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The Principle of Indemnity in Insurance Law

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ABSTRACT

Objective: The principle of indemnity, as one of the most fundamental principles in damage insurance contract is thematic and has a broader subject area than the concept of damage in civil liability. **Methodology:** This is the principle underlying the two effects: first, due to this principle, the policy holder is obligated to compensate a damage that has been resulted due to the occurring a coverage event on the property of the policy holder in the property insurance and on the people in the insurance of liability. **Results:** Thus, A defining characteristic of insurance, providing that a loss payment will replace what is lost, putting the insured back to where it was financially prior to the loss without rewarding or penalizing the insured for its loss. In fact, based on this principle, the resulted damage should be compensated totally and ideally. This is known as "positive aspect." Secondly, the compensation should not lead to the increase in the assets of the victim and it should not be turned into a benefit source for the injured party (the negative aspect). Anyway, although this principle has two different approaches, positive and negative, applying it requires the judicial precedent rely on the positive aspect, unless the contrary is approved. **Conclusion:** This is a binding principle of damage insurance contracts that insurers are obligated in administering it to compensate the actual loss (assessed) of the victims according to the contents and conditions of issued policy up to maximum insurance obligations. In insurance law approved in 1361, legislator has employed the word "damage" in 15 articles out of 36 articles (1,7,13,10,14,15,16,19,20,21,22,23,28,29, and 30) indicating that damage is highly important in insurance law.

1. Introduction

Damage creation is an inevitable fact in human societies, thus, an approach entitled damage compensation has been predicted in law to deal with the difficulty, and thereby the victim can get rid of this problem. Therefore, followed by the evolutions observed during two last centuries in civil liability which underlie the development of such a law, the fact of compensation of damage has been freed from any limitation along with the implementation of justice in some legal systems such as France and causes more protecting of victims of harmful acts and more compensation of damages resulted on them. These protections were to the extent that some of the authors such as Rapersays in this regard that: "today, the responsibility is nothing but damage compensation and current law tends to it to replace the thought of damage compensation with the thought of responsibility" (Badini, 2005).

Studying the historical evolution of damage compensation in various communities and legal systems worldwide indicates appearing wondrous evolutions from the viewpoint of legal experts and legislators. These evolutions have been generated by science, industry, and business growth and consequently the increase of damaging dangers and events that threaten the properties and people, in one side, and in some cases can lead to a loss and implementation and responsibility of an individual, in the other side, who is as faultless as the victim in occurrence of the accident. In fact, development of the concept fault and considering the behaviors as error in the modern machine life is an inevitable fact for any common person or development of liability cases without any error and based on the risk or guarantee causes imposing of damage on those who were not really faulty, rather they have taken attempts to produce goods and offer services to other people of the society and booming of market and economical activities (Babayi, 2001), but avoiding unilateral support of the victims led the lawyers', economists', and businessmen's mind to propound an appropriate and efficient instrument to balance the protection of the

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victims and agents of the loss. This helpful tool was the insurance whose main function, in the present societies, is to divide the danger driven from the damages and events; though the probability of persuading people to negligenceis one of the objections regarded by critics to this method of damage compensation (Clarke, 1997).

Therefore, in the present law, there are various mechanisms more efficientthan previous to compensate the damages of the injured party; some of them are as insurance of properties, insurance of persons, insurance of liability and social insurance which generally the lawyers call them alternative designs of civil liability system and divide it into two main types "commercial insurances" and "Social security system" (Badini, 2005).

Damage domain in insurance law is broader than civil liability. In other words, in insurance law fulfillment of damage is feasible without the implementation of elements of civil liability. Fulfillment of civil liability is subject to the ascertainment of damage but damage fulfillment is not secondary to the fault expression or existence of responsible.

In some of the legal systems, necessity of full compensation of all damages on the victim has been accepted as two basic principles of law. According to the principle of indemnity when a person causes unduelosses, whether financial, spiritual, life, or physical, he is bound to compensate the damage; either the legislator orders its compensation or not. According to the principle of full indemnity the compensation of loss should be to the extent that the victim's loss is fully compensated and put him back in a situation similar to the pre-damaged days (Babayi, 2005).

Sustaining and proof of loss has been always introduced as one of the elements of fulfilling civil liability (Katooziyan, 2003; Safaee and Rahimi, 2010) and compensating the damage is the most important purpose of this liability. Thus, it is obvious that determining compensable damage and reparability area of these damages are highly important in civil liability and dedicated main topics of this problem to itself. Also, the principle of indemnity, as one of the basic principles in damage insurance contract, has a thematic function and a broader theme domain to the concept damage in civil liability. The present article aims at studying the principle of full indemnity in insurance law.

2. Materials and methods

2.1 Definition of Concepts:

Damage: this literally means lose money, sustain a loss and loss and damage. In Islamic texts, loss means personal injury to one's own and other one whether loss, wound or murder, to waste and mar one's own and other's property, and encroaching like usurpation, abuse of confidence (MakaremShirazi, 1990). And, in legal terms where there is a breach of properties or an absolute benefit is lost or a person harms in health, honor, and emotions, it is said that there is a loss; on the other hand, reducing a person's property and preventing its increase for any reason will cause a loss (Katooziyan, 2003).

In insurance law, the word damage, sometimes, is defined as "claim" and sometimes as "loss and damage" or as "reparation" in insurance term, but, no comprehensive definition has been proposed for it. In terms of insurance law, damage has a wider meaning and concept. Atohagen, a German lawyer says that: "damage is occurrence of danger or realization of something that the insurer obligates to compensate its outcomes in insurance contract (cited by MahmoodSalehi, 2011). According to JuliosFingirke, another German lawyer, an event or an accident that causes fulfillment of original obligation of the insurer is called damage (MahmoodSalehi, 2011).

Compensation: this word literally means emendation of loss and in Islamic law it means recovering the situation of the injured party to the previous condition. Therefore, such a term is relevant in private law when, first and foremost, a person sustains a loss and then that damage is from a person other than the parties to the dispute, also, that person should be liable for it. The damage will not be compensated if none of the aforementioned cases are implemented, because if a person makes himself intentionally sustain a loss, it is a damage that was resulted by himself and he should bear it. Moreover, any other person cannot afford the damages resulted to a person, rather he should be a person whose obligation is liable. So, if a person's pet damages a person without the negligence of its owner, or when a person entrusts a fool a property and the fool wastes it, the foolish is not responsible for it (Ansari and Taheri, 2005).

Insurance: Imam Khomeini says in Problem 1131: "insurance is a contract between policy holder and insurer company, institution or person which accepts the insurance and this contract requires offer and acceptance as other contracts and conditions that are valid in other contracts' motive and contractibility are also valid in this kind of contract and this contact can be executed with any kind of wording or language (Moosavi Khomeini, 1999).

Insurance is a contract between policy holder and a company or a person as insurer. Based on this, s/he pays the company or that person to compensate damages. So, this is an independent contract and transaction which is in compatible with conditions coming in the future, whether insurance of commercial goods, building, automobiles, civil servants insurance and workmen's compensation insurance or life insurance and so on which are typical and common in wise custom (MakaremShirazi, 2015).

2.2 The Philosophy of Damage Compensation in Insurance Law:

The first justification that can cause the appearance of the principle of indemnity in insurance law is the observance of justice or preserving it in the society because justice requires that any victim receive reparation to the extent that has sustained a loss, not more, not less (Bariklo, 2008). However, other justifications have also been offered in the necessity of the mentionedprinciple. Some lawyers regard the existence of the social order and security (public order) involved in and they believe that if the principle of indemnity is not the basis of the payment, insurance can be as a source of use for the policy holder and amotivation for intentional damages and this can, in turn, be followed by corruption and disturbance of public good order (Karimi, 1998). This theory can be understood by judicial precedent of France based on the annulment of contract of civil irresponsibility referring to the public order of rules (Bariklo, 2008).

Some other believes that the mentioned principle is driven from the socialization approach of the dangers (Bariklo, 2008). Based on this attitude, full indemnity of the injured party is possibly only if he is supported socially and this indicates that the victim first should refer to the social institutions to compensate his damages. Followers of this principle view the social correlation necessary and use the "distribution justice" as a tool for fulfilling it.

According to this attitude, the facilities of the society, whether financial or non-financial such as social opportunities, should be distributed throughout the society so that everyone can benefit from it based on his/her merits. Indeed, talent and qualification of the person is the basis of receiving the advantages. Yet, it is not the facilities and asses of the society to be distributed, but the losses and damages should also be for all the people of the society, in general. So, all the people should share them. Upon this, in job accidents and motor vehicles, the obligatory insurance is applied.

2.3 Dimension of the Principle of Indemnity:

The principle of indemnity has two dimensions: positive and negative. According to the positive dimension, all the damages should be compensated and according to the negative aspect, no injured party should profit from the harmful act or the insured event and his situation improves more than past. The only thing that should be considered in the relations of insurer and policy holder id the positive dimension, unless the insurer improves its contrary. Thus, the victim's damage is viewed independent from the severity of the event factor. Fault which is the most important element in civil liability and is divided into the light and heavy should not be regarded unless the insurer relies on it. Therefore, the function of the fault is less important in the insurance law and the causality factor between the risk of the event occurrence and the resulted loss is the principal criterion and the degree of the faultiness of the event agent has no effect on the paid reparation.

Insurer has no role in limitation and adjustment of damages of the price of the damage unless this is a part of the conditions of the contract based on the agreement with the policy holder. Thus, the price that should be paid as compensation should be exactly adapted with the resulted loss followed by a harmful event. In fact, the insurer should compensate all the losses relying on the positive dimension of the principle of indemnity because the balance between the resulted loss and the paid damage is efficient in justice, morality, and economic (Safiyan, 2006).

3. Discussion and results

3.1 Domain of the Principle of Indemnity in Insurance Law:

The principle of indemnity which determines the scope and the way of compensating the victim's loss in civil liability law (Katooziyan, 2003) and is declared as the most important purpose of civil liability rules, according to some authors, technically liability is declared by the debt related to the damage compensation (Katooziyan, 2003). In other words, liability of damage requires sustaining a loss and the responsible is obliged to pay debt. Also, liability action can never be regarded as the profiteering device. In fact, subject matter of civil liability is not the punishment of the faulty;rather damage compensation is originated by it (Katooziyan, 2003).

Damage insurance is also a contract that is concluded along with the fulfillment of the goal of civil liability because its objective is to compensate the resulted damage to the property and assets of the policy holder or a person who is responsible for it based on the rules of civil liability. Thus, the principle of indemnity (MahmoodSalehi, 2011) dominates these kinds of insurance contracts. According to the principle of indemnity the resulted losses to policy holder or third person should be completely compensated. In fact, in administering the principle the insurer obligates to compensate the actual loss (assessed) of the victims according to the contents and conditions of issued policy up to maximum insurance obligations and recovers the victim's pre-event situation as possible. Therefore, coverage such insurance should not be resulted in increase of the victim's assets and improves his situation better than the past (Clarke, 1997). As a matter of fact, insurer obligates to compensate damage and remove imbalance appearing in insurer's financial situation after occurring an event for insurance subject matter. If the principle is not the criterion of damage payment, then insurance will be regarded as a device for profiteering and leads to corruption and disturbance of public good order and encourages intentional damages.

3.2 Comparison of the Principle of Indemnity in Insurance Contracts with Compensating Civil Damage:

although the principle of indemnity in civil liability is similar to the principle of indemnity in insurance law regarding their objective, they are different in legal and theoretical foundations; because, first, damage compensation in civil liability is based on non-contractual liability and tortious liability. While, damage compensation in insurance law is based on the contractual liability and in line with the concluded insurance contract between insurer and policy holder.

Secondly, as damage compensation in civil liability is driven from the tortious liability and non-contractual, it lacks consideration and is obliged to pay it due to law. However, damage compensation in insurance law is in exchange for paying premium from policy holder and is one of the contractual obligations of the insurer.

Thirdly, civil liability law has been founded on the personal compensation of damage by the liable person for the event and its aim is to accomplish reparation justice for the rights of the victim and all liability insurances have been enacted based on this end. But, in principle, damage insurances are based on the distribution justicewhich each has a different foundation and approach.

Fourth, althoughcivil liability has been widely replaced with insurance in compensating damage; it cannot be replaced with civil liability in protecting the norms of morality (Katooziyan and Izanlo, 2007). Contrary to civil liability law which deals with protecting norms of socio-morality and damage protection, insurance development may lead policy holder whoexempts himself from the bearing damages from negligence and errors by transferring risk liability to the insurer act carelessly and recklessly against others' rights, life, and property. As a matter of fact, exemption from liability and non-bearing the pressure of damage compensation makes policy holder ignore other people's rights, life, and property and encroach and excess his functions.

4. Conclusion

Industry and technology development during several recent centuries have led to many dangers and heavy damages originated from economic activities and this necessitates insurance law in the society. In the last times, as the tribal life was common and every person was supported by his/her own tribe; but, due to the changes in the context of the society and discretion of ethnic ties, these days the main discussion is providing financial and psychological security for the people in a society. One of the common ways is insurance.

Insurer often is not related to the agents of the damage. So, he cannot be viewed as the only responsible for compensating the damage based on civil liability rules and the basis of his obligation in damage compensation should be founded in another category. Upon this, damage should be interpreted as civil liability without confusing its concept. In insurance law approved in 1316, legislator has used the word "damage" in 15 articles (1, 7, 13, 10, 14, 15, 16, 19, 20, 21, 22, 23, 28, 29, and 30) out of 36 ones and this indicates the importance of damage in insurance rules.

The main purpose in insurance contract especially damage compensation is to compensate the victim's actual damages. Indeed, reparation and returning the initial situation of the victim and restoration the disturbed relations to the normal condition is the raison d'etre of the insurance contract. Insurance functions have led many positive effects in fulfilling damage compensation in the field of economy. However, in the other side, covering such insurance should not increase the property of the injured party and improves his position better than the days before the event. Otherwise, insurance contract will be profiteering source for policy holder and as a result will result in corruption and will encourage intentional damages and reckless activities and this is an applicability of unlawful ownership. This indicates the basic, common, and traditional principle in insurance law which is known as the principle of indemnity.

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