



# **THE CIVIL LIABILITY OF THE STATE FOR ITS BREACH OF BUILDING AND MAINTAINING THE ROAD NETWORK "COMPARATIVE STUDY"**

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<b>Received:</b> 10 <sup>th</sup> October 2021 <b>Accepted:</b> 11 <sup>th</sup> November 2021 <b>Published:</b> 21 <sup>th</sup> December 2021	In this research, we followed the descriptive analytical method by analyzing the legal texts, according to the opinions of jurists and comparing the legislations under comparison. We will discuss in this research the civil responsibility of the state that damages the individuals as a result of neglecting maintenance work and providing a usable road network, as well as the pillars of this liability through the following requirements: The first requirement: tort liability of the state. The second requirement: the pillars of state liability.
<b>Keywords:</b> Law, Legislations, Liability, Public Utility	

## **INTRODUCTION**

The road network is one of the important public utilities that the state manages, and the law allows it to collect certain fees from some members of people who the law gives them the right to benefit from these public utilities. The breach by the state that manages this public utility of its obligations imposed on it by law, especially its neglect of road maintenance and repair, requires the civil responsibility to confront the state which is represented the authority of administration as a result of its dereliction and negligence that led to damage to a majority of people or one of them.

The importance of the research appears through the state's obligation to building and maintaining the road network in order to ensure that individuals benefit from it as one of the most important public utilities, and therefore the state civilly asks about its breach in the case that it does not provide a road network and does not maintain what is exposed to damage from it.

The problem of the study arises in the case of the state's breaching its duties which related to the provision of the road network, and its failure to perform the required maintenance work, and the exposure of individuals to traffic accidents as a result of this negligence.

In this research, we followed the descriptive analytical method by analyzing the legal texts, according to the opinions of jurists and comparing the legislations under comparison.

We will discuss in this research the civil responsibility of the state that damages the individuals as a result of neglecting maintenance work and providing a usable road network, as well as the pillars of this liability through the following requirements:

The first requirement: tort liability of the state.

The second requirement: the pillars of state liability.

## **THE FIRST REQUIREMENT**

### **The Tort Liability of the State**

First, we must clarify what is meant by tort liability in general, and then show how the civil liability of the state is achieved as a result of not providing a usable road network, and this is through the following two sections :

### **FIRST SECTION**

#### **The General Meaning of Tort Liability**

Legal responsibility is the case of a person who committed an act that caused harm to others, and he required that the law be held accountable for that , In it, there must be an external route that a person takes and what results on that the occurrence of harm to the community or one of the persons, or that would threaten the occurrence of such harm, and this conduct must also be in violation of a legal rule. Also , that this route is in violation of a legal rule, and it is not sufficient for it to be in violation of a moral rule only, and if the majority of the behavior in violation

of the law is also its violation of the rules of morality, then what is relied upon in legal responsibility is the violation of legal rules, because it is the one that entails the legal penalty <sup>(1)</sup>.

As for civil liability, it arises when an individual breaches what he is committed to before others by law or agreement, and the penalty in it is compensation for the damage resulting from this breach. The tort liability is one of the types of civil liability, and it arises from a breach of a specific obligation imposed by law, which is not to harm the rights of others, and if such damage occurs, the tort responsibility of the person who caused the harm is based on what entails compensation for the victim, and tort liability is not considered recent, where it appeared since ancient times in the old French law, then moved to the modern French law in 1804, and its appearance was not limited to the French law, but several legislations stipulated it, such as the Jordanian, Iraqi, Egyptian and other laws, and there is a close relationship between tort responsibility and industrial and technological development, after the emergence of modern means of transportation and machines that increase the chance of causing damage to a person in his daily movements, this means that tort liability has the primary goal of protecting human from the damage <sup>(2)</sup>.

As for tort liability, it means the liability arising from the illegal act, and it is referred to by various names, including liability for harmful act, warranty and tort liability, and it can be defined as "The obligation of a person to compensate the damage arising from his personal act or from the act of persons who are under his effective control within the limits established by law" <sup>(3)</sup>.

With regard to the tort liability, the Iraqi legislator stipulated in the Civil Code that "If someone directly damages the money of another or reduces its value, he is a guarantor, if causing this damage was premeditation or transgression" <sup>(4)</sup>.

It also stipulated that "every harmful act to the soul, such as killing, wounding, beating, or any other type of harm, is obligated the person who causes the harm to pay compensation <sup>(5)</sup>". Also, "every transgression befalls others with any harm other than what was mentioned in the previous articles requires compensation."<sup>(6)</sup>.

Also, the Jordanian Civil Code of 1976 stipulates that "every damage to others obliges the actor, even if he is not distinguished, to guarantee the damage" <sup>(7)</sup>.

