligation violated in the contractual liability, which can be either an obligation of result or an obligation of conduct. Some other jurists [37] define it as the violation of the legal obligation not to injure or harm another. So that everyone must take a reasonable care in his or her conduct towards others.

Both the Jordanian civil law No. (43) of 1976, and the Federal civil transactions law No. 5 of 1985 of the United Arab Emirates, renounce the idea of the fault totally, and adopt instead the idea of the harming, as a basic element of the civil liability arising from the harmful act, because of being considerably influenced by the Islamic jurisprudence.

Therefore both the article (256) from the Jordanian civil law and (282) from the civil transactions law of the United Arab Emirates provide that (Any harming done to another shall render the actor, even though not a person of discretion (Non-discerning person) bound to guarantee the repair of the prejudice or the harm). One of the jurists [6] define the harming as the act or the omission which leads to the harm or injury. And it is also defined [18] as the act done or committed by someone, which leads to the harm or prejudice inflicted to another. We can mention also the definition of another jurist [29], who defines the harming as the transgression of the limits by which the person shall be bound to adhere or to which shall be bound to reach in an act or omission. Finally it has been defined by both the explanatory note of the civil transactions law No. 5 of 1985 of the United Arab Emirates as amended by federal law No. 1 of 1987, and the Jordanian civil law No. (43) of 1976 as the transgression of the limits to which it should be stopped, or to which it shall be reached in an act or omission, leading to the consequential harm or prejudice inflicted to another.

It is to be concluded from these definitions that the term of "harming" replaces that of the harmful act, and can be used instead of it similarly and equally [6], as well as substituting the term of the illegal act. The harming can either be a positive act or a negative omission. It can denote also to both the willful act or the mere negligence [29].

2.2. The Basic Components of the Fault

It is worth-bearing in mind that the fault as basic element of the tortious liability (fault-based liability) is made up of two components: the material component, that is to say the encroachment. And the moral component, namely the discernment or cognition. Therefore, we should review both of these two components in brief and as follows:

First: The encroachment: Encroachment is considered in itself as the basic element of the civil liability arising from the illegal act, as well as the other two elements of the damage and the causal link between them. In conformity with the afore-mentioned article (204) of theIraqi civil law. It is defined [3] as the transgression of the limits by which the person shall be bound in his or her conduct. It can also be regarded as a deviation in the conduct, whether this deviation be willful (intentional) or non-willful (unintentional). Strictly speaking the willful deviation is usually combined with the intention to harm or injure another. Whereas the non-willful deviation may emanate from negligence or carelessness. This deviation can be measured by two standards or tests: the subjective and objective standards. According to the former we are focused on the personality of the tortfeasor or the perpetrator of the illegal act him or herself. And not on the illegal or harmful act itself [4]. This standard or test makes the prudent or careful person liable, even though he or she commits the smallest and simplest deviation of conduct. Whereas the careless person may only be found liable if he or she perpetrates a considerable deviation of conduct [19]. Whereas the latter, that is to say the objective standard is more equitable than the former, because it measures the deviation or perversion of the conduct of the tortfeasor or illegal act perpetrator, and compares it with the typical conduct of a person who is neither characterized by ultra-intelligence nor by infra-stupidity [1]. This hypothetical person is known as the reasonable person, who is surrounded by same external circumstances of the perpetrator. Without taking into account the internal circumstances. The external circumstances include both the temporal (time) and spatial (place) circumstances. The internal circumstances which should be eliminated from this objective measurement include three types of circumstances: the age, sex and the social status of the illegal act perpetrator [4]. Finally the encroachment is being defined [3] in accordance with the objective standard as the deviation from the conduct of the reasonable person surrounded by same external circumstances of the illegal act perpetrator.

