References

1. Haeri 2014, Marriage in accordance with Sharia laws
2. 2016 The Iran Project - News related to Iran, specially political, military and regional affairs!*theiranproject.com/blog/tag/white-marriage-in-iran*
3. http://www.theweek.co.uk/middle-east/61738/white-marriages-irans-cohabiting-couples-defy-sharia-law
4. http://www.theweek.co.uk/middle-east/61738/white-marriages-irans-cohabiting-couples-defy-sharia-law-'White marriages': Iran's cohabiting couples defy Sharia law –
5. National Organization of Civil Organization Office for Statistics www.iran-dayli.com
6. *Iran's state-run body for youth affairs reported by " The telegraph" www.telegraph.co.uk*
7. Justice for Iran 2/2014
8. Justice for Iran 2/2014 p.9
9. (Iran national AIDS Control Program 1994 and Mnsoori. F.A.B Sayad , hH. Hatami 2001. data.unaids.org .factsheets 01>iran_en.
10. Rana Rahimpour, BBC Persia's, 'White marriages': Iran's cohabiting couples defy Sharia law - The Week-*www.theweek.co.uk/.../white-marriages-irans-cohabiting-couples-defy-shar*
11. *Darvishpour, http://www.theweek.co.uk/middle-east/61738/white-marriages-irans-cohabiting-couples-defy-sharia-law*
12. *Tizro 2012 pp.45–46*
13. *- Bøe 2015 p.101*
14. *Nayyeri/IHRDC 3/2013 p.32*
15. *Osanloo 5/2006*
16. *On December 1, presidential adviser Hessamedin Ashna an artcle By Golnaz Esfandiari December 06, 2014*
17. *http://www.ibtimes.co.uk/outcry-chechnya-schoolgirl-17-forced-wed-married-police-chief-47-1501724*
18. *Iran Alive Ministers ,www.iranaliveministers.org*
19. ,©2016 The Iran Project - News related to Iran, specially political, military and regional affairs!*theiranproject.com/blog/tag/white-marriage-in-iran/*
20. By Golnaz Esfandiari, December 06, 2014 Source: http://defence.pk/threads/rise-of-white-marriages-in-iran.348024/#ixzz4L6dH1O7I
21. As Javid Samoudi -Source:http://defence.pk/threads/rise-of-white-marriages-in-iran.348024/#ixzz4L6dH1O7I
22. Sociologist Majid Abhari -http://defence.pk/threads/rise-of-white-marriages-in-iran.348024/#ixzz4L6dH1O7
23. - Sangeeta dhami and Aziz Sheikh " the Muslim family " article published by Radcliffe Medical Press, Oxford, England www.ncbi.nlm.nih.gov
24. Sangeeta dhami and Aziz Sheikh " the Muslim family " article published by Radcliffe Medical Press, Oxford, England www.ncbi.nlm.nih.gov
25. Nina Ansary, an expert on women's rights in the Islamic Republic "White marriage" a growing trend for young couples in Iran (latimes.com) submitted 1 year ago by mambisa.

ROLE, RULES AND PLACE OF DISTINCTION BETWEEN INTENTIONAL TORT AND NEGLIGENCE TORT IN TORT LAW

Saeid Yektaei,
Master of private law studen , University of Tehran , Kish international campus, Kish island, Iran
saeid1355y@gmail.com
Hassan Alidadi Suleimani,
Assist. prof, University of Tehran, Kish international campus, Kish island, Iran

Abstract. The issues of intentional torts and negligence torts and the distinction of their respective legal judgements are usually discussed under the general title of harmful action. The current essay has been devoted to the explanation of the idea that the correct place of the debate of the division of the way of causing harms into direct and indirect in the logic of civil liability is intentional tort and the normal strategy adopted by the legal experts will lead to major mistakes in judgement elicitation and illogicality of the theory of civil liability.
Key words: Civil Liability, Intentional Tort and Negligence Tort, Rule of Intentional Tort, Harmful Action, Causation Relationship, Guarantee, Damage.

Introduction. Civil liability as an independent and coherent branch of law does not have a long record within Iranian law. In jurisprudence and the codes driven from it, there are various judgements regarding the causing damage outside the contractual relations that have been touched upon in a cursory manner in the sections of guarantee, ransoms

and usurpation. Legal theorists have come up with a new and coherent system of civil liability by explaining and explicating the notions concerning civil liability and distinguishing it from other legal areas and issues of liability and also determining its elements and effects. However, these theorists have made use of jurisprudential rules and new laws in their theorization. For example, in traditional logic causing physical harm to someone was considered under two general categories of causing intentional harm and unintentional harm in two sections of ransoms and retaliations with different rules and logic. But in the new tort logic, Iranian legal experts discuss the issue of causing physical harm under the general notions and titles of causing harm to the other and assay its peculiar judgements in a general form in their discussion of the damages subject to civil liability.

Then, in tort theorization, the rules and judgements regarding various jurisprudential issues are arranged and systematized in the form of a general theorization and discussed with a different logic as compared to the traditional logic. In common law legal system, modern tort law was founded in late nineteenth century following the annulment of the writs based system. Accordingly, tort law system was established in these countries since the late nineteenth century although the judgements of causing financial and physical harms in this legal system is of hundreds or even more than a thousand years record.[40]

This perspective shift in legal rules and new theorization and leaving the traditional logic and attitude behind and adopting new approaches, which are the origin of various effects in legal system, have not been sufficiently reviewed and discussed in Iranian law. This is particularly the case with civil liability. The dominant approach and theory in Iranian tort law has taken form under the inspiration of the modern tort system in other countries in general and French legal system in particular without any reservation or cirtical revision. Despite seeing the difference in the jurisprudential discourse of torts as compared to the approach of the modern tort law, Iranian legal experts consider the new order doctrine completely natural and take it for granted and seek to discuss jurisprudential issues within the new framework while these new theoretical approaches in judgement derivation and resolving the newly emerged issues are essentially different from the normal course of traditional legal procedure and even Islamic legislation. It seems that this very difference in perspective and logic has led to the confusion, conflicts and intellectual divisions among the modern legal experts and jurists.

According to the current tort theory, causing physical or financial harm to another, provided all so called conditions for liability exist, makes one liable before the possible damages and he is obliged to compensate. Based on this logic when an intentional physical harm is done to another the perpetrator should be liable to make up the damages while religious rules insist only on retaliation and the perpetrator who comits a crime or an offence is not obliged to recompense it financially. There is no rule with such generality in jurisprudence addressing intentional or negligence torts causing civil liability and the discussion of physical harm is pursued under two independent categories in the sections of retaliation and ransom and the judgements of each section are propounded separately and with a different logic and form. But in Iranian modern tort law such a general rules and regulations are accepted and this has led to the confusion of legal experts as to the reason of the lack of civil liability for causing a physical harm to another.

Among those cases in which one can see notable and serious complications in applicability and adaptability of jurisprudential judgements and approach with modern tort logic we can refer to the divisions of harmful action in Iranian modern law. The legal experts have offered categorizations of harmful action in modern law in view of the division applied in jurisprudence and laws as regards intentional tort and negligence tort and provided judgements accordingly.

First Section. Chapter One: Distinguishing Between Intentional Tort and Negligence Tort in Laws and Doctrine: To begin with we need to discuss the definition of the principle of intentional tort and negligence tort in the codes and doctrine of Iranian Civil Code and after it we can turn to other issues.

In jurisprudence the guarantee resulted from causing harm to another outside the contractual relations has been discussed under two general categories of intentional tort and negligence tort. The harm is either directly done to another in the intentional tort form or through providing the necessary ground in an indirect form by man or animal and is called negligence tort. In Iranian Civil Code the Articles 328-330 are concerned with intentional tort while the Articles 331-335 discuss the negligence tort. The same course has been followed in Islamic Penal Code before the amendations of 2013 where first a definition has been offered of the requirements of guarantee resulted from intentional tort and negligence tort and after it particular judgements have been suggested of the harm done to another's life and then in section six, the Articles 334-339 an account is given of the judgements regarding the crimes related to intentional tort and likewise in section seven and in Articles 340-362 the judgements of criminal negligence tort are presented. In the amended penal code of 2013 the relevant judgements have been expressed under the general title of the requirements of guarantee in Articles 492-537.

