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Revolution of Contractual Liability and Death of Contracts Claim

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Abstract: In this article, we consider definition and conception of contractual responsibility then provide an analytical response in relation to replacement the place of contractual liability by tortuous liability. Main question is, whether to achieve justice and to make reasonable rules governing upon liability of manufacturers and foreseeable damage and responsibility, should be passed from contract and mixing to tort rules or in side of this evolution, the traditional structure tortuous liabilities rules are also essential? Enforcement of justice requires minimizing the role of the contract? Contract law tends toward the tort and mixed of boundaries between the responsibilities are evolutionary movements or should be block its? With the creation of new economic conditions resulting from the development industry and the industrial revolution and subsequent of them, labor issues and the imbalance in economic and trading power additional inflation and economic crises, theory of freedom of will and contract lost its sovereignty and was criticized. Writer believes, although all these colorful beliefs and social criticism, yet the rules relating to contracts, is allocated an important part of the civil and commercial law codes to itself. In spite of the extension is found in rules of torts law, the contract also has its proper place.
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1. Introduction

Despite well- established background based on careful possibility distinction between tort and contract obligations, now, according to society needs and provides legal protection to the weaker party in some special contracts such consumer contracts against experts, some obligations assumed and entered into contracts by the courts.

Social execution of justice in the courts is caused to refrain from performing contract and imposed their desired values on the parties in paternal way. Although in many cases, in existence and agreement of parties on these legal obligations is doubtful. Meanwhile adding obligations in hypothetically expands the scope of contractual liability and this action is often detriment of the victim, because of if such obligations are not entered into the scope of contract without doubt there is in tort. In most cases tort rules can be more appropriate for victim.

Somebody1 believes that nowadays can not draw precise boundary between contract and tort law. Hence these two liabilities are studied under a general title with similar rules, i.e. "civil responsibility". Many similarities are names for these two scopes. Conversely professor Andrew Robertson2 is goes to extent which believes that contractual relationships are creator of both contract and tort obligations. Also we could seen such theories like abuse of right or responsibility of producers, as well as its current form have broken clear boundaries between tort and contract liability3.

Doctor John4 Fleming says that contract and tort intersect in different contexts, occasioning problems that do not yield to any simple and uniform solution. Often, the question is whether

[1] -Jurdan, dr.Patris, **civil responsibilities**, translated by: adib, majid, published by mizan press, tehran, 2007, p44-45.

[2] - Robertson, Andrew, **The Law of Obligations: Connections and Boundaries**, Article: On the **Distinction between Contract and Tort**, Published By: UCL Press and Cavendish Press, 2004, p87.

[3] - Katouzian. Dr. Nasser, **Civil liability**, Volume 1, Tehran University press, 2009, P66.

[4] - Fleming, Dr.John, **Tort in Contractual Materix**, Osgoode Hall Law Journal, Vol.33, No.4, 1996, p661.

any perceived gap in contractual doctrine, such as the insistence on privity or consideration, should be filled by a tort remedy. But what is certain is that, believe to expand the circle of tort liabilities are disadvantages for the parties the contract which is negligible. If before questions about complete contract damages liability by referring to general rules faced with a positive response. Now, with contemplation, the answer is: "why?" Why with existence of contract we must go toward the general rules.

2-The conception and scope of contractual liability

A. The conception of contractual liability

Breach of contract historically can be related to tort but what is certain, is not continuing of it[1]. Some writer have defined contractual liability with these terms: responsibility of the party does not act to the obligation of contract or if it does not correctly performed. (Article 1137-1147 Civil Code of France.[2]) The most complete definition provided says: contractual liability is: requirement of obligor to compensate damages that result from failure to perform contract imposed to another party.

Today, it is believed that compensation is due to failure of performance of contract is an independent obligation and like tortuous liability. It is not difference losses is caused from what, about it is important the losses be compensated. Thus, in the dominant theory, there is no essential difference among responsibilities. Both have a similar function and effects.