Second: The discernment or cognition: the cognition is considered as the moral component of the fault. The encroachment is not sufficient in itself for the civil tortiousliability or the liability from illegal or harmful act to arise. Furthermore, the doer of the act should realize or have the required awareness of the acts he or she perpetrates [4]. It is to be noted also that the discernment or discretion from one hand and the cognition or awareness from the other hand are linked together, because the person who realizes or is aware of his or her act, should be a discerning person. And vice-versa the non-discerning person is not aware of his or her act. This means that any person suffering from non-discernment for minor age, insanity or idiocy will be totally unaware of the acts he or he perpetrates. Therefore, it can be said that the fault as the basic element of the civil liability is closely related to both the cognition and discernment [37]. And the general rule in most civil laws is that no liability without discernment [20]. The person must be discerning in order to be tortuously liable [4]. And in conformity with this rule some civil laws requires that the person only be discerning in order for his or her liability to arise, no matter whether he or she attained full age or not [19]. One example of these laws is the first paragraph of the article (164) of the Egyptian civil law which stipulates discretion for the liability from unlawful acts to arise and provides that (every person with discretion is liable for his or her illegal or unlawful acts). Therefore, the discernment is an essential prerequisite for materialisation of the civil liability, irrespective of attaining of the full age. Because it is regarded as the component of the cognition or awareness of which the fault is made up. It should be available in order for the civil liability from the illegal act to arise, otherwise the act perpetrated will not be considered as a fault [37]. Hence no fault without cognition or awareness. Consequently, the discerning child is fully and totally liable tortiously, although not attaining full age. Because cognition or awareness are components of the fault. Without which no fault is being committed [4]. Non-discerning child, insane

and idiot persons are not tortuously liable.

3. The Fault-Based Liability in the Iraqi Civil Law Because of Adopting the Idea of the Encroachment or Willfulness

We shall dedicate this section of the study to study the situation of the Iraqi civil law from one hand, and the Islamic jurisprudence and the comparative law from the other hand concerning the fault-based liability and as follows:

3.1. The Situation of the Iraqi Civil Law Concerning the Fault-Based Liability

Although the Iraqi civil law does not mention the "fault" in the article (204), and mentions, instead, the encroachment, which is considered the material component of the fault. But it adopts and embraces, indeed, the "fault". And regulatesa well-established general rule that no liability without fault [20]. Which can be deduced from the first paragraph of the article (186), which provides that (A person, who has directly by perpetration or indirectly by causation caused damage to or decreased the value of the property of another person, shall be liable, if he or she acted willfully or by encroachment, when inflicting the damage).

The following points have been shown from the interpretation of this text: First: the Iraqi civil lawadopts implicitly the"fault" in the tortiousliability from personal acts, in spite of adhering to the encroachment in the afore-said article (204), as a basic element of the civil tortious liability. This can be clearly illustrated by the fact that it stipulates the willfulness or encroachment as prerequisites for both the perpetrator and the abettor to be liable [24]. The willfulness and encroachment refer inevitably to the "fault" [3]. The former means the intention to harm or injure another, and the latter means the perpetration of the harmful act carelessly and negligently. Second: the Iraqi civil law contradicts the situation prevalent in the Islamic jurisprudence, in that it destroyed the differentiation embraced by Islamic jurists between the perpetration and causation. Third: although the Iraqi civil law keeps both the terms of the perpetrator and the abettor within the formulation of the article (186), but it equalizes between them, by stipulates the willfulness or encroachment for the liability to arise. This means that the differentiation in the Iraqi civil law is a mere superficial or verbal one with useless and fruitless results. Whereas the differentiation in the Islamic jurisprudence is actual, essential and practically very useful. Fourth: the contradiction can also be found between both the article (186) and (191) of the Iraqi civil law concerning the civil liability from personal acts. From one hand the article (186) stipulates, as we have said, the willfulness and encroachment for the tortious liability of the adult. Whereas it does not stipulate both of them for the liability of the non-discerning person, who should be liable strictly or objectively, irrespective of the element of the fault represented by both the willfulness and encroachment, according to the first paragraph of the article (191) from the other hand. This means that the liability of the non-discerning person is not a fault-based one, but a strict liability, which arises as soon as the non-discerning person perpetrates a harmful act [20]. So to speak, the contradiction between these two texts makes the liability of the non-discerning person is heavier and more severe than that of the adult person with full capacity. Because the former does not depend upon the willfulness and encroachment to materialize, whereas the latter does. Fifth: because the Iraqi civil law stipulates willfulness and encroachment for both the perpetrator and the abettor to be tortiously liable, it permits the solidarity between them in the liability, and makes them both jointly liable for guaranteeing (ḍamān) the harmful act [3]. In conformity with the second paragraph of the article (186), which provides that (where two persons - a perpetrator and an abettor - are involved in committing the damage, the one who acted willfully or by encroachment shall be liable; where both are liable the liability will be joint and several). This means that both the perpetrator and the abettor are obliged to guarantee the harmful actin the case of beingjointly involved [9].