The doctrine of civil liability (torts) has interpreted the expression of the judgments in the aforementioned manner based on the distinction of harmful action to intentional tort and negligence tort. In fact, many of the legal writers have explained the conditions and sentences of civil liability in view of the distinction between intentional tort (direct harm) and negligence tort (indirect harm). Accordingly, the legal experts have argued that as to intentional tort the demonstration of negilgence is not the condition of liability and regardless of the mode of harmful action the harm doer is liable for the damages caused by the intentional tort. However, as to the negligence tort, the perpetrator's

[40] G.Edward White, Tort law in America, An intellectual history, Oxford university press 1985,pp.3f.

liability depends on the demonstration of his role in the harm based on substantive grounds otherwise he is not accountable before any harm whatsoever.[41]

In legal works the discussion of the elements and the conditions of the realization of civil liability is pursued in three sections of damage and irrepairable damage, harmful action and causal relation. Then the harmful action is divided into direct intentional tort and indirect negligence tort.[42]

To explain the thematic relevance and the proper place of the distinction between intentional tort and negligence tort based on the doctrine of civil liability we first provide an outline of the view of the jurists and then turn to the theoretical foundations and place of the debate of harmful action in the modern doctrine of civil liability.

The origin of the categorization of intentional and negligence torts in Iranian law is Imamyah jurisprudence. A cursory overview of jurisprudential sources reveals that the jurists have categorized the judgements related to civil liability under two general headings of intentional tort and negligence tort. The same categorization and method have been used in civil code and Islamic penal code. However, upon a close inspection of the discussions of the jurists it is revealed that the latter did not intend to offer a categorization a la modern legal discourse in this regard based on which special conditions and judgments would be inferred. Some have also claimed that the debate of harmful action under the two categories of intentional tort and negligence tort in jurisprudential texts is not related to the thematic conditions and judgements and does not bear any judgemental effect.

In many of jurisprudential works and particularly those dealing with the jurisprudential principles, a general principle is expressed as the principle of damage according to which anyone who damages another's property is obliged to recompense it. The extensions are provided for the financial damage or physical damages under the two general categories of direct damage and indirect (occasional) damage.

Some have conceived direct damage as bringing about the cause of damage, e.g. murdering another or eating something or burning another's property, and indirect (negligence) damage as creating the thing by which the damage is done though due to a cause other than it, e.g. diging a well and forcing others to do an unpleasant thing.[43] In other words, direct damage refers to the harmful action that is essentially done by the willful or unwillful agent and cause harms to another while indirect (negligence) damage represents an action that brings about the thing from which no harm is essentially resulted but in the absence of which no harm is done too.[44]

Some jurists after noting the aforementioned categorization and providing extensions for each of direct and indirect damage from the prophetic traditions and jurisprudential opinions, reminded the readership that there is no clear basis for this categorization and one can cast certain doubts regarding it. Moreover, in most cases it is truly hard to distinguish between these two categories. But this lack of clarity is not significant because it bears no particular effect and the criterion based on which we may take actions is the attribution of a damage to a person whether it is direct or indirect and in both cases there is no difference in judgements.[45]

In Iranian civil code following the order of subjects as discussed in jurisprudential works the judgments of the guarantee resulted from damage to another are expressed under two categories of direct and indirect damages. As to destruction and damage it is argued:

Article 328: If anyone destroys the property of another person, he will be held responsible and must either produce its equivalent or its value, whether or not the property was destroyed intentionally and whether it was the actual property or profits there on that were destroyed; if he causes defect or damage to such property, he is responsible for the depreciation in price.

Article 331: Anyone who causes some property to be destroyed must give back its equivalent or its value, and if he causes a defect or damage to it he will be held responsible for any depreciation in value.

As we see, no difference has been mentioned as regards two cases and only in the abovementioned articles we come to understand that intentional damage refers to the direct damage done to another while negligence damage (destroying one's property) represents the indirect harm done to another (causing financial loss). Anyway, in both cases guarantee and responsibility exist.

In those cases where the destruction is done by the action of an object or an animal, the guarantee by the owner of the object or animal is hinged upon the occurrence of an illegal action.

In Islamic penal code also first a definition is offered of direct and indirect destruction and then their relevant judgments are presented and in most cases no allusion is made to the role of negilgence and enemity in direct

[41] Katoozian, Naser, Civil Law, Extra-Contractual Requirements: Compulsory Guarantee, Theran, 1995, pp. 204-209; Emami, Seyed Hassan, vol. 1, p. 392; Lotfi, Asadullah, Requirements and Counter-Requirements of Gaurantee in Jurisprudence and Iranian Civil Law, Majd, 2000, pp. 65-67; Safaei, Seyed Hussein and Rahimi, Habibullah, Civil Liability (Extra-contractual Requirements), SAMT, 2013, PP. 80-84.

[42] In some works, the discussions regarding intentional tort and negligence tort are raised in the section of the principles of civil liability as a branch of the harmful action. Since the debate of harmful action is concerned with the conditions that the harmful action should have for creating civil liability this is in fact a debate of the basis of civil liability as such (necessity of demonstration of negilgence, or taking one liable without demonstrating the absolute negilgence or liability). See for instance: Safaei, Seyed Hussein, Rahimi, Habibullah, ibid, no. 49-51, pp. 80-84; Katoozian, Naser, ibid, no. 81-82, pp. 204-209.

[43] Mir Fatah al-Husseini al-Maraghi: al-'Anavin, Nashr al-Islami Institute, 1997, vol. 2, Principle of Guarantee due to Damage, p. 435.

[44]

[45] Mir Fatah al-Maraghi: al-'Anavin, vol. 2, Gaurantee Due to Damage, p. 435.

involvement in destructive action but in the discussion of indirect engagement in crime, like civil code, in most of the cases in which the damage is done by either an object or an animal, the owner is only held responsible wherever the negilgence or enemity is proven.

Based on the surface meaning of the judgements of civil liability and general requirements of the contract one cannot conclude that there is a major difference between direct and indirect damages in view of the role of negilgence and the basis of liability and as many of the jurists and legal experts have emphasized, the truth is that the basis of resposnisblity in both cases is one and the same. Then only in dubious situations the basis of liability could be questioned otherwise in direct destruction where the agent of the harmful action is an object or an animal it is the owner who should be held responsible of course based on a well demonstrated negilgence. There are also such cases where the basis is so clear that there is no need for extra effort for demonstration of the negilgence of the perpetrator.

For further explanation of the fact that there is no difference between direct and indirect involvement in destruction as regards the mode of action of the perpetrator or the role of negilgence it suffices the reader only to refer to those cases in Islamic penal code where on the one hand, the perpetrator himself is held responsible due to his direct involvement in the damage not the other factors that are directly involved, and on the other hand, liability has been recognized without demonstration of negligence in indirect damage (caused by the object or animal owned by someone).[46]

According to explanations offered by the jurists as regards destruction there is only one religious judgement with unique conditions and is the basis of the difference of these two sections. Then in jurisprudence there is only one general principle of destruction based on which anyone who causes a financial or physical damage to another (either directly or indirectly) is held responsible for the recompensation. In both direct and indirect involvement the public attaches the same guilt to the perpetrator and there is no difference in the judgement in this view.[47]

Article 492- Crime is retributed with relataliation or ransom only when the outcome is documented by the perpetrator's action whether this action is an example of direct involvement or and indirect ground preparing or both of them together. Then if the judgement is the same as regards direct and indirect destruction and Islamic Sharia does not make any difference regarding them, whenever a damage is attributed to someone he is immediately retributed. Although the liability is proved by the demonstration of the causal relationship between the action or refusal of action and the damage done, the causal relationship is expressed and demonstrated in different ways and this difference is itself the origin of the different views that exist in this regard. The religious legislator and jurists have sought to contextualize liability and responsibility in various conditions. These judgements are all based on the common sense and the issues related to the causal relationships.