There is an innovative idea that negates contractual liability and considers it absurd concept. In their view, aim of contractual remedy is not compensative.

The losses rather it is merely a performance of the contract by paying the equivalent monetary of obligations has been breached. [3] Contrast, opponents treated the theory of performance by equivalent as an absurd concept. We must note that remedy can not be a form of performance for violated obligation. Performance is only conceivable that the obligation itself is done. Remedy does not find difference based on the nature of cause of compensation. As it falls from its name, its function is always compensative [4]. However, somebody [5] believe it, one can not completely ignore the existing contractual relationship before compensation. If obligor and victim since before have signed a contract and expressed their will, has not effect, therefore, the contract does not enforced, even after the performance, too, continues of its present. Because of although non-performance generally alters the original obligation, but requires compensating is not anything unless a continuation of it. Bind to compensate, although differ from the original obligation but in fact, not a new obligation. In response must be said[6] that binding to compensate not a replacement or follower of major obligations. It is the duty based on non-performance of contractual duty imposed on obligor and its attribution to the contract is caused of violated the contractual duty and not because of general duty to avoids harm to another person.

Contractual liability comes into existence after breach the contract but is not considered as replacement. Direct source of obligor responsibility for binding to compensation is failure of performance of contract. Therefore contractual liability should not be mixed with issues relating to the performance of contract[7].

B. The revolution of contractual liability

In the course of developments of contracts law and contractual liability, fluctuations in rates of tends to apply the principle of freedom of contract comply with change the conception of fault, and change the dominant fiction in determining of liability has been the decisive role. With the help of this principle can close or far together the distinctions of tortuous and contractual responsibilities. While the effect of limitation of principle of freedom in context and effects of contracts, considered it necessary. This doctrine that has been inserted in article 10 of civil code of Iran in many scholars believes is rooted in Islamic law (feghe emamieh)[8]. And is not innovation of

[1] - Chitty On Contracts, Vol.1, 28 Edition, Sweet & Maxwell, London, 1999, Pp49-50.

[2] - Langerodi, dr,Mohammad gafar**, Law terminology,** published by: gangedanesh press, first edition, Vol.5, 2000, p3328.

[3] - jurdan, dr.patris, **Op.cit**., p 31.

[4]- jurdan, dr.patris, **Op.cit**., p 34.

[5] - jurdan, dr.patris, **Op.cit**., Pp 34-45.

[6] -Katouzian. Dr. Nasser, **General rules of contracts**, Vol.4, published by Tehran university press, 2012, p298.

[7] - Katouzian. Dr. Nasser, General rules of contracts, **Op.cit**, Pp 132-133.

[8] - Believers are bound to its terms unless terms solved the prohibited issues. Quoted by, Katouzian. Dr. Nasser, article: **freedom of**

Iranian legislatives or the influence of European law although influence of European law, particularly article 1134 civil code of France in this field can not be denied. In the ancient Roman law agreement of will[1] does not create binding unless traditional forms of conclusions of contracts would be fully respected[2]. But the need to distribute the work force, large transactions and requiring accelerate too the trade, give importance to will of individuals. Hence formalities of contract was reduced and instead of it will of person was replaced[3]. In the Roman law in any stage of the process, as a whole rule this theory is not accepted.

In relying and applying the principle of freedom was extreme. To the extent that some writer were absolutely defense and acceptance the freedom of will. Before the coming of the seventeenth century this principle was accepted but its radiance was in the eighteenth century economic freedom is caused natural law and claim if people be free in economic activity, the gates of competition will open between them[4] and prices and terms of contract will be determining by competition rather than order of legislative[5]. Freedom of person and independence will be the era of thoughts and even leads to social and cultural developments such as the French revolution[6].

Today, the principle of contractual freedom accepted as a useful social means and wherever not is appropriate for used act and procedural restricts it[7]. These changes has caused that a group of writers add compliance contract with social necessities or public policy to essentials condition of validity of contract. With this condition, the authors want to express this fact that freedom of contract has so far respected there is no conflict with social and legal system[8].

The main purpose of contractual liability is protected and enforces the contractual obligation and prevent of breaches contract.[9] And also wants to put claimant in that situation he would be if the contract was enforced. In other words, the goal of contractual liability is to protect of basic human rights under private law. In fact is a second helpful element in law of obligations after contract[10]. Another goal has been claim is creation "safety" for person. Perhaps as a summary of objectives in other words can be said contract of law is means for the acquisition of goods, services and money. Tortious liability is means for supporting a person and his property. So, these two areas complement each other and are useless without each other.

From a social perspective, where the contract has conflict with social justice, justice will prevail upon it[11]. This leads increased government intervention by legislation [12] and expansion of torts law expansion of tort law is a price to pay for the inflexible rules of contract law[13].

Based on the above thinking, in the contemporary world, in Europe countries most disputes solve with the principles of civil liability even when the parties have the opportunity to negotiate the contracts terms. For example[14], the

contract, majd researcher journal, no. 5 and 6, 2009, Pp7-8.

[1] - Nudum Pactum: sanhoorie, dr. abdolrazagh ahmad, **law of obligation, general principles of contracts**, vol.1, translated by: s.m.dadmarzi, and m.h.daneshkia, published by: qum university press, first edition, 2002, p57.

[2] - kastaloo, andre, **history of obligations law**, translated by: rezaiee, rasool, published by:majd press, first edition, 2008, p 61.

[3] - hayaiee, dr.ali abbas, article: **basis of obligation in iran and French law**, emam sadegh university journal law, no.13-14, p3.

[4] - emamiee, assadollah, article: **role of will in contracts**, right journal, no.4, 1990, Pp1-2.

[5] - sanhoorie, dr. abdolrazagh ahmad, **op.cit.,** p59. And Rubin, Dr.Paul H., **Courts and the Tort-Contract Boundary in Products Liability**, Available at: http://ssrn.com, P4.

[6] - Denial from freedom is meant cancel his humanity. Quoted by: Rousseau, jean-Jacques, **social contracts**, translated by: kalantarrian, morteza, published by: agah press, Tehran, 2005, p57. These ideas additional of the UDHR is even in countries legislation has also manifests. Article 959 and 960 civil code of Iran is instances of it.

[7] - Katouzian. Dr. Nasser, article: **Praise or arrangement of contracts**, law university journal, 2002, no.52, p 118.

[8] - Cheshire, Fifoot & Furmston's, **Law of Contract**, Published by Butterworths, 1991, Twelfth Edition, P26.

[9] - Harpwood, Dr.Vivienne**, Modern Tort law**, published by Cavendish Press, 2003**,** p2.

[10] - Von bar –dr.Christian, Drobing -Ulrich, **Study on Property law and Non- Contractual Liability as they relate to Contract Law**, 2003, p51.

[11] - Katouzian. Dr. Nasser, article: Praise or arrangement of contracts, **op.cit,** p119.

[12] - In directive of European countries 90/314/EEC Limitation of liability in cases of health and safety is prohibited.

[13] - An Expanding Tort Law – The Price Of A Rigid Contract Law **.**

[14] - Until 1992 Honda's car was not equipped with airbag and seatbelt mere existence, it was in full compliance with existing laws. Quoted by:

courts were allowed to customers who purchased cares without air bags; get remedy from manufacturers because of injuries that only air bags could prevent from them. It seems that tortuous liability is altered to a general social instance scheme by expertise of judges in common law regime.

3-Analysis of death of contracts and contractual liability claims

We must accept traditional and famous distinction between contract and tort responsibilities, now, play little role in some issues. Today's, in the area of supply defective products or services it lost his important. Boundary between two areas in common law countries, particularly in some scope of torts law changes his movement and close to each other. For example, in defective products liability what is important today protect of reasonable expectation of the customer and not bases of responsibility. In most cases the law of protecting consumers in countries can be basis and actionable in both bases.

There are no cases that speak about defective products and negligence liability not to enter. Even France, which still applying rule of non-cumul has been ignoring from this rule.

Grant Gilmore with attention to attraction of events of contracts to torts law and contract law is become social, purposed term to "contort" and speak of death of contract due to assault of public policy to the castle of private arrangements[1].

Experienced lawyers is proposed not the two responsibility will merge, but the proposal is the effects arising from breach Liability contract or tort law is uniform whether what rules governing both rules consistent as possible to can make[2].

A. Arguments of the death claim

Before the industrial revolution, torts law was less important area and go carefully and slow as a means of compensate for serious injury[3]. Torts law until to the twentieth century did not represent a fundamental change while approach of open economy in nineteenth century with immediate movement caused the growth and development of contract law by focusing on the will and intent of parties and freedom of contract doctrine. But now freedom of contracts limited more by the legislators, especially in the sectors driving, insurance, environmental pollution, rely on professional services and support to consumers of goods and services, to the extent that current liability in present century has increased and even talk about being swallowed contract law by torts law[4].

The major factor that causes the development of tortuous liability in matrix of contract was economic analysis of law, presented by some researcher as Posner, Shavell and Lands. The certainly believe that torts law is the only element which lead to safety[5]. Hence talk of its importance exaggeratedly. It should be noted that transactions can be judged on their own terms, instead the accessory of distributive justice[6].

As another reason for wanting to expand of torts liability is noted to inefficiency of traditional contract damages. In this claim referred to the limitation of contract remedies[7]. Such as: foresee ability rule of damages, limitation in non-pecuniary damages and etc.

In merely economic losses, the courts generally tended to make important the rules of contract law in the first degree, because the theory of politics, economics and law were provided in nineteenth century is become in light of freedom of contracts and free trade. Hadley Byrne V. Hiller case about mere economic loss caused a great change. Finally, in the key case of petroleum companies against Iso Marden (1976) appeal court opening the door to picking and choosing between contract and tort

Minton V. Honda Of America (684 N.E.2d648 (ohio1997): Krauss, Dr.Michael, **the Boundary Tort and Right to Contract**, Policy Analysis, No.347, Jun 1999, p4.

[1] - Fleming, Dr.John, **Tort in Contractual Materix**, Osgoode Hall Law Journal, Vol.33, No.4, 1996, p663.

[2] - Tunc, dr,andre, **international encyclopedia of comparative law**, vol.6, torts, London, martins publishers, 1983, no 45-47.

[3] - Schäfer, Hans-Bernd, **Tort Law: General (3000)**, 1999, p570.

[4] - Cheshire, Fifoot & Furmston̓ s, **Law of Contract**, Published by Butterworth, Twelfth Edition, 1991, p26.

[5] - Rubin, Dr.Paul H., **Courts and the Tort-Contract Boundary in Products Liability**, Available at: http://ssrn.com, P4.

[6] - Ripstein, dr.Arthur, **The Division of Responsibility and the Law of Tort**, Fordham Law Review, Vol.72, 2004, p104.

[7] - Droff, Dr.Michael, **Attaching Tort Claims to Contracts Action: an Economic Analysis of Contort**, Seton Hall Review, Vol.28:390, 1997, p397.

law[1]. Professor Atiyah believes that now it is time to merge the old rules of tort and contract liability in necessary cases and with relying on confidence and voluntary obligation, common in bout, create the new obligations law[2].

Professor Lynden by his theory of punitive justice meets disputes among the public and private law. This theory generalizes to cases related to environmental pollution, defective products and mistake of medical treatment[3].

Fredrick Pollack in 1875 and 1887 draw the boundaries between contract and tort law issues which are thought able to define the issues precisely. Contract law is governing on torts law. Torts law to extent remained less practical. But first shock to the dominance of the contract was interred in 1932 in the case of Donoghue. However until 1960 contract law continues to maintain its dominance, but at the end of the decade, with growth of tort liability, this dominance was threatened. Today, contract and tort liability are in disappoint form complex.[4] Distinguish of them from each other are difficultly. Tort law with major changes and expansion cause of actions based on fault or negligence has been find remarkable change. Tendency to tort law in certain responsibilities in certain activities such as nuclear facilities or act of safety and health during work, environmental damage and defective product liability has considerably increased. At the beginning of the nineteenth century, torts law was not normal system of allocating losses. But in the contemporary world, tort law will become the main system to receive compensation. This expansion caused existence of insurance to be essential for survival of tort liability. The next question that until where is insurance can continue to support the tortuous liability system, we should not be neglect two this question.