3.2. The Situation of the Islamic Jurisprudence and the Comparative Law Concerning the Fault-Based Liability

Now we shall discuss and analyze here the situation of the Islamic jurisprudence and the comparative lawconcerning the fault-based liability and as follows:

First: The situation in the Islamic jurisprudence: to begin with, the Islamic jurisprudence does not adopt totally the idea of the "fault" [19]. Furthermore, it is to be said also that this jurisprudence does not embrace the idea of tortious liability from the illegal act, well-known in the comparative law. Instead, the Islamic jurisprudence adopts the idea of guaranteeing (ḍamān) of the harmful act [11]. This is because of the objective tendency of the Islamic jurisprudence. which is represented by the juristic maxim providing that (The perpetrator is always guaranteeing the harm, even though not acting willfully, or committing any act of encroachment) (Al-Mubāshiru ḍāminun Wa in lam Yata'ammad). It is indicated from this juristic maxim that the Islamic jurisprudence quits altogether the idea of the "fault". But it seems that the Islamic jurisprudence comes nearer to this idea, even if it does not adopt it in another juristic maxim. It is clearly obvious from the juristic maxim that (the abettor will only be guaranteeing, if acting willfully, or committing any act of encroachment) (Al-Mutasabbibu Lā-yaḍmanu IllāBī -l-Ta'ammud). This means that the guaranteeing made by the abettor is limited or restricted to his or her willfulness and encroachment. But one of the jurists [31] thinks that the encroachment is sufficient in itself for the abettor to guarantee the harmful act, rather

than the willfulness or the intention. Because the rights are guaranteed in the case of the willfulness or the intention. The impact of the willfulness is somewhat similar to that of the "fault". In that the abettor may intend the act itself, but not the effect resulting from this act [8]. One of the Islamic jurists went so far that there is no difference in guaranteeing (ḍamān) the damage whether it be done by willfulness or by fault [39]. Furthermore, one of the positive jurists [20] says that thewillfulness and encroachment in terms of the Islamic jurisprudence are similar and synonymous to the commission of the fault in terms of the positive law.

It is worth-referring here that the main point of dispute between the Iraqi civil law and the Islamic jurisprudence is confined to the guaranteeing (ḍamān) of the harm committed by perpetration and not the by causation. In that the Iraqi civil law stipulates both the willfulness and encroachment for guaranteeing, as opposite to the Islamic jurisprudence which does not require both of them for guaranteeing the harmful act committed by the perpetrator and not the abettor [3]. The Islamic jurisprudence also contradicts with the Iraqi civil law in another point of dispute, it does not permit the solidarity between the perpetrator and the abettor in guaranteeing the harmful act, because it does not recognize their joint gathering and involvement in the guarantee. According to the juristic maxim regulated by the article (90) of the journal of juristic rules (Mejelle-iAḥkāmAdlīye"Majallah") which provides that (Where the perpetrator and the abettor are involved in inflicting the damage, the former will be liable rather than the latter) (IdāIjtama'a al-Mubāshiruwa-l-MutasabbibuYuḍāfu al-| ḥukmuIlā al-Mubāshir).

Second: The situation in the comparative law: as far as the comparative law is concerned, once again we say that we have chosen the English, Egyptian, Jordanian and Emirates laws to represent the comparative law in this study. The liability in the English common law is, principally, a fault-based one. The "fault" in this law known as the "tort" is made up of two basic elements or components: the material and moral ones. As it is the case with other laws embracing the principle of the fault-based liability, the material component encompasses the either the act or the omission [26]. Whereas the moral component represents the "state of mind" of the tortfeasor. When discussing the fault-based liability in the English law, we shall take into account two important matters: First the most important matter as to this "state of mind" upon which the fault-based liability is based, is the three aspects by which it is characterized. That is to say, the intention, malice and the negligence [13]. If available or at least one them, these aspects emphasize that the liability is based on the fault or tortious in nature. The importance of the liability for fault of the fault-based liability in the English common law increased with the development of the tort of negligence [32]. Second it is to be noted also that the presence or the absence of one of these three aspects of the"state of mind" of which the moral component of the tort is made up, determines the sub-type of the fault-based liability [33], this is because the English common law does not include a general rule governing the civil liability arising from the tort, contrary to civil law system. Therefore, the presence of the negligence refers to the liability from the tort of negligence. The presence of the malice may indicate the civil liability from the tort of defamation, particularly the libel [36]. The liability from the invasion of the right of privacy, the liability from the trespass to the land and the liability from the tort of malicious falsehood. Whereas the presence of theintention may determine the liability from the trespass to persons, including both the assault and battery, the tort of passing-off, the tort of conspiracy and the tort from the liability for inducing a breach of the contract.