Second Section: Reason and Logic of Determination of Conditions and Elements in Modern Doctrine of Civil Liability: Iranian legal experts like their French counterparts discuss the conditions of the realization of civil liability under three general categories.[48]

The important point that needs to be noted is that the legal experts study the difference between the judgements of the liability according to the difference of the style, function and condition of the perpetrator. Then categorization and distinction between harmful action in this regard is at stake if the difference in function and situation make difference in the judgements of civil liability.

---

[46] In the Article 336 of the previous Islamic penal code (the content of which has been repeated in the Article 528 of Islamic penal code of 2013) the direct involvement in destruction is described as follows: Article 339- whenever due to the collision of two vehicles damages are done without any clear evidence of the guilty one both parties will be held responsible and they have to share the damages regardless of the type of vehicles and their equal or inequal values and if one of the drivers is guilty he should be held responsible alone.

As the latter article stipulates wherever a person is involved in a damage he is only responsible and he should recompense. Here only the perpetrator's action is the reason of the damage and no other element is involved. Otherwise in those cases where there is no clear evidence as regards the guilty one all praties involved will be held responsible.

One can say that the content of the Article 336 of unamended version of Islamic penal code (and Article 528 of amended version) is not merely addressing the accident between the vehicles rather it can be applied to all similar situations even the murder and heavier crimes because the demonstration of one party's negligence leads to his being held responsible. This is why in jurisprudential works the driver is only held responsible for the collision (as mentioned in the Article 334 of previous version of Islamic penal code).

We can also find such cases where the damages done by human action is normally attributed to human action without any further need for demonstration of the guilt and negligence. For example, as soon as it is shown that an accident or a damage has its origin in a defected product the public takes the producer of the product as the perpetrator without making any investigation as regards the guilt. However, there may be also other factors that would have led to the accident that were beyond the producer's capability but this does not matter by the public and the producer will be held responsible alone. For further details in this regard cf. Babaei, Iraj, Civil Liability and Extra-contractual Requirements, p. 100 ff.

[47] Mir Fatah al-Husseini al-Maraghi: ibid, and Makarem Shirazi, Naser: Qawaid al-Fiqhayah, vol. 2, 1991, pp. 208-2005; Bojnurdi, Seyed Muhammad Hussein, al-Qawaid al-Fiqhayah, vol. 2, pp. 31-32. For further details in this regard cf. the explanations of Ali Haeri Shah Bagh as regards the jurisprudential ideas of jurists: Civil Code Explained, Ganj-e Danesh, 1997, vol. 1, p. 317.

[48] Katoozian, Naser, Extra-contractual Requirements of Civil Liability, vol. 1, General Rules, third edition, Tehran university press, 2011; idem, ibid, vol. 2, Specific and Mixed Liabilities, 2011; idem, Introductory Course of Civil Law, Legal Events, Sahami Press, 1998; Safaei, Hussein, Rahimi, Habibullah, Civil Liability (Extra-contractual Requirements), 2nd edition, SAMT, 2013; Amiri Qaem Maqami, Abdulmajid, Obligations Law, vol. 1: Outlines of Obligations Law – legal events, Tehran, Mizan, 1998; Husseininejad, Husseinqoli, Civil Liability, Majd, 2010; Babaei, Iraj: Tort Law and Extra-contractual Requirements, Mizan, 2015.

The liability of the physician as regards the damages that are done to the patients due to his medical actions; the liability of those people who take care of the infants and maniacs and are to be held responsible for the possible damages that they can do to another; the liability of the owners of vehicles due to the possible damages that can be done by these vehicles; the liability of the employers due to the actions that may be taken by their employees damaging another. In fact, in legal systems the emphasis is laid on the necessity of establishing causal relationship between the action or liability bearing situation and the damage and in this case sometimes the common sense is used as the basis. However, since sometimes numerous factors are involved in the occurrence of an event and it is truly hard to determine the causal relationship the legal systems come up with certain strategies in this regard that are discussed n this part of the civil liability theory.

The logical place of the distinction between intentional and negligence torts in the logical discussions related to the modern tort law is the debate of the causal relationship and it has not been conisdered in the discussion of harmful action. In other words, causing harm to another directly or indirectly represent two forms of causal relations and this difference does not bring about any major change in the liability judgemetns in view of the way of causing the harm.

Those who consider intentional and negligence torts to be among the issues related to harmful action and attach different legal status to them respectively when come across a damage the first question that dawns unto their mind is whether the damage is direct or indirect? If the harm is direct and represents an intentional tort we certainly do not need to prove the guilt or negligence and according to the general rules of civil law, Islamic penal code and jurisprudence it will be subject to civil liability regulations. If the damage is indirectly done (by means of occasioning) not only the causal relation should be established rather the guilt of the harm doer has to be also demonstrated and mere demonstration of causal relationship will not be a basis for liability.

Now, according to jurisprudential logic, if the causal relationship is demonstrated regardless of whether it is out of direct or indirect action, in line with the general rules of civil liability recognized by civil law and Imamyah jurisprudence, there remains no place for further investingation. Of course, legal system can follow its particular tort policy and regulations and present certain framework for recognition of the grounds of civil liability. The Article 57 of Islamic Penal Code explains this as follows:

Article 57: Whenever a crime is committed upon the illegal order of one of the official authorities the one has given the order as well as the one who has followed the order will stand the punishment that has been determined in the law. However, if the one who has followed the order has had an acceptable excuse for thinking that he has been exercising the law could be fined to pay ransom or bail.

This bail verdict is clearly because of the fact that the one who has followed the order was in some way involved in harm doing though the order giver had been the chief cause of the harm. Accordingly, the accomplice deserves more to be sentenced to pay the bail. However, public opinion always condemns the one who has given the orders and neglects the one who has followed the orders.

In fact, the efforts are mostly concentrated on providing a legal solution by means of insisting on the division of damage doing into intentional and negligence torts without conducting further investigation of the natural and existential reality of the issue of damage and its respective basis and reasons. In other words, in the solutions proposed by this approach neither the principles of justice are observed and exercised nor the social and economic considerations are taken into account and only a formal and not essential conception of the classification of tort into intentional and occasional is underlined. This notion of harm doing is not discussed in jurisprudential sources in this manner and this is why the respective judgement has been amended and revisied in the Islamic penal code of 2013 where the Article 159 rephrases the judgement as follows:

Article 159- whenever a crime is committed under the decree of one of the official authorities the order giver and the order follower are retributed both. However, the order follower who has mistakenly followed the order of the order giver and has an acceptable excuse for his involvement in the crime will not be punished and instead will be fined according to the respective regulations as regards ransom and bail.[49]

We can make use of the daily examples of the medical accidents or surgery. In this field, the general public attributes the damage resulted from suregery and medical operations to the physician only when the latter has commited a mistake or negligence. Due to these formal reasonings that are accompanied by allocation of a positive background for the distinction between the intentional and occasional torts and inattention to the fact that this division is indeed an elucidation of the causal relationship based on the common sense judgements, a series of improper judgements like those related to civil liability of the medical doctors in previous Islamic penal code emerged according to which the doctor is only liable where a sheer mistake has been made by him in the medical operations. This spurred furious reactions and resistances on the behalf of legal experts and public opinion and a group of legal experts and jurists sought to tackle this problem by working out a solution for such judgements by legal means. Finally, in the amended version of Islamic penal code of 2013 the aforementioned judgement was revised and the liability of medical doctor was grounded and calculated based on the negligence that occurs on his behalf.

For tackling such a delicate problems that are so effective in economic, social and functional relations in society a vague formal approach is used while for having a just and efficient legal system this formal approach needs to be avoided. Thus in each case the issues related to harm doing should be addressed in legal system on the basis of justice and economic and social efficiency.