B. Death claim particular in products liability area

Whether the possibility of option responsibilities or the intervention of courts or compulsory acts means death and the end of contractual liability? The answer is negative. It is true that in some areas legal interventions and interpretations apply with respect to content of contract. Contractual liability and contract law still has its place. Professor Friedman[5] in his book says: generally contract law, law, there is a co-existence with market and free trade. Open economy simply was consistent with contract law in nineteenth century. The law of contracts and provides liberal support for the residue of economic behavior unregulated. In the early part of nineteenth century, the law of contract grew fat with the spoils of other fields. Over time, significant changes come in society and common developments in public policy which systematically robbed contract of its subject-matter such as labor law, anti-trust law, insurance law, business regulation, and social welfare legislation. The growth of these specialized bodies of public policy removed from contract transactions and situations formerly is governed by it.

Discuss of death of contract first time provide by Grant Gilmore[6]. He thinks general theory of contract law is inadvertent discovery of Dean Langdell[7] in his first book. In second edition, Langdell added a summary of law of contract as an appendix to the casebook in 1880. After Longdell, Holmes and Williston, work on this theory. And create the framework for it. And general theory of contract is established.

Must accept[8], in current liability law; gradually devise replacing the traditional fault principle. And rules of law as an efficient means of attracting interest and eliminate corruption, in philosophical language is interpreted to devices. One of the effects and items for passing from contract policy and the traditional theories of civil liability, then imposed liability to the producer based on economic thought and justice, is not effect of private contract relatively. With this devise, manufacturer and supplier of defective products can not reduce their responsibilities. Contractual relationship gives his place which is based on compromise to their legal status. By this way justice stay immune from assault and force of power.

[1] - harlow, dr.karl, **torts law**, first edition, published by mizan press, Tehran, 2003, Pp144-145.
[2] - harlow, dr.karl, **op.cit.,** p147.
[3] - harlow, dr.karl, **op.cit.,** p180.
[4] - harlow, dr.karl, **op.cit.,** p186.
[5] - Grant, Dr.Gilmore, **Death Of Contract**, Published by the Ohio State University Press, Edited by: Collins Ronald k.l, 2nd ed, 1995, p7.
[6] - Grant, Dr.Gilmore, **op.cit,** 13-14.
[7] - Langdell believed that the law was a science, like any other science- an attitude which commended him to president Elliot of Harvard, himself a chemist, and led to langdell's appointments as the first dean of the Harvard law school.
[8] - Katouzian. Dr. Nasser, **liability of defective products**, Tehran University press, 2009, Pp 49-51.

5- Conclusion

However, shall not be deemed that the contract factor has been removed from the structure of civil liability of producer. Condition of contract has no effect in establish and how to fulfill in samples of standard of professional care for potential risk of use. Because a contract of manufacturer and consumer of goods adds to ability predict of foresee ability damage and scope of liability. Contract reduces the ambiguity insurance issue and appropriateness of insurance premium with risk. For example, if insert in contract that the car is purchased for speed competitions, surely degrees ensure the safety is higher than from usual. For this reason careful of manufacturers takes other quality.

Some theorists for determine the responsibility re-noticed to role of contract in this field. Hence it is unlikely that pragmatism again bring precedent to starting point of this evolution and under contract.

Boundary among freedom and policy is not fixed. Economic and social condition crucially has role in drawing the flexibility boundaries. Justice is resulting from this combination. Attraction and tension of this desirable ideal is the motivation of theories.

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[27]. 28/06/2012

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