The article of the Egyptian Civil Code stipulates that "every mistake that causes harm to others obliges the one who committed it to compensate" <sup>(8)</sup>.

From the above texts in comparative civil laws, we find that the law determined the foundations of civil tort liability and shown the pillars of this responsibility of error, damage and causation. These pillars will be discussed in the frame of the state's civil tort civil liability statement as a result of its failure to provide a usable road network in the next requirement.

## SECOND SECTION

### The Civil Tort Responsibility of the State as a Result of not Providing a Usable Road Network

We indicated that the state manages the public utilities that provide services to the public people through the executive authority and its administrative devices in accordance with the law, where the construction, management, and maintenance the roads and the collection of fees and taxes from some public people who use these roads make the state bear civil responsibility in if it fails down on the construction work of the road network. In Iraq, the law made road construction a specialization of the General Authority for Roads and Bridges under Article 20 of the authority's law, which states in Paragraph, firstly: "The authority is exclusively concerned with the implementation of high ways, main and secondary, intersections and tunnels located outside the boundaries of the Baghdad mayoralty and municipalities, and the implementation of bridges".

And this law gives the right to collect wages for the passage of cars and trucks passed trucks on the highway or private roads according to special instructions issued by the ministry and whose revenues are returned for the purpose of maintaining and developing those roads. The law also stipulates that the Ministry of Construction and Housing

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<sup>(1)</sup> Dr. Hashim Ahmed Mahmoud, Al-Wajeez in Civil Liability for Damage to Nuclear Reactors, Dar Miser for Publishing and Distribution, Alexandria, 2020.

<sup>(2)</sup> Dr. Abdul Majeed Al-Hakim, and others, Al-Wajeez in the Theory of Commitment in the Iraqi Civil Law, Volume 1, Al-Sanhoury Library for Publishing and Distribution, Beirut, 2015.

<sup>(3)</sup> Dr. Reda Metwally Wahdan, Al-Wajeez in Civil Liability, Dar Al-Fikr and Law, Egypt, 2017 AD.

<sup>(4)</sup> See: The text of Article 1/186 of the amended Iraqi Civil Code No. 40 of 1951.

<sup>(5)</sup> See: The text of Article 202 of the amended Iraqi Civil Code No. 40 of 1951.

<sup>(6)</sup> See: The text of Article 204 of the amended Iraqi Civil Code No. 40 of 1951.

<sup>(7)</sup> See: The text of Article 206 of the Jordanian Civil Law No. 43 of 1976 AD.

<sup>(8)</sup> See: The text of Article 163 of the Iraqi Civil Code No. 131 of 1948 AD, amended.

must afforest and maintain external roads and provide requirements for their preservation and sustainability and ensure their maintenance.

Also, the Jordanian Roads Law of 1986 gave the right to the Minister of Works or the manager of Works to prevent walking on any road and stopping the use of any part of it or turn the walking from it to any other road for a period to complete any works on the road. Including repair, maintenance and expansion works.

By linking these texts with the provision of the civil tort liability in the civil law that were previously referred to, the liability of the state arises in the case that the state does not perform maintenance work and preservation of the roads.

And considering that roads and streets are public and state-owned funds, and in this context, Article 1244 of the French Civil Code stipulates that "the owner of the building shall be responsible for the damage caused by its demolition if the demolition is due to a lack of maintenance or a defect in the building" <sup>(9)</sup>.

And sometimes the owner assigns someone else with the maintenance according to the law, as if the maintenance is under a contract with a company specialized in the maintenance of roads or fixed construction. In this way, also, the responsible is the owner, meaning that the owner remains obligated in the case of lack of maintenance, demolition or damage that occurs, but the owner can take back what he paid on the beneficiary or on the company that specialized in the maintenance.

And the concept of a building defect is the lack of sufficient fixation of the building <sup>(10)</sup>, and a very simple bend in the road or street, for example, there is a bend in the street or a hole, and this is according to the general concept that came with it, the ruling of the French Court of Cassation <sup>(11)</sup>.

Also, the defect in the construction is the defect in the construction of the building, which is due to the use of inferior building materials, damaged or unfit for construction or may be due to the error in the design <sup>(12)</sup>.

Accordingly, the damage resulting from the demolition of the building does not prevent the person threatened with damage from the right to demand that the necessary or protective measures be taken to prevent the building from falling or demolishing <sup>(13)</sup>.

Also, the text of Article 1244 of the French Civil Code, mentioned above, does not assume to the victim to prove the fault of the owner of the building, but only he must assume that this demolition occurred due to a defect in the building or lack of maintenance, according to what was ruled by the French Court of Cassation <sup>(14)</sup>.