[49] For interpretation of the amendemnts cf. Babaei, Iraj: Civil Liability and Extracontractual Requirements, pp. 187-189.

An overview of the background and history of the doctrine of civil liability in the common law legal system reveals the similar mode of raising the question and related misunderstanding in the legal system. In fact, in the traditional legal system that is based on the writs a similar conflict existed as intentional vs. occasional (negligence) torts in our legal system: in this system the judgements of the courts were issued in various forms depending on the fact that whether the damage was done directly by the individual or he was merely indirectly involved (Trespass or Action on the case).

Following the annulment of the writs system in common law toward the end of nineteenth century the common law continued its life through a new theorization. The tort law sought to revise the legal rules of writs by seting aside the traditional forms and framework and founding a new theoretical basis for civil liability. Thus the new theoretical basis of tort discourse casted light on the existing ambiguities regarding the judgements of the direct and indirect damages that have their origin in the incorrect understanding of the nature of liability and thus avoids the occurrence of the same mistake in common law system.[50] One can say that tort logic and liability acknowledgement philosophy will not be able to continue with direct vis. Indirect dichotomy and make any difference regarding the liability in their terms. **Second Section: Chapter One: Principle of Intentional Tort (Destruction) and Definition of Intentional Tort and Occasional (Negligence) Tort in Civil Law:** The jurists have resorted to the principle of intentiona tort in their struggle for demonstration of guarantee and civil liability. They formulate this principle as follows: "whoever destroys another's property he will be held responsible for it (he should guarantee it)". They believe that the validity of this principle is so firm that there is no need for any further argument in demonstration of the fact that destruction leads to liability. The necessity, consensus and several texts endorse that the property, work, honor and blood of the Muslim are respected and no one is allowed to trespass them and this as such substantiates the principle (Maraghei, 2/434).

Anyone who causes a harm to another is to be held responsible for it and suould recompense it according to the "no harm" principle. By studying this principle we find out that there are two theories of liability that have been referred to Iranian civil law as intentional tort and occasional (negligence) tort.

Dr. Langeroodi defines intentional tort as follows: destroying another's property in partial or total form in a way that the act of destruction has been willed by the agent himself (e.g. stimulating a wild dog to tear the passenger's cloths). It does not matter if the damage has been done directly (by a tool or without a tool) or indirectly, intentionally or unintentionally in all cases the harm doer will be held responsible and liable.

According to the Article 328 of Civil Law anyone who destroys another's property he is responsible for it and should provide its equal or price whether the harm is done intentionally or unintentionally, or paritially or totally.

In intentional tort the individual personally does harm to another (e.g. a man breaks another's windown, kills another's animal, destroys another's house, or sets another's car on fire). Intentional tort is always associated with action in the sense of doing something.

As to the nature of this principle some jurists believe that it is drawn upon the phrophetic traditions.[51] (Allameh Helli, Nihayah, 1/384). Some others endorse the prophetic origin of the principle but are of the belief that no single tradition available contains it (Najafi, 36/157).

On the contrary, some jurists do not believe in its prophetic origin (Khoei, Misbah, 2/44). And some others despite denying the existence of such a principle in the traditions insist on its general basis (Imam Khomeini, Makasib, 2/ 279). Thus, when an individual destroys another's property he is held responsible for the action and concived to be liable before the owner; in the sense that he is obliged to provide an equal or the price of the destroyed property (Mohaqeq Damad, 112).

The Quranic basis of this principle is the following verses: "The recompense of a sin is a sin like it" (Chapter 42 Shura: 40), and "If any one aggresses against you, so aggress against him with the likeness of that which he has aggressed against you" (Chapter 2 Baqara: 194). In the first verse the recompense of the action regardless of its virtuous or evil nature is its equal. The absoluteness of this verse is used to argue for unconditional liability in return of trespass or destruction. The second verse also insists that "if someone trespasses against you react to it in similar way".

'Eteda (aggression) has been used in the second verse and other similar verses means transgression (Tusi, Tebyan, 1/ 280; Tabtabaei, 2/61) and the commentators believe that it includes all types of aggression and transgression; including cutting trees, setting the farms on fire, plundering and destroying the public properties like jungles, aquaducts, and ponds and public perspectives (Tabatabaei, ibid; Makarem, Tafsir, 2/ 20; Zamakhshari, 1/ 235; Zoheili, 2/ 179). Sheikh Tusi has grounded his argument of the necessity of the recompense of the damaged properties with their equal or by their price (Tusi, Mabsut, 2/ 60).

However, some jurists have said that the aforementioned verses are concerned with intentional aggression and trespass and do not address the negligence torts; while the principle of harm covers all intentional and occasional damages (Ansari, Makasib, 106).

But it seems that in both verses counteract has been declared legitimate and the two verse connote that no single aggression should be left unanswered (Tabatabaei, 2/ 74). Then destruction requires liability.

---

[50] Oliver W. HOLMES, The Common Law (Macmillan & Co. 1882), p 90-94; percy H.WINFIELD, The history of Negligligence in the law of Torts, 42 L.Q.Rev. 184(1926); Victor SCHWARTZ, Kathryn KELLY and David PARTLETT, Cases and Materials, Prosser, Wade and Schwartz's Torts, 11th ed. (Foundation Press, 2005), p.1310.

[51] Ayatollah Jawadi Amoli in his presentation of the debates of the renowned jurists Ayatollah Haj Seyed Muhammad Muhaqiq Damad quotes the latter as follows: "no matter where another's property is destroyed because based on the self-evident principle any form of destruction of another's property has to be recompensed" (Jawadi Amoli, al-Salat, 432).

Numerous prophetic traditions have been cited in jurisprudential works as the basis of this principle the majority of which insist on the necessity of respecting the property, rights, blood and honor of the Muslim and hold the harm doer liable. One of these authentic traditions is the tradition that has been quoted by Abi Basir and Abdullah Ibn Masud of Holy Prophet (peace be upon him) who has said: the property of a Muslim is respected like his blood. In other words, in the same way that shedding one's blood is forbidden the destruction of his properties is also recompensed.

One can say that the property is respected and should be protected against the possible encroachment and in the event of any trespass civil liablity and guarantee are required. In other words, anyone who destroys individual or public properties is responsible to recompense the damage.

Will is not required to be associated with the destruction and this is the very sense of the lack of element of will and intention in the emergence of responsibility (guarantee); however, agency in action and realization of attribution and also the agent's relation with destruction are required; then in guaranteeing the harm the negligence (involvement) is not a condition although attribution is a condition and it should be proved as a major element of liability (guarantee) (ibid, 114, 115).

Chapter Two: Types and Concept of Property in Intentional Tort (Destruction): Intentional tort (destruction) is of two types: real tort and semi-real tort. In semi-real tort contrary to the real tort, the property is not wholly destroyed rather its propertihood is damaged and it loses its value. For example a farming land would lose its value due to the poisonous pollution of the factory located in the vicinity. Here the land continues to be though it is no longer valuable.

Some jurists contend that the principle of destruction covers both types but there are some others who believe that property damage is not applied to semi-real tort and in this type of harm we should refer to the verses in Quran that speak of one's liability before unpermitted intrusion (Bojnurdi, 2/ 20). This idea has been criticized and it was argued that even when a property has just lost its value this is also tantamount to its annihilation (Mohqeq Damad, 111).

Since in the principle of destruction the phrase "destroying another's property" is mentioned we need first clarify the notion of property and then analyze it. Property represent the thing in return of which people give something and take care of it; then soil, ash and the dead body of an animal is not a property (Shartuni, 2/ 1252). Some jurists have also declared something a property that is of interest for people (Imam Khomeini, Bay', 1/323). This is to say that people's interest denotes an object's value while need is something that people depend on it and use it.

