

The Tortious Liability Arising From Giving Erroneous Judgment In The Iranian Legal System : By Emphasis On The Attorney's Liability

Mohammad Javad Abdollahi^{1*}, Morteza Jalilzadeh², mehdi rezaei moghadam³ and Ebadollah abbasi⁴

^{1*} **corresponding author:** Attorney at law, PhD student in private law , Tehran University, Qom campus

Email: e_m_abdollahi@yahoo.com

² Attorney at law, PhD student in criminal law and criminology ,University of tehran Judicial Sciences

³ Attorney at law ,Tehran ,Iran.

⁴ Attorney at law, Department of law, Eslamic Azad University, Abadeh branch, Abadeh , Iran.

Abstract: Besides all their concern for advocacy of justice, Judges and attorneys in each scientific or moral levels are fallible and it is always possible that they give intentionally or unintentionally an erroneous judgment that would result in causing damages. Many different factors interfere in giving an erroneous judgment and the liability of each one is realizable by ascertaining the particular regulations: parties to the dispute, the court's official employees (secretary and archivist) and semi-official employees (office manager), judge, state; because the judgment is a service provided by the state and the person sustaining a loss must be finally recompensed (171st principle of Iran's constitution) and at last the attorney. In this study by denoting the contour of liability of the first groups we will set about the attorney's contour of liability and its criteria. By obligating the attorneys' interference in the claims, the attorneys' role in giving a judgment has been strengthened and eventually this fact poses the subject of the contour of liability of this class. Verifying the attorney's liability shows that: 1. the attorney's contour of liability is entirely depended on the resulted power contour coming from the client. 2. To find an attorney liable some factors are assumed: a) inexpertise and lack of scientific and technic capability for doing the subject-matter of the proceeding. b) Attorney's lack of honesty and truthfulness. d) Delay in meeting an obligation which has a time limit. e) Lack of attorney's confidentiality to the client. 3. Considering that the obligation of attorney is an obligation means, his liability is based on the theory of culpability and is therefore defensible. 4. The attorney's nonfeasance may injure also the rights of the third persons and this discussion has also its hypotheses. Aim of posing this subject is Verifying the contour which finds an attorney liable or exculpates him in giving an erroneous judgment and protecting this contour to prevent aggression to the attorney's rights and necessity of the preparing and specifying the attorneys' professional moral codes towards the client and judge and the insurance coverage of the attorneys' liability against the client.

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Introduction

After doing primary research (in penal crimes) and the required research (on legal cases) the prepared case to give judgment will be proceeded by the forum. Giving erroneous judgment and its enforcement is one the essential fields of realizing the tortious liability. This point has been remarked among the people since the establishment of the judgment institution and especially in the religious instructions and Imam Ali's judgments. During the mentioned research and giving judgment some other jobs beside judgment may be involved and by realizing some conditions, the process will result in finding them liable. Some of these jobs could be attorney ship, office management and court secretary ship.

A judgment will realize the liability for an attorney or the other jobs mentioned before which causes infringement of client's rights or exposes his rights to a decisive infringement. These rights are not exclusively the material rights but will include also the moral damages which are mentioned in Iran's tort law approved in 1960 .

It is to be noted that the aim of choosing this subject, despite its importance is not only recovering the rights of victims but also the practical and prevalent aim of this study is to create a professional security for the lawyers and reduce their troubles about the financial consequences resulting from their unwanted professional faults.

In this study we will first give a definition for the erroneous judgment and its applicability and contour then we will set about the conditions and contour of liability of

each person mentioned above especially the attorneys at law.

First Part- definition and contour of erroneous judgment

Some jurists define the judgment as “the court’s decision which is made in litigious affairs” and believe that “when a judgment is about the nature of a claim and resolves it totally or partially it will be a decree otherwise this judgment will be a writ”[1].

Some professors believe that “the court’s judgment in its wide meaning is the court’s decision which is made in litigious, non-litigious or official affairs but judgment in its particular meaning concerns the court’s decision in litigious affairs...”[2].

Some others believe that “the judgment, in its exact concept of the word is related to a decision which is a decree or a writ”[3].

In France also some experts have offered two meanings for judgment: 1. In general the judgment consists of the act of judging after the research and debates and in a more precisely meaning it consists of verifying a case to achieve a solution” 2. The result of this act and the decision made (in a judicial manner) is called judgment[4].

This judgment could be given from other judicial authorities (such as court of first, court of appeal or superior court). For example the judgment given by the branches of settlement of disputes councils or the courts of general jurisdiction could cause realizing the liability as well as the judgment given by the cour de cassation and the only difference between them resides in the judgment unity or multiplicity manner of these authorities which will be discussed in part 2 of this article.

In general we could say that a judgment is the final judicial decision of the proceeding authority for the posed affair which according to civil procedure could be given as a decree or a writ.

The courts as the authorities of proceeding the subject of the disputes besides proceeding the evidences invoked by the parties will do any research which find necessary and after announcing the end of proceedings will attempt to compose the judgment in a maximum time of one week. (Article 199 of Iran’s civil procedure law)

Each judgment is consisted of procedural and substantive qualifications. The procedural qualifications could be mentioned in 4 cases:

1. The judgment must be composed literally: in such a manner that the civil procedure law, after giving the judgment finds it also necessary to announce the judgment literally.
2. The judgment must be serviced in a written manner
3. The judgment must include the information such as the identity of the renderer court, the judgment number, the class of the file, the date of render, the identity of the parties to the dispute and their demands, the factual

background, the causes, the evidences, the documents and principles and articles which have been used as the basis of the judgment and at the end the identity and the position of the judge or the judges must be mentioned [5].

4. The judgment must be signed by the judge or the judges

The substantive qualifications are exclusively related to the contents of principle 166 of the constitution; the judgment of the court must be well-reasoned and valid. The judge is bound to proceed the disputes of the parties according to the law and finally to give his judgment well-reasonably and documented to the law articles (if required based on the jurisprudential sources and valid fatwas). Thereby, the judicial decision which is made opposed to the procedural and substantive qualifications and which also results in infringing the rights of one the parties to the dispute is with no doubt an erroneous decision.

A decree or a writ is given erroneously which without taking in account the legitimate rights result in infringing a right of one the parties’ rights. Also a decision which result in representing a right as a null and void and vice versa is definitely an illegitimate and erroneous judgment and is therefore protestable.

In other words we could call this judgment as an untruthful judgment. By approving the Iran’s civil procedure law in 2000, in article 326 of this law giving erroneous judgment has been legislated and according to the article 327 of this law the judge who renders the judgment after describing well-reasonably the erroneous judgment had this power to send the file to the court of appeal for substantive proceeding and if required to recall the judgment. By approving the courts of general jurisdiction and revolutionary courts establishment law reform act in 2002 this regulation has been abrogated and the verification divisions have been replaced to proceed these affairs (opposition between law and Islamic law).

It is to be noted that in realizing the title of erroneous decision its intentionality or non-intentionality is not of much importance. Meanwhile an erroneous decision which has been corrected according to the regulations of the civil procedure law could not per se realize liability for the judge.[6]

Second Part- applying the general rules of liability about the attorneys’ tortious liability

In order to realize the tortious liability three essential elements or conditions are necessary so that the lack of one of these elements will release the tortious liability. The tortious liability elements are as follows:

1. Damage
2. Harmful act
3. Causation between the harmful act and damage

In order to study the attorneys’ liability, verifying and coinciding each of these three cases is necessary:

1. **Damage:**

There is no consensus of opinions in its definition, however the following opinion could be mentioned:

The author of Maniat-o-taleb has offered this definition: "The absolute of deficiency or loss in soul, organ of the body, property or dignity".[7]

This definition seems to be a perfect and general definition which is appropriate for our debate; since the claims posed in courts divide generally to financial and nonfinancial claims. In financial claims which are appraisable to money such as demanding money, attorney's nonfeasance usually will result in material damage. In other words, with no doubt the material damage exists in such claims but the presence and proving a damage such as a moral damage is much difficult than ordinary.

Since the main approach and aim of the Islamic legal system is to recompense the victim and it regards him as a person who has been aggrieved and is deserved of being redressed of the damages done, so in this argument the attorney is bound to recompense all the damages which are attributed to him; the essential aim of this system is to return the victim to his conditions before the commission of the fault.[8]

While compensating these damages, all the moral damages resulting from harmful act commission must also be recompensed. It is to be noted that although the article 10 of the tortious liability has predicted the moral damage demanding, in jurisprudence for the possibility of moral damages demanding there is not a consensus of opinions between the jurists.

Concerning the article 30 of the press law in 1985, the council of guardians as the position of giving idea and resolving disputes had found the appraising of the moral damages by property compatible with the Islamic law principles. In fact in many cases, moral damage compensation (damage to dignity, personality, individual's body and soul liberty) is of much importance to be recompensed by material compensation: for example in cases concerning the repugnant to chastity crimes if the attorney accept the procurator but for any reason (ex; lack of attorney's fee payment) neglect his duty of defending, the resulted moral damage to client is hardly compensable and neglecting this damage is not fair.

2. Harmful act

Concerning the client's power contour, the attorney as the representative of the client plays an important role in trial process. In other words, the attorney's liability in commencing, prosecuting, giving and enforcing the judgment is closely dependent to his power contour and considering this liability he is exposed to harmful act commission. For example an attorney who hadn't have the right of denying or hesitating the other party's document could not be condemned to the accusation of being the cause of giving erroneous judgment based on this document; that's why the attorney haven't had the power of protesting the other party's document. Thus in proceeding such claims in attorney's disciplinary prosecutor's office the first point to be clarified is the

limitation and the resulted power contour of the attorney. In a general classification the attorney's duty in a case could be divided into two categories below:

1. The duties which have a time restriction: the explanation to be offered here is that according to the civil procedure, the affairs which are demanded by the court to be performed by the adverse party could be restricted to an especial time and also being assumed to be done in an ideal uniform; this period of time could be legally documented (such a time for a week to deposit the survey fees) or could be documented by the court order (such as time determination for presenting witnesses after the first session).
2. The duties with no time restriction: in other words these duties are considered by the client to be in an ideal plurality manner. Non-performance of these duties by the attorney will never cause infringing the client's rights and the attorney could revive the attorney's rights in another time; these duties are not restricted by a determined time, however non-performance of these duties will result in delaying in giving decisive judgment and also the prolongation of proceeding. It is clear that if because of this delay, client be exposed to any damage, the attorney is the one who is responsible for recompensing this damage.

Enactment of special laws (attorney ship law of 1933 and the bar association independence by-law approved in 1953) and taking to account some cases of attorneys' infractions arise this question that "is the attorney's liability criterion a fault?" in other words does all the article one of the tortious liability law include the attorney's liability?

The response to this question is that the attorney as the representative (with a little negligence) is regarded as the client. His obligation is assumed as an obligation to means (obligation to protection, exercise of jurisdiction and attempting to dispense justice); except the cases in which the parties have agreed on the result obligation (achieving the client's ideal result)[9]. In other words, the attorney is considered as the person in position of trust for the client and except the cases in which his oppression and default are proved, he is not found liable. The attorney is the sympathetic and trustworthy person and the consideration of this relationship of attorney ship must not cause the extinguishment of the attorney's trustworthy character [10].

3. The causation

This is the third element of the elements which realize the tortious liability.

The attorney's representation in court must be ascertained by offering the letter of attorney. Thus his obligation limits will be mentioned by the contract of mandate. However there could be some obligations which despite the fact that there is not the possibility of including these obligations in the contract, they are the attorney's customary obligations. In this part, the breach of those obligations which will result in giving an erroneous judgment could be divided into two categories:

1. The breach of contract obligations: The breach of these of these obligations will result in attorney's contract liability and proving the nonperformance of this obligation (and not the attorney's fault) is sufficient to realize the liability; because the nonperformance of the conditional act (such as demand for issuing a writ of enforcement, demand for urgent contemporary order) is a breach of obligation by itself and is considered as a fault.
2. The breach of those obligations which are not mentioned in the contract of mandate: in these cases, this is the victim who ought to prove the attorney's fault.
3. The breach of those obligations which despite the fact that they are not mentioned in the contract of mandate, these obligations could be expected from an aware and reasonable attorney: for an example we could assume a case in which the period of time of the demanding for security for relief sought has not been determined and the attorney has set about performing this duty only one month before the conclusiveness of the judgment and thereby by wasting the time he has caused the debtor's loss of property. It is obvious that the security for relief sought could be taken before the conclusiveness of the judgment but it is this unreasonable act is not expected from an aware attorney. Thus in such cases, although the obligation is not mentioned in the contract, it seems that only proving the nonperformance of this action is sufficient to realize the liability.

The third part- State's tortious liability (governmental functions of judgment)

In spite the fact that the judges have their independency in giving their opinions and also in their decision makings, they are controlled under the supervision of judiciary which is a state organization. Irrespective of the particular liability of the state concerning his employees' fault and in order to accomplish the official duties (according to public law "article 11 of tortious liability") if we find a judge liable, in fact we have found liable the state and this is not from the viewpoint of the state's liability based on the public law and is not resulting from his employees' fault but this fact is proceeded from the viewpoint of tortious liability; such as a persona moralist of private law concerning his nongovernmental activities. In conclusion whenever these activities harm a person, they will be involved in tortious liability and considering the particular principles of that liability this liability could be typical or based on the fault. For example if a car belonging to state have an accident by which a third person be injured, according to typical liability and also the article 1 of the compulsory insurance of the ground motor vehicle of 2008 law reform act, the state is responsible for recompensing this damage [11]. Also if in consequence of falling a wall of a building belonging to state one person be injured, by realizing the circumstances, namely the fault of keeping that thing, the state (as the owner of the thing that has injured) will be responsible for recompensing the damage [12]. In the case of our debate, considering that the judgment authority has been delegated to judges by the government (wali faghih: jurist guardian), so the judgment is a branch of guardianship and in other words as the judgment authority is exclusively attributed to government the state is responsible for compensating any damages

which come from the judges' judgments to the parties of the claim and the third persons. In the legal system of Iran, the principle 177 of the constitution confirm this opinion. The state's liability in such cases is principally based on the fault. It is to be noted that in case of the ascertainment of each of the authority's (attorney, office manager, office secretary and the judge of the court) fault and after recompensing the victim's damage, the state also has the right to refer to the customary state agent.

4. The liability of the others

Concerning the parties to the dispute, according to the action rule they must be considered liable for the damages and referring to others must be renounced. A sensible example for this case could be one in which the plaintiff despite the attorney's warning does not represent the principles of his documents in the court and considering that his demanding has no other document, his demanding is annulled and in consequence he is faced wasting exorbitant legal costs.

The office manager, court's secretary and the other official employees in the branch are controlled under the supervision of the branch chief. What is obvious here is that if we could attribute a fault to one of these individuals, he will have certainly the tortious liability; but the answer to this question that if we could find liable the branch chief (judge or magistrate) for one of these individuals' action or their nonperformance of an action is not yet definitely clear.

It seems that these individuals as the state employees are liable for the damages which they intentionally or by imprudence cause to other individuals while performing their duties and according to article 11 of the tortious liability law if the damages could be attributed customarily to them the related administration will be obliged to compensate the damage. [13]

In the principles of the European torts law, the customary causation relationship has been accepted. In the cases which plural factors are involved in causing damage they have accepted the joint liability for the victim but in the legal system of Iran the approach is that we limit the reasonable cause to one factor. [14]

What is coming from our laws is that it is not impossible to extend a customary cause to multiple causes. The evidence to this fact is the article 1247 of the Iran's tortious liability law in which the supervision of the ward's property could be given to trustworthy persons and they should be considered as the ones to recompense the damages.

Thus, in order to recompense the victim's damages it seems that some causes could be found liable. In our discussion, the office manager is a semi-skilled in administrative and legal affairs, the secretary and archivist of the court must be careful enough in keeping safe the acts and documents of the parties to the dispute and thereby the breach of these obligations (explicitly or implicitly) could result in realizing the customary causation.

Conclusion

The attorney ship is one the most sensitive and important professions in different societies (specially the developed societies; the resemblances between this profession and the sensitive governmental professions are the evidences to this fact. Nowadays recompensing the victim's damages by use of traditional tortious liability principles is so difficult and this fact appears much obviously in the relationship between the poor and rich classes. The relationship between the attorney and the client could be regarded as one the evidences of these relationships and it seems appropriate that to socialize this relationship a "damage compensation fund" be established among the attorneys' society.

Regarding the fact that one of the difficulties of damage recompensing is the relative or absolute inability (insolvency) of the person who injures, as a recommendation it seems that by identifying "the attorneys' tortious liability insurance" in different fields (such as in France in legal, criminal, public and international fields) we could simultaneously help the compensation of the victim's damages and support in some cases the agent of the harmful act because of his renounceable and not serious fault.

Although the practice is based on finding and limiting one cause as the customary cause, where there is the possibility of realization of the customary cause in multiple individuals, the article 1247 of Iran's tortious liability law will not prevent of finding them jointly liable; Thus where the office manager colludes with the adverse party and obliterates the effective document of the dispute and the attorney of the case in proceeding session does not mention that document in presenting bill and as a result the court's judge gives his judgment erroneously and against the reality, if the customary causation relationship could also be attributed to the attorney, both the office manager and attorney could jointly be found liable.

As a recommendation, by approving professional morality codes for attorney ship (similar to medicine morality codes) we could prevent realizing the troubles and in consequence less tortious liability for the owner of the attorney ship profession; the fact is that as well as the law, the morality will help the strength and power of this profession and will bring continuously sanctity and reverence for this profession.

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