To sum up the situation in the English law as to the fault-based liability we can say that because of the presence of the negligence, malice or the intention, the liability in all of the preceding tort is fault-based as a general principle [26]. But there are some cases in which the strict liability or liability without faultmay arise, especially in the cases where it is not required from the plaintiff to prove the presence of one of afore-mentioned three aspects of the "state of mind" of which the moral component of the tort is made up. Instead it is sufficient to prove the damage or injury he or she suffered, as an exclusion from the general principle of the fault-based liability.

Now let us discuss the situation of both the Jordanian Civil Law No. (43) of 1976, and the Federal civil transactions law No. 5 of 1985 of the United Arab Emirates concerning fault-based liability. To begin with both of these two laws are highly affected by the Islamic jurisprudence in most of their terms and rules. Following suit the Islamic jurisprudence, they adopt the idea of the strict liability (objective liability), focused on the objective protection of the injured, rather than evaluating the conduct of the harmful act doer [6], and based upon the basic element of the damage. This is summarized by the idea of guaranteeing (ḍamān) the harm, as opposite to the idea of civil liability based on the basic element of the "fault". The harm in both of these laws has an objective sense rather than the personal or subjective sense of the fault. Because the former is only related to the compensability of the injured, whereas the latter in is closely tied to awareness and discernment of the doer of the act. Both of these laws borrowed this concept from the idea of guaranteeing the harm in the Islamic jurisprudence, which aims at compensating the injured or the aggrieved rather than reviewing the conduct of the doer, and irrespective of the personal features of the doer whether he be discerning or non-discerning, mentally sound or mentally retarded [6]. Therefore, the general rule concerning the harming in both the Jordanian and Emirates laws is determined according to both the articles (256) and (282) respectively, which provides that (Any harm done to another, the doer of which is bound to guarantee it, even though not a person of discretionor non-discerning person). Then both the articles (257) of the Jordanian law and the (283) of the Emirates law make a distinction between the

perpetrator and the abettor, by entailing in the first paragraph of both of these articles that (Harming shall be committed either by perpetration or by causation). And as a consequence of this distinction the second paragraph of these articlesbased the guaranteeing (ḍamān) of the perpetrator on the element of the damage or harm only, without taking into account the willfulness or encroachment. Whereas the matter is different for the abettor, whose guaranteeing (ḍamān) the harm is conditional upon the willfulness or encroachment. They provides that (If the harm is committed by perpetration, the perpetrator is unconditionally bound to guarantee the prejudice and, if by causation, the guaranteeing by the abettor is conditional upon encroachment, willfulness or if the act is leading to the prejudice). It is clearly obvious that that this text is highly affected by the juristic maxims (Al-qawāʿid al-fiqhīyah) of the Islamic jurisprudence which distinguish deeply between the perpetration and causation. The former is used to describe the case in which the harmful act is the direct and only factor leading to the damage, without the interference of any other act [7]. The latter is the case in which some one (abettor) commits an act leading indirectly and consequentially to the damage or prejudice. What is important for us to elucidate the situation of both the Jordanian and Emirates laws concerning the idea of "fault" and the fault-based liability is the guaranteeing (ḍamān) of the abettor whichcomes nearer tothe idea of the "fault"

, by stipulating the willfulness or encroachment, particularly the former which means the intention to do harm, that is to say the abettor must intend the consequence as well as intending the act [6]. What we should emphasize here is that this intention required for the willfulness to be materialized is considered as a personal feature of the will, which depends upon the awareness and discernment or discretion of the doer. Since the non-discerning person is unable to intend to do the harm on another [6]. This means that in the case of the harm by causation, the abettor will not be bound to compensate the injured, unless being proved that he or she intends to do the harm. In other words he or she commits a fault by willfully intending to do the harm [29]. Even though both of these laws do not adopt the idea of the "fault" and fault-based liability, but instead they based the compensability of the injured on the idea of guaranteeing the harmful act [6].

Turning to the situation of the Egyptian civil law No. 131 of 1948, we can see obviously that this law adopts the idea of the "fault" as a general rule [40], according to the aforementioned article (163). But it distinguishes between two types of the fault: the provable or the personal fault, upon which the civil liability from personal acts is based, and the presumable or supposed fault, which is considered as the basis for both the vicarious liability and the liability arising from things [4]. The provable fault means that the burden of proving is to be shouldered by the creditor of the obligation or the injured, who should prove the fault committed debtor or the doer of the act [37]. Whereas the presumable or supposed fault means that the creditor or the victim does not carry the onus of proving, because the legislator presumes or supposes the perpetration of the fault for the sake of the injured, in order to facilitate his or her compensability from the damage [4].

4. The Strict Liability in the Iraqi Civil Law Because of Renouncing the Idea of the Encroachment or Willfulness

After discussing the situation of the Iraqi civil law concerning the fault-based liability, and comparing it with that of the Islamic jurisprudence and the comparative law. We shall dedicate this section to study the strict liability in the Iraqi civil law as well as the Islamic jurisprudence and the comparative law, in the case of the absence of the willfulness or encroachment in the following sub-sections and as follows.

4.1. The Situation of the Iraqi Civil Law Concerning the Strict Liability

We have said earlier that the Iraqi civil law adopts the idea of the "fault" as a general rule, and embraces the principle of the fault-based liability in the article (186). But exclusively it runs contrary to this original situation, and adopts the strict liability of the non-discerning person [20], irrespective of the element of the fault represented by both the willfulness and encroachment in the first paragraph of the article (191). Adopting the strict liability of the non-discerning person or any other person having his or her status, the Iraqi civil law is affected by the idea of the perpetration prevalent in the Islamic jurisprudence, which is summarized by the legal maxim saying that (The perpetrator is always guaranteeing (ḍamān) the harm, even though not acting willfully, or committing any act of encroachment). The first paragraph of the article (191) provides that (If a minor – discerning ornon-discerning - or any one having his or her status damages the property of another, will be bound to guarantee from his own property). It is clearly obvious that the Iraqi civil law does not adopt the fault-based liability in this paragraph, but instead it adopts the principle of the strict liability, based on the damage perpetrated by the minor, whether he or she be discerning or non-discerning, or any one having his or her status like the insane [20]. Two remarks can be deduced from the above-mentioned text: First this liability can not be a fault-based one at all, since the "fault" is made up of the awareness and discernment [17], but the non-discerning person is neither having awareness nor discernment [4]. It is indeed an objective liability. Second the Iraqi civil law considers the liability of the non-discerning person as an original rather than a reserve liability, because the non-discerning person should guarantee the damage and compensate the injured from his or her own property [19]. Finally it is to be mentioned that the age of discernment or discretion in the Iraqi civil law starts from attaining the age of eight years old until

completing eighteen years old, namely the full age [2].

4.2. The Situation of the Islamic Jurisprudence and the Comparative Law Concerning the Strict Liability

We shall try in this sub-section to indicate the situation of the Islamic jurisprudence and the comparative law concerning the strict liability in the case of the absence of the willfulness or encroachment, and as follows:

First: The situation in the Islamic jurisprudence: as we have said earlier that Islamic jurisprudence eliminates the idea of the "fault", and adopts instead the idea of guaranteeing (ḍamān) the harmful act, rather than the idea of the liability. This guaranteeing is based on two juristic maxims: the first is (No harm shall be inflicted, and no retaliation of harm with harm) (LāḍararWalāḍirar), and the second is (Harm must be removed) (Al ḍararYuzal). One of the jurists [11] defines the guaranteeing as the indebtedness of the estate, the patrimony or the financial assets with something due to be paid. In accordance with the juristic maxim that (The perpetrator is always guaranteeing the harm, even though not acting willfully, or committing any act of encroachment), the idea of the "fault" has been eliminated and replaced by the idea of guaranteeing, which is based upon the objective protection of the injured or the victim. This protection is based upon the element of the damage, rather than the element of the "fault". This means that the guaranteeing by the perpetrator neither does depend on the willfulness nor on the encroachment. The guarantor, if he or she be a perpetrator rather than an abettor, should only be required to have the patrimony and not to have both the awareness and discernment [19]. This juristic maxim is also reinforced by another maxim that (Where the perpetrator and the abettor are involved in inflicting the damage, the former will be guaranteeing rather than the latter). This maxim indicates clearly the objective tendency of the Islamic jurisprudence, because the perpetrator will be guaranteeing the harm, even though the abettor does the act willfully or by encroachment [31]. It is the perpetrator who effectively inflicts the damage [35], whereas the abettor only causes it. Thus if they are both involved in destroying the property of another, the perpetrator will be guaranteeing rather than the abettor [35]. For example if some one digs a well, and another one throws property inside it causing damage. The perpetrator will guarantee directly, whereas the abettor will not be guaranteeing, except when acting willfully [21]. Because the person who destroys the property directly, must be guaranteeing it by paying compensation or damages [22]. Therefore, the perpetration is considered as the effective factor leading to the damage per se [8]. It is worth-bearing in mind that the guarantee in the Islamic jurisprudence has such various typesas the guarantee of the surety, trespasser, Squatter [11], usurper, and the guarantee of the profits and benefits of the valuable property usurped [23].

Second: The situation in the comparative law: the comparative law also adopts the principle of the strict liability, but to various extents. Let us begin with the English common law, then study the situation in the Jordanian, Emirates and Egyptian laws: as far as the English common law is concerned. Although it adopts the fault-based liability as a general principle, and establishes it on the idea of the fault-based tort, in the most cases of the liability, as we have indicated earlier. But it also adopts the principle of the strict liability in some cases, and to a limited extent [14]. This type of liability is featured by being established on the element of the damage which the plaintiff suffers, rather than the element of the "fault", known as the "tort" [26]. This means that it is sufficient for the compensability of the plaintiff to be materialized to prove the damage or injury he or she suffers [38]. Some jurists [28] define it as that type of the liability which may arise, without proving intention, malice or negligence. It is obvious from this definition that the strict liability is not established on the element of the "tort", especially the three aspects of the "state of mind" of which the moral component of the tort is made up. Namely, the intention, malice and negligence. But it is established only on the element of the damage, as an exclusion of the general principle of the fault-based liability [13]. Therefore, its materialization does not require that these three aspects be proved. In spite of its limited extent in the English law, the strict liability may have some applications. The most remarkable of which are: 1- the liability from dangerous things, which is determined as a type of the strict liability in the light of the judicial precedent (Rylands v. Flectcher 1865. 3H&c774 (1868) LR3HL, 330 (House of lords)). 2- the Liability for animals in accordance with both the first and second articles of the (Animals Act 1971). 3-the liability from nuisance. 4- the liability from defective products according to the second article of the Consumer Protection Act 1987). 5- the vicarious liability which some jurists [38] consider it as an application of the principle of the strict liability [26].

When we take into account the situation of both the Jordanian Civil Law No. (43) of 1976, and the Federal civil transactions law No. 5 of 1985 of the United Arab Emirates, it is evident that both of them adopt, as opposite to the Iraqi civil law, the strict liability as a general rule. Because both of them do not stipulate the awareness and discernment as prerequisites for the civil liability to arise. They have built the system of the liability on the juristic maxims: (No harm shall be inflicted, and no retaliation of harm with harm) (LāḍararWalāḍirar) and (Harm must be removed) (Al ḍararYuzal). This indicates that the liability is established on these laws on the element of the "harm" rather than the element of the "fault", which requires the awareness of the deviation from the normal conduct [30]. This is what was stipulated by both the article (256) of the Jordanian civil law and (282) of the civil transactions law of the United Arab Emirates, which provide that (Any harming done to another shall render the actor, even though not a person of discretion

(Non-discerning person) bound to guarantee the repair of the prejudice or the harm). This means that the bases on which the guaranteeing of the prejudice inflicted by the harmful act is founded in the Islamic jurisprudence and the Jordanian and Emirates laws, is the objective idea or concept of the harm, which is different from the subjective or personal concept of the fault [6]. Then both of these laws adopt clearly the principle of the strict liability of the perpetrator rather than the abettor, since he or she is bound to guarantee the harmful act unconditionally, without considering the willfulness or encroachment. And irrespective of the conduct of the perpetrator, whether it be committed willfully or not, encroachingly or not [6]. According to the first part of the second paragraph of the articles (257) of the Jordanian law and the (283) of the Emirates law, which provides that (If the harm is committed by perpetration, the perpetrator is unconditionally bound to guarantee the prejudice). But as it is the case with the first paragraph of the article (191) of the Iraqi civil law, both of these laws establish the strict liability of the minor (child), whether he or she be discerning ornon-discerning, according to both the first paragraph of the article (278) of the Jordanian civil law and (303) of the civil transactions law of the United Arab Emirates, which provide that (If a minor – discerning or non-discerning - or any one having his or her status damages the property of another, will be bound to guarantee from his own property). This general rule aims at guaranteeing the prejudice inflicted by the harmful act doer, in spite ofa non-discerning person, and compensating the injured. Because the basis on which the guaranteeing of the prejudice inflicted byminor, whether he or she be discerning ornon-discerning, or any one having his or her status like the completely insane person, is not the "fault", but the objective protection against the damage or the prejudice suffered by the injured. The capacity of the person is not an influential factor here [6], since the guaranteeing by the minor or any one having his or her status does not depend upon the awareness or discernment of the doer, but upon the prejudice or the damage suffered by the injured, in accordance with the juristic maxim (No harm shall be inflicted, and no retaliation of harm with harm).

Although the Egyptian civil law No. 131 of 1948 embraces the principle of the fault-based liability in the field of the tortious liability arising from personal acts, but it excludes from this general rule the liability of the non-discerning person, and does not consider it as a fault-based liability, but establishes it on the basis of the strict liability [20]. Because the "fault" as a basic element of the fault-based civil liability requires the awareness [12], but the non-discerning person is unable to aware of the act he or she does [4]. The Egyptian civil law encompasses this rule in the second paragraph of the article (164). Which provides that (when the injury is caused by a non-discerning person, the judge may, if no one is responsible for him or her, or if the victim of the injury can not obtain reparation or compensation from the person responsible, condemn the person causing the injury to pay equitable damages, taking into account the position of the parties). It is also obvious from this text that this type of liability is characterized by being a conditionalreserve, and attenuated liability [12]. It is conditional if the injured is unable to obtain reparation or compensation from any other person except the non-discerning person him (or) herself. It is also a reserve liability, if no one is responsible for the non-discerning person, or when the guardian or custodian is insolvent [20]. This liability is also attenuated, because the judge should take into account the position of the parties when determining the magnitude of the damages [34]. Therefore, it is up to the judge either not to compensate the injured at all, if he or she is rich and solvent, but the non-discerning person is poor. or to decide full compensation if the injured is poor [12].

5. Conclusions

The conclusion is made up of both the findings and recommendations and as follows:

First: Findings: The study has reached the following findings:

1) The Iraqi civil law No. (40) of 1951 adopts the concept of the "fault"in the article (186), in spite of not mentioning it expressly as a basic element of the tortious liability, particularly the civil liability from personal acts, in the article (204), and mentions, instead, the encroachment, which is only considered as the material component of the fault. This means that it embraces the fault-based liability.
2) The principle of the strict liability in the Iraqi civil law is restricted to the liability of the non-discerning person and those having the same status according to the first paragraph of the article (191).
3) Although the Iraqi civil law is highly affected by the Islamic jurisprudence, in general, but the general rules regulating the liability by perpetration and causation in the Iraqi civil law contradict the juristic maxims regulating the guarantee of the harmful act by perpetration and causation in the Islamic jurisprudence.
4) The Islamic jurisprudence does not recognize the concept of the "fault". But recognizes the idea of guaranteeing (ḍamān) the harm, and founds it onthe objective protection of the injured, based upon the element of the damage only.
5) The idea of guaranteeing (ḍamān) the harm in the Islamic jurisprudence, and both the Jordanian and the Emirates laws highly affected by this jurisprudence, is based on two juristic maxims: the first is (No harm shall be inflicted, and no retaliation of harm with harm) (LāḍararWalāḍirar), and the second is (Harm must be removed) (Al ḍararYuzal).
6) The article (186) embraces a well-established general rule that no liability without fault, by stipulating willfulness or the encroachment for the tortious liability of

both the perpetrator and the abettor to arise.

7) The liability in the English common law is, principally, fault-based, the "state of mind" upon which this fault-based liability is founded, includes three aspects by which it is featured. That is to say, the intention, malice and the negligence, which distinguish this liability from the strict liability adopted to a limited extent.
8) The Jordanian Civil Law No. (43) of 1976, and the Federal civil transactions law No. 5 of 1985 of the United Arab Emirates adopt, as opposite to the Iraqi civil law, the strict liability as a general rule, and do not require the willfulness or the encroachment for the perpetrator to guarantee the harm.
9) The Egyptian civil law No. 131 of 1948 adopts the idea of the "fault" as a general rule, but it excludes from this general rule the liability of the non-discerning person, and does not consider it as a fault-based liability, but establishes it on the basis of the strict liability.
10) The most important finding we have concluded from this study, is that the adoption of the Iraqi civil law to the fault-based liability, as a general rule, by requiring the willfulness or the encroachment for the liability of both the perpetrator and abettor, precludes the ever-increasing world-wide tendency towards the objective or strict liability, which is first embraced and recognized by the Islamic jurisprudence.

Second: Recommendations: After displaying these findings, the researcher suggests the following recommendations:

1) The Iraqi legislator fell into a big confusion and embarrassment, when he confused between the system of the liability and the system of guaranteeing the harmful act. Whereas the former is based upon the element of the fault, and the latter is based on the element of the damage. Therefore, the researcher recommends that the Iraqi legislator distinguish between the system of the liability and the system of guaranteeing the harmful act, and adopt the former in the case of the damage done by perpetration, and the latter in the case of the damage done by causation. The researcher suggests the following amendment of the article (204) of the Iraqi civil law: (Every damage entails the doer or the perpetrator to guarantee the harmful act and pay damages, even though not doing the damage willfully or by encroachment. Unless being an abettor acting willfully or by encroachment, he or she shall be liable to compensate the injured).
2) The Iraqi legislator also fell into confusion and embarrassment, when he confused between the idea of liability and the idea of guaranteeing the harmful act. When he mentions the guarantee in the article (186), but he intends implicitly the fault upon which the liability is based. Because of stipulating the willfulness or the encroachment. Whereas he actually intends the idea of guarantee in the article (191), when mentioning the guarantee of the damage by the discerning or-non-discerning minor, or any one having his or her status. because the guarantee is based on the element of the damage rather than the element of the mistake. Considering that the non-discerning minor is not aware of what he or she does. Since the purpose of the guarantee is to compensate the injured for the damage inflicted or suffered, without searching for the awareness or discernment of the doer, owing to its being based on the element of the damage. Therefore, the researcher recommends that the Iraqi legislator distinguish clearly in the first paragraph of the article (186) between the idea of guaranteeing the harmful act and the idea of liability. He should follow suit the Islamic jurisprudence and benefit from the juristic maxim regulating the guaranteeing of the harmful act by the perpetrator, and adopt the idea of guaranteeing concerning the act done by perpetration, in order to keep abreast of the ever-increasing world-wide tendency towards the objective or strict liability. But he can still reserve and keep the idea of liability based upon the fault, concerning the act done by causation. Therefore, we suggest the following amendment of the first paragraph of the article (186) of the Iraqi civil law: (A person, who directly by perpetration does damage to or decreases the value of the property of another person, shall always guarantee the damage, even though not acting willfully, or committing any act of encroachment. But if he or she does damage to or decreases the value of the property of another person indirectly by causation, he or she shall only be liable for compensating the damage, if acting willfully or by encroachment, when inflicting the damage).

Author Contributions

Younis Salahuddin Ali is the sole author. The author read and approved the final manuscript.

Conflicts of Interest

The author declares no conflicts of interest.

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