Some scholars have also offered alternative definitions: "property is something that is desirable and of value for providing people's needs and does not impede their livelihood; including eating, drinking and whetever that either directly or indirectly provides people's needs" (Bojnurdi, 2/ 20-21).

There are also jurists who have declared exploitability a constitutive element of the propertihood of a property; because exploitability as such contains a possibility of preservation and accessability and the latter is required where the exploitation of something is not possible without it. Then whatever is exploitable is simultaneously life-giving and accessible. For example, we take advantage of light and heat of the sun, then it is as exploitable as it is accessible. Today continuous developments in exploitablity of objects have led to the expansion of the domain of properties (Amid Zanjani, 115).

Now one can argue that "property" does also include profits (Bojnurdi, 2/ 21; Khoei, Misbah, 2/ 31) and does not exclusively belong to external objects. It is also applied to whatever is needed by man and is involved, whether directly or indirectly, in human physical health and growth and is exploitable. Then, destroying another's property – in any form – will be subjected to civil liability and guarantee. If we do not take them as examples of properties there is no doubt that they are involved in the propertihood of the objects and can be subjected to the civil liability rules.

But as to the application of the principle of destruction to financial damages some believe that due to the phrase "another's property" it merely addresses the external objects (Hakim, 3). However, the existing body of reasons and documents proves that damage in any form leads to the harm doer's being held responsible and will be a basis for liability. Then harm as a general notion includes all types of harm.

Then, we can feasibly claim that the principle of destruction is not merely focused on financial damages rather it insists on recompensing all types of damages including the spiritual ones. This is because according to the content of this principle anyone who causes a harm to one's property, interests, life, dignity and honor or any other thing he will be held responsible and he should guarantee the recompense.

This is also why some jurists have underlined this issue and argued: "jurists refer to the principle of destruction (tort maxim) in demonstrating liability in such cases as the transgression of property, rights, interests, murder or mutilation and the like" (Maraghi, 2/ 434). Accordingly, in Islam property is ordered to be preserved and respected like life, health and all individual inalienable rights and in the event of damage the man who has caused the damage should be held liable.

For example, since natural resources are often considered to be among public wealth and national properties, i.e. Anfal[52] and Moshtarakat[53], the leader (Imam) is the owner on the behalf of the nation ('Amid Zanjani, 233). Then they are not owned by a specific person and can be declared an extension of "another's property". They should serve the

[52] Jurists believe that Anfal refers both to the war trophies and public properties that are not owned by an individual like dead lands, mountains, wilderness, canebrake, seas, mines and so on and so forth (Montazeri, 4/ 5).

[53] Moshtarakat represents the objects that are shared by all people and precedence can be a basis for priority in them (cf. Shahid Thani, al-Rozat al-Bahyah, 7/ 170).

interests of Imamat due to their being under the custody of the Imam (Montazeri, 4/ 104) and the government should supervise these properties (ibid, 109).

Thus, no one is allowed to own these properties without the permission of the Imam who manages the society as people's representative and any form of encroachment to them is considered to be a sin. Any form of encroachment to such properties is an example of usurpation regardless of the occurrence of it during the presence of Imam or his absence (ibid, 107).

There are also objects and resources that are owned neither by individuals nor by the state and can be profitable in various ways and everyone is allowed to take advantage of them according to Holy Quran. Thus, destroying another's right to take advantage of environmental resources either through destroying the exploitation ground or by way of bringing about impediments is intolerable according to the principle of "no harm" in Islam that defies all possible damage ('Amid Zanjani, 264).

However, some jurists have insisted on the realization of guarantee and civil liability; because guarantee in this context is tantamount to undertaking, i.e. undertaking the recompense of the damages done to another's property; the one who has undertaken another's property no longer in possession of the latter is responsible to return it in the previous form. This is also the case with the unowned properties that is undertaken by the individual; that is to say he must guarantee their being returned in their previous form (Sadr, Sharh al-'Urvah, 4/ 292).

Causing harm to the unowned elements and objects also leads to guarantee and civil liability even if it has not been done willfully; because presence or lack of will does not change the nature of the destruction done.

But since the majority of Shia jurists (Maraghi, 322) and even the Sunni jurists (Kasani, 7/ 17) insist on the essential respectfulness of the properties as the basis of guarantee of destroyed items one can claim that this can be deductively applied to rights too and one of the evidences of the inclusion of non-financial rights among the guaranteed destroyed items is the generalization of the principle of harm and its application to other cases insofar as the jurists use it in dealing with the destruction of properties and bodies alike. Moreover, those who have taken "no harm" maxim as the criterion of the guarantee of the destroyed items also believe that it includes the non-property cases too (i.e. those cases that are not considered properties) ('Amid Zanjani, 115).

We know that according to the principle of domination, every owner has the right to take advantage of his own property without any reservation and regardless of the concerns of needed proportion or extra proportion. However, whenever taking advantage of one's own property causes any harm to another it is prohibited based on Islamic creeds because ownership is hinged upon the lack of harm (Sistani, 157). Then the owner is not allowed to cause harms to another for the sake of using his property and the principle of "no harm" sets certain restrictions for the rights of owner in such cases. Then if an owner does not pay the necessary attention to this principle and continues to cause harms to another through using his property he will be held responsible for the damages and no excuse is accepted based on the need or emergency. However, if the owner does not have any intention to damage another's property and he is merely seeking to have access to his property he is allowed to make use in normal scale though this permission has no conflict with the substantiation of guarantee and civil liability (Bojnurdi, 245). This is because lack of respect and lack of guarantee have no concomitance (Maraghi, 107).

Then the scope of the principle of domination is limited to the normal and rational domination and follows the codes (Imam Khomeini, Bay', 1/ 79, 80) and unnomarl and irrational possession thematically lie outside the domain of this principle. From another perspective, according to the Article 40 of Constitution, no ne can cause harms to another's property or transgress public interests by his actions; that is to say, exercising one's rights by no means justify the permission of causing harms to another, rather any harm could be a basis for demonstration of liability before the misuse (Qasemzadeh, 217). Then the owner cannot own (take advantage of) his property in a way that would trespass another's individual and social rights. In other words, he is not allowed to cause any harm to another's rights and properties on the pretext of having right to take advantage of his property.

Chapter Three: Principle of Negligence (Occasional) Tort. Many of the jurists believe that occasional tort is a branch and extension of the principle of destruction (intentional tort); and they divide tort into intentional tort and negligence tort (Bojnurdi, 22; Imam Khomeini, Tahrir, 2/ 190). However, some jurists refer to a tradition by Sokuni from Imam Sadeq (peace be upon him) who has quoted the Holy Prophet (may Allah bless him and his household) to have said: "anyone who digs a hole or a well in the passway of the Muslims or sets nails in their way that would cause harms and wounds he will be held responsible for the damages" (Hor-e 'Ameli, 19/ 182). Thus, the jurists have argued that "it is fair to say that this general principle could be rephrased as follows: any action that is issued from a rational agent and normally causes harms to the property and life of the Muslims while the action is closely associated with will the agent will be taken as responsible" (Bojnurdi, 28). Thus conceived, negligence tort (occasional harm) consists of causing damages and harms to another's property without having the intention or being involved directly rather based on negligence and lack of caution (for example the dog's leash is loosely tied and it attacks the passerbys). According to the Article 331 of Civil Law, anyone who destroys another's property he is obliged to pay its price and if the harm is partial and not whole the price of the destroyed part should be paid.

However, in negligence tort the perpetrator cause harm in an indirect fashion. For example, someone turns on a fire and leaves (that is he does not himself sets something on fire) and the wind takes the fire to adjacent lands. Likewise a man digs a hole and leave. Intentional tort (destruction) is always associated with action while in negligence tort both action and lack of action are conceivable. As a simple example think of one who borrows a sheep and does not feed it. Here the negligence and inattention to an action is the basis of tort.

The most important evidence of this principle is the traditions in which the liability of the person is highlighted who has not been individually involved in a destruction rather he has prepared the ground for its occurrence and indirectly caused harm to another's life and property. For example, a man digs a hole in a passway and another one falls into it while he is passing in this case the hole digger is responsible and the one who should guarantee the recompense according ot the tradition related by Zarareh from Imam Sadeq (Hor-e Ameli, 19/ 179). This tradition has been quoted both by Baznati and Abi al-Sabah Konani (ibid, 13/ 339; 19/ 181). This traditions reads as follows: "anyone who puts anything in the passway of Muslims he is responsible for the consequences".

Some jurists claim that "guarantee" [liability] is not applied in such cases (Naraqi, 44). However, in some cases the person is held responsible even for the properties that are not owned by another. Then in all conditions the perpetrator is obliged to undertake the responsibility and return the property in its previous form (Sadr, Sharh al-'Urvah, 4/ 292). In both intentional and occasional torts the intention for causing harm is not required; rather it suffices that someone has caused a harm to another. But as it was mentioned as regards intentional tort it is necessary that the damage to be certainly attributed to the action of the perpetrator (Mohaqeq Damad, 120).

Moreover, having knowledge of the subject and judgement is not a requirement of neither principles; then regardless of the fact that if the perpetrator is informed of the harm done by his action or not he will be held responsible for the cosequences. Thisi is endorsed by numerous prophetic traditions that exist in this regard.

Intentional and negligence torts differ in that the former causes the harm directly while the latter causes it indirectly. Then, any action that causes harm to natural environment in the form destruction or pollution and makes it unusable will bring about liability (Fakhla'ei, 55). For example, due to the noise caused by mining excavations unprecedented harms are caused to the environment and wild life; or the mining and industrial wastes are kept somewhere without observing the legal codes and cause harms due to natural factos; or the dust caused by the activities of factories in a region endangers livestock breeding and bee keeping.

The other difference of these two types of torts is that in intentional tort the positive actions causes harm and the refusal of taking an action is never considered as an extension of intentional tort, while in negligence tort even the presence and lack of action both are conceived as the source of tort (Mohaqeq Damad, 118). The refusal of action can cause harm where the action is an obligation either based on law or due to a contract like accepting attorneyship or executorship and refusing to undertake one's obligations as regards protecting the trusted property or right (Amani, 1/ 392; Mohammadi, 32).

Moreover, in intentional tort negligence is not a precondition of the liability. For example, jurists believe that the liability of the physicians and vets is unconditional and is not conditioned upon negligence (Najafi, 27/ 322). As to the artisan if he causes a harm to the property he will be held responsible regardless of the presence or absence of negligence; and even if he has the required skills, he will still be liable for the action he has done (Karaki, 8/ 267).

In such cases the individual is known liable in view of the intentional tort (ibid.) But in negligence tort where the perpetrator is liable only when his negligence or guilt is proven; in other words, when he has not adopted the necessary measures of caution (Emami, 393). Thus, the action that is attributed to the perpetrator is considered a mistake and enemity (Katoozian, Guarantee, 136). Then, in negligence tort if the attribution of the damage to the perpetrator is not substantiated no harm is done (Mohaqeq Damad, 120).

Where negligence is a precondition of liability the harmful action is the basis of civili liablity when the perpetrator has committed a mistake that can be intentional or unintentional (out of carelessness) (Eskini, 238). Accordingly, if the man who has suffered a damage wants to ask the perpetrator to recompense the damage he needs to prove that the negligence of the perpetrator has led to the damage. Thus, in demonstration of negligence the man who has suffered the damage has the role of the claimant and should provide evidences that substantiate the mistake or negligence of the perpetrator (Katoozian, forced liability, 104).

In intentional tort negligence is not a prerequisite in that it is not important if the perpetrator is guilty or not. For example, if someone breaks another's glass while he is sleeping he is held responsible for recompense. But as regards negligence tort, according to articles 551, 555, and 553, if the perpetrator has committed a negligence he is liable otherwise not.

Second Section: Chapter One: Unauthorized Management of Another's Property Without His Permission: The legislator considers the self-proclaimed custodian to be a representative. Thus, if one has been chosen as the representative to manage another's property based on a contract or by force he is no longer a self-proclaimed custodian because the latter connotes management without permission. There is a very important point as to the writs regarding the self-proclaimed custodianship to the effect that if the permission has been received from the owner before undertaking the management there is no occasion for self-proclaimed custodianship anymore and the manager manages the property as the representative and he deserves to be paid for all the services that he has offered. Nevertheless in self-proclaimed custodianship the self-proclaimed manager deserves to receive the costs that he has covered to protect the property. Management of another's property should not have been undertaken due to reluctance, force or mistake. As to reluctance it needs to be mentioned that in law reluctance makes the actions ineffective and a permission is required to be asked from the owner. Then if reluctance (force) is to the extent that leaves no room for will the damages should be covered not by the perpetrator rather by the one who has forced the former to undertake the job. If the self-proclaimed custodian manages the property due to mistake consideration of himself as the custodian assigned by the owner he will be subject to the judgements of management of another's property without permission but if he thinks that he is

managing his own property and then it is revealed that the fact is otherwise there remains no occasion for self-proclaimed custodianship judgements.

In the self-proclaimed custodianship of another's property there may third parties obligations besides those of self-proclaimed manager and the owner. The self-proclaimed manager should give an account of the period of his management and the owner should cover the costs and the same time these both should be accountable before the rights of the third parties involved. The impermissible management of another's property also includes the actions taken by the individual out of good will for management of another's property.[54]

The Article 306 of Civil Law is the only article that has dealt with the impermissible management of another's property. According to this article: "If anyone manages the property of a party who is continuously absent an incapacitated person or the like, without the permission of the owner or the person who has the right to give permission, he must give an account of his period of management. If it would have been possible to have obtained permission at the time or if delay in interfering in the matter would have caused no loss, then no claim for expenses of management can be entertained. If how ever, a lack of intervention or a delay in such action would have entailed losses to the owner of the property, expenses of management can be claimed by the person who performed the duties of manager."

Many writers of civil law contend that the Article 306 of Iranian Civil Code is drawn from the Article 1372 of French Civil Code where the idea of justice is emphasized and it is suggested the justice requires us to return the costs that have been covered by the one who has managed a property for one's interest.[55]

Some conditions are needed to be available for the realization of impermissible management of another's property:[56]

First Condition: Self-proclaimed intervention

The management of another's property should be in an unauthorized form. This is highlighted in Article 306 with the phrase "…without the permission of the owner or the person who has the right to give permission…"[57] To prove that one's management over another's property has been unauthorized there should be no contract or law around. Then if someone has signed a contract with another to manage his property he will be his representative not an unauthorized manager. The legislator intends to address the issues of the custodian of the incapable one that refers to children, immature ones and the maniacs.

Second condition: necessity of management

The legislato has stipulated this condition in the Article 306 as follows:

"If it would have been possible to have obtained permission at the time or if delay in interfering in the matter would have caused no loss".

For example, when the husband has the ability to run the family and fulfil his obligations but some other one provides allowance for his wife he will not be entitled to ask the husband to cover the costs.

The other point is that the legislator has considered interference in management of another's properties for the sake of preventing the possible losses to be an example of unauthorized management and not a profit-seeking act. Then the action of the individual who repairs another's car without permission with good intention cannot be taken as a basis for forcing the owner to cover the costs. Then it is not enough to prove that the action taken by the unauthorized manager was profitable rather it should be demonstrated that if he did not interfere or delyed the intereference the property would have been damaged.

Third Condition: the owner's inability of management:

The Article 306 of Iranian Civil Conde seemingly suggests that one is allowed to interfere in another's property management where the owner is not able to undertake it personally and needs assistance otherwise it is needless to say that when the owner himself able to manage his own property there is no occasion for external interference. In this article the legislator has mentioned two cases where the owner could not manage his own property and by the phrase "and the like (etc.)" it becomes clear that these two cases are merely examples among others.

It goes without saying that in most cases the unauthorized management of another's property takes place when the owner is absernt; but the major element of this legal institution is nto the absence of the owner or his lack of consciousness. What is of importance in unauthorized management is the inability of the owner of managing his own property and his need for help though he is present and conscious of the situation.

Chapter Two: Unauthorized Manager and the Effects of the Unauthorized Management of Another's Property:

Unauthorized management of another's property as a legal institution is of consequences and effects. Although the relationship of the unauthorized manager and the owner is on the significant effects of this institution it is certainly not the only effect. The unauthorized manager may establish certain relations with another individuals in the coruse of managing another's property and these relations undoubtedly are associated with a set of rights and obligations. Needless to say, the owner will have obligations before the unauthorized manager and the third parties.

The Article 306 claims that the unauthorized manager has one obligation before the owner and it is giving account of the period of his own management. In other words, the manager should be accountable before all benefits and losses. Moreover, according to the Article 167 of Civil Code, since the unauthorized manager is considered to be a religious trustee he is obliged to be careful not to go to the extremes.

[54] Jafari Langroodi, Mohammad Jafar, Law Terminology, Tehran, Ganj-e Danesh, 1995, seventh edition, p. 126.
[55] Madani, Seyed Jalal al-Din, Civil Law, Tehran, Paydar Press, 2004, p. 188.
[56] Katoozian, Extra-contractual Requirements, Tehran University Press, 1995, second edition, vol. 2, p. 285.
[57] Civil Code of Islamic Republic of Iran, Article 306.

Generally speaking, the owner's obligations before the unauthorized manager can be summarized in the following two:

1- Covering the necessary costs: the article 306 of Civil Code suggests that the owner is obligated to cover the costs only when these costs are necessary "… the manager will be entitled to receive the costs that had been unavoidable".

2- Restitution: If the unauthorized manager suffers material and physical losses in the process of impermissible management of another's property, these losses have to be recompensed by the owner if the conditions of unauthorized management exist. For example, the neighbor who has suffered physical losses in his efforts for extinguishing fire in his neighbor's house could ask the owner to cover the costs of possible surgeries and medication.[58]

Unauthorized contract might be possessive or covenantal; the unauthorized possessive contract refers to selling another's property without having the owner's permission while unauthorized covenantal contract represents someone's enterance into a covenant on the behalf of another one according to which he has to undertake doing certain things for the other pary involved in the covenant.[59] The one who engages in contract without the permission of another one is called unauthorized party involved in the contract who declares himself as the representative. Unauthorized contract cannot be denined before being validated or repudiated by the owner but it is not valid either rather it is an ineffective contract.

The Article 247 of Iranian Civil Code reads: "Contracts regarding the property of others, except those entered into by natural guardians, executors or legal representatives, are not binding even thought the owner of the property agrees there to…". The only effect that can be expected from such contracts is the fulfilment of the obligations as stipulated in the contract in the event of the permission allotted by another. The unauthorized contract is binding on the behalf of the man who deems himself as the representative of another. The ineffectiveness of the contract will continue as long as the permission has not been given or denied. The Article 252 of Civil Code announces: " Consent or refusal need not be immediate; in case of delay causing loss to a party who has acted in an authorized manner he shall have the right to break the contract ". The ineffectiveness of the contract will continue even after the death of the owner and according to the Article 253 of the Civil Code: "In the case of an unauthorized contract, if the owner of the property dies before signifying his consent or refusal, this consent or refusal can be given by the heirs".[60]

Whenever the owner signifies his consent of the unauthorized contract the latter will be complete and have its own legal effects. The Article 248 reads: "The consent of the owner of a property in an unauthorized contract can be signified orally or by an act which signifies his consent to the contract". For example, the owner can allow the unauthorized manager to undertake the contract affairs of the property after the occurrence of unauthorized contract. According to the Article 249 of Civil Code: "The silence of the owner of a property, even if he is present when the transaction is made, cannot be taken as indicating his consent".[61]

Whenever the third party (the man who has bought the property of the owner from the unauthorized manager) has paid the price of transaction, the owner can ask the buyer or the unauthorized manager to pay him the price and the third party has the right to ask the unauthorized manager to refund his payment.

Chapter Three: Conditions of Permission, Numerous Transactions of Another's Property:

Whenever another's property is transacted in an unauthorized way without the owner's permission while other transactions have also been made regarding the same property the owner is free to authorize the transaction that he wills. In this case if the owner authorizes the first unauthorized transaction the latter transaction and all consequent transactions will be authorized and if the last one is authorized all previous ones will be annulled.[62]

A) Conditions of Permission:

If the permission or consent of the owner is to be effective in authorizing the unauthorized transaction there are conditions that should be met in advance:

1- The permission should be given when the owner is qualified and if the owner is immature or mentally ill the permission will not stand.

2- The permission of owner is effective when it is not preceded by a refusal that has already annulled the transaction and there is no occasion for legal authorization.

B) Condition and Effects of Transaction after Refusal:

The owner may refuse the unauthorized transaction on the event of which the transaction is annulled forever and has no legal effect whatsoever.[63]

The Article 251 of Civil Code explains this point: "The refusal of an unauthorized transaction is effective whether expressed orally or by some act which indicates absence of consent." It is needless to say that the owner's refusal annuls the contract when it is not preceded by previous consent. If the property is given to the third party who has bought the property by the unauthorized representative the owner is allowed to ask the buyer to return his property. Whenever the transacted property is damaged by the buyer the owner has the right to ask the buyer to return the property in whole form along with all profits regardless of their being used or not.

[58] Katoozian, Nasir, Legal Events, Sherkat Sahami Enteshar, 2005, Ninth Impression, p. 298.
[59] Novin, Parviz, Contracts, Tadris Press, Autumn 2005, first edition, p. 353.
[60] Shahidi, Mahdi, Civil Code 3, Obligations, Majd Press, 2004, Fourth Edition, p. 98.
[61] Emami, Hassan, Civil Law, Tehran, Asami Library Presss, 1961, third edition, vol. 1, p. 301.
[62] Novin, Parvis, Contracts, Tehran, Tadris, 2005, first edition, p. 365.
[63] Emami, Hassan, Civil Law, Tehran, Asami Library Presss, 1961, third edition, vol. 1, p. 302.

C) Unauthorized Transaction and Relative State of the Effectiveness of the Contract:

The principle of relativity of the effect of contract is one of the basic principles of contracts according to which "Undertakings or contracts are only binding on the two parties concerned or their legal substitutes" (Civil Code, Article 231).

We know that the third party in a contract is the one who is not in fact part of the contract in reality and and his will is not involved in the structure of the contract. We believe that the unauthorized transaction is by no means an example of obligation for the third party. Because:

A: In unauthorized transaction the unauthorized man does not have any title in the contract and after the consent of the owner he could only be a representative and in legal terms, he cannot be considered a party involved in the contract even if his will has formed the contract. In other words, in the by attorney contract the will and intention of the attorney builds the contract but the party involved in the contract is the one who has been represented by the attorney not the latter. Then the owner is one of the parties of the contract when he has signified his consent of the contract and after it he will be responsible for all consequences of the contract and the unauthorized representative will not have any role.

B- The bindingness of the contract for third parties as it is clear from the appearance is the goal of the bindingness of the contract in general and the contract is binding when its effects are enacted while in unauthorized contract there is no bindingness whatsoever.

C- If in the contract the right for revocation or any other condition is stipulated for his interest these conditions are not exercisable before the consent of the owner because the contract is not binding and has no effect and the contract is not whole. It seems that these conditions are binding for the owner from the very moment when the contract is sealed and after signifying the consent they can be put into action, like the right to revocation or other rights provided the involvement of the unauthorized representative is not the major cause of the stipulations of these conditions in the event of when they are annulled as such. Then the unauthorized representative has no place in the contract and cannot lay any effect on it and the owner is the party of the contract insofar as if unauthorized contract undertakes obligations for the third party, i.e. the owner, the transfer of these conditions to the owner would be against the legal norms.

D- When someone seals a contract for a third party, e.g. asks someone to draw a painting for a third one he undertakes an obligation towards the third party from his own resources while in unauthoritative contract one seals the contract based on the resources of the third party for whom something is ordered. In this latter case if the contract is sealed in the name of the third party it legally belongs to the owner and no return is deemed for the unauthorized party. According to the Article 196 of Civil Code: Anyone who makes a contract it is deemed that he is acting for himself unless in making the contract the contrary is laid down or unless subsequent evidence to the contrary is established. When making a contract, however, anyone can make provision for the benefit of a third person.

E- According to the aforementioned reasons in unauthorized contract the owner is the party involved in the contract but in undertaking obligations on the behalf of the third party the latter is not the party of the contract. In the unauthorized transaction it is not possible the obligation for the third party, the third party and the owner come together in one person.

Conclusion. Contrary to what has become popular among Iranian legal experts, one cannot draw certain conditions of civil liability from mere distinguishing between intentional tort and negligence (occasional) tort (in the former there is no need for proving the direct involvement while in the latter the guarantee requires the quilt and negligence to be proven). The fact is that this classification has its origin in Imamyah jurisprudence. There is only one jurisprudential principle and religious judgement regarding the liability (guarantee) resulted from the damage. i.e. harm principle (no harm in Islam), according to which anyone causes another any harm he is liable to recompense it. The prophetic traditions and jurisprudential debates distinguish between intentional and occasional torts (harm) but this classification has not been for drawing different judgements of the damage in terms of its being direct or indirect. In all cases the judgement was of the same scale, but what is of importance is the demonstration of the veracity of attribution of the damage to one's direct or indirect action and the negligence or guilt is used as a means for demonstration of this attribution.

In the modern logic of tort law in Iran, the constitutive elements of civil liability have been outlined under three titles of harm, occasioning and harmful action; the discussion of the damage of values and the affairs that entail liability stipulate the qualities and conditions of the recompense of the damages; there is also a method for demonstration of the the causal relation between the legally liable person responsible for the damages too; according to the philosophy of the knowledge of liability as well as various social, economic and human considerations it becomes clear of the harmful action that specify in which conditions causing harm to another are followed by liability or no liability. Misunderstanding the place of these two issues cause confusion regarding the judgements of civil liability; the concerns of justice and functionality prevail the discussion of the harmful action and civil liability and any decision in this regard will be followed by a certain judgement of the civil liability. However, the debate of the direct-ness or indirect-ness of damage will have no effect on the philosophy of acceptance of civil liability or the concerns of justice or functionality and is a way for demonstration of the causal relation.

Upon a correct and transparent theoretical view a la all moder legal systems of the issues of liability we find out that we should adopt a general maxim of the major basis of the civil liability in the legal system and specific and proper judgements to be determined for harm in particular fields from various political, economic and social points of view. In other words, in Iranian tort law the discussion of the harmful action is better to be grounded on the general

harm principle regardless of the intentional or occasional states and then the specific fields of liability, as we referred to earlier, like the liability of the medicine, product liability, workshop activity, state and general activity, firms and buisnesses, to be determined. Since the direct-ness or indirect-ness of harm doing is not a reason for changing the legal judgement, then the discussion of distinguishing between the intentional tort and negligence tort is not among the key issues of the harmful actions. The vital element of this discussion is explicating and accounting for the method of demonstration of causal relationship.

References

1. Katoozian, Naser, Civil Law, Extracontractual Requirements: Forced Liaiblity, Tehran, 1995, no. 81-82, pp. 204-209.
2. Emami, Seyed Hassan, Civil Law, vol. 1, p. 392.
3. Lotfi, Asadullah, Occasions and Exceptions of Liability in Jurisprudence and Iranian Civil Law, Majd, 2000, pp. 65-67.
4. Safaei, Seyed Hussein and Rahimi, Habibullah, Civil Liability (Extracontractual Requirements), SAMT, 2013, pp. 80-84.
5. Katoozian, Naser, Ibid, pp. 204-209.
6. Mir Fatah al-Husseini al-Maraghi: al-'Anavin, al-Muasisah al-Nashr al-Islami, 1997, vol. 2, principle of intentional tort, p. 435.
7. Bojnurdi, Seyed Muhammad Hussein: al-Qawaid al-Fiqhyah, vol. 2, Nashr al-Hadi, 1999, Harm Principle, p. 31.
8. Imam Khomeini, Tahrir al-Wasilah, Dar al-Elm, Qom, vol. 2, pp. 560-564.
9. Najafi, Sheikh Muhammad Hassan: Jawahir al-Kalam, edited by Reza Ostadi, Maktabah al-Islamyah, 1984, vol. 43, p. 43 and 95.
10. Muhaqiq Helli: Sharay' al-Islam, edited by Seyed Sadeq Shirazi, Tehran, 1989, vol. 4, p. 1019.
11. Shahid Thani, Sharh Lumah, edited by Seyed Muhammad Kalantar, 10th edition, p. 107.
12. Mir Fatah al-Maraghi, ibid, p. 435.
13. Makarem Shirazi, Naser, Qawa'ed al-Fiqhyah, vol. 2, pp. 205-208.
14. Bojnurdi, Seyed Muhammad Hussein, ibid, vol. 2, pp. 31-32.
15. Katoozian, Naser, Extracontractual Requirements, Civil Liablity, vol. 1, General Principles, Third Edition, Tehran University Press, 2012.
16. Idem, ibid, vol. 2: Specific and Compound Liabilities.
17. Idem, An Introduction to Civil Law, Sherkat Sahami Enteshar, 1998.
18. Safaei, Hussein and Rahimi, Habibullah: Civil Liability, SAMT, 2013.
19. Amiri Qaem Maqami, 'Abdulmajid, Obligaitons Law, vol. 1, Mizan, Tehran, 1999.
20. Husseininejad, Husseinqoli, Civil Liability, Majd, 2010, Babaei, Iraj, Civil Liability, Mizan, 2015.
21. Babei, ibid, pp. 187-189.
22. Jafari Langroodi, Muhammad Jafar, Law Terminology, Ganj-e Danesh, 1995, Seventh Edition, p. 126.
23. Madani, Seyed Jalal al-Din, Civil Law, Tehran Paydar, 2004, vol. 2, p. 188.
24. Katoozian, Naser, Extracontractual Requirements, Tehran, Tehran University Press, 1995, second edition, vol. 2, p. 285.
25. Emami, Seyed Hassan, Civil Law, Tehran, Tehran University Press, 1956, vol. 2, p. 350.
26. Civil Code of Islamic Republic of Iran, Article 306.
27. Katoozian, Naser, Legal Events, Tehran, Sherkat-e Sahami Enteshar, 2005, 9th edition, p. 298.
28. Novin, Parviz, Contracts, Tehran, Tadris Publishers, 2005, p. 353.
29. Shahidi Mahdi, Civil Law, Contracts, Majd, Tehran, 2004, p. 98.
30. Emami, Hassan, Civil Law, Tehran, Asami Library Press, 1961, vol. 1, p. 301.
31. Shahidi, ibid, 2004, p. 104.
32. Novin, Parviz, ibid, 2005, p. 365.
33. Emami, Hassan, Ibid, p. 302.
34. Article: Ahmad Nasiri, The Place of Tree-Like of Private Law-Civil Law.
35. www.lawgostar.com
36. Writs
37. Trespass or Action on the case
38. Oliver W. HOLMES, The Common Law (Macmillan & Co. 1882), p 90-;
39. percy H.WINFIELD, The history of Negligligence in the law of Torts, 42 L.Q.Rev. 184(1926);
40. Victor SCHWARTZ, Kathryn KELLY and David PARTLETT, Cases and Materials, Prosser, Wade and Schwartz's Torts, 11th ed. (Foundation Press, 2005), p.1310
41. G.Edward White, Tort law in America, An intellectual history, Oxford university press, 1985, pp.3f.