## THE SECOND REQUIREMENT

### Pillars of State's Tort Liability

The pillars of civil liability in general are the reasons or considerations that cause the legislator to put "the compensation for damage upon a particular person" and sometimes these considerations may come back to the person who causes the damage from the error and the causal relationship between the error and the damage, and these pillars do not differ whether between contractual liability on the one hand and the tort liability on the other hand, where we will deal in this requirement the pillars of the state's tort liability by dividing the requirement into the error pillar carried out by the administration that manages and preserves the roads and the damage that befalls the user of these roads and the causal relationship between the error and the damage through the following two sections:

## FIRST SECTION

### Error Pillars

What is meant by the error in tort liability is the breach of a previous legal obligation issued by the cognition, and that this previous legal obligation is the obligation to respect the rights of all and not harm them, and it is an obligation to exert care, and the required care is to take precaution, caution, vigilance and look carefully to behavior to avoid harm the others, according to the previous definition, we find that the definition is divided into two elements, namely the material or objective element, and the moral or mental element.

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<sup>(9)</sup> Article 1244: (The owner of the building is responsible for the damage resulting from its demolition if it occurred due to lack of maintenance or a defect in its construction, which is amended by the order No.131 dated in 10 February 2016).

<sup>(10)</sup> French Civil Cassation 3, 15<sup>th</sup> March 2000, IV, 1974. See: French Civil Code in Arabic, 108 Dalloz Edition in Arabic, Saint Joseph University in Beirut, 2009, p.1454.

<sup>(11)</sup> French Civil Cassation 2, 14<sup>th</sup> December 1978. Plancqueel's comment. See French Civil Code in Arabic, Dalloze, ibid, p. 1454.

<sup>(12)</sup> Dr. Nabil Ibrahim Saad, The General Theory of Commitment - Sources of Commitment, Dar Elgamma Elgadida, Alexandria, p.433.

<sup>(13)</sup> Ezz El-Din El-Danasori, Abdel Hamid El-Shawarby, Civil Responsibility in the Light of Jurisprudence and the Judiciary, Dar EL-Matboaat EL-Gameya, Alexandria 2015, p. 447.

<sup>(14)</sup> French civil cassation 3, 4<sup>th</sup> June 1793 and also in the same sense another ruling, civil cassation 1, 6<sup>th</sup> November 1983, Ban 623, Mel Chabas. See: French Civil Code in Arabic Dalloze, ibid., p. 1454.

The material element means breach and transgression, and what is meant by the transgression is the excess of limits that a person, whether natural or moral, must be obliged to in his behavior and it is a deviation in behavior, whether the deviation is intentional or unintentional. Intentional deviation is what is associated with the intent to harm others. Unintentional deviation is what comes from negligence or dereliction <sup>(15)</sup>.

Within the scope of the state's tort civil responsibility to provide a usable road network, this element can be achieved in the case that the administration deviates from the duties that entrusted to it by law and violates them by building roads in a way that does not conform to the specifications, or the administration fails to do the maintenance and permanence work for the road network.

As for the moral element, which is meant by awareness and discrimination, civil responsibility arises in the confrontation of a person who enjoys full awareness and discrimination, and this is a condition for the realization of responsibility, in the absence of awareness and discrimination, tort responsibility cannot be raised <sup>(16)</sup>.

Naturally, the state and its administrative devices enjoy with a legal personality, and according to this element, it is possible for the state to be held civilly liable as a result of its breach of road construction standards and also in the case of its violation to perform maintenance and sustenance of works.

## SECOND SECTION

### Damage Pillar

Damage is defined as harm befalling on a person in a right or in a legitimate interest to him, and it is a pillar of liability because liability means an obligation to compensate and compensation is estimated according to the extent of the damage and by its absence, liability is negated and there is no place for compensation and the claimant of responsibility does not have an interest in filing a lawsuit.

Damage is the second pillar of civil liability. It is not sufficient for its realization to occur error, but the error must cause harm, and the victim is the one who is assigned person to prove the damage that befalling him because he is the one who claims it, and the damage is not assumed to occur only because the debtor did not perform his contractual obligation or only for his breach of his legal obligation in the frame of tort. The occurrence of the damage is a material fact that may be proven by all means of proof, including evidence and presumptions.

The damage is divided into two types, the first is material damage and the second is moral damage. As for material damage, it is a loss incurred by the victim in his money, such as the loss of money or the loss of a deal or the occurrence of an injury in which the victim incurs expenses.

As for moral damage, it is what does not appear in the form of financial loss, but rather appears in the form of pain resulting from hurt feelings resulting from insult, or restriction of freedom resulting from unlawful imprisonment<sup>(17)</sup>.

The rule adopted by the Iraqi legislator is that compensation for moral damage is limited to tort liability alone, so there is no compensation for moral damage within the scope of contractual liability.

As for the state's tort civil liability for its failure to fulfill its legal responsibilities by providing a usable road network, it cannot be achieved without the realization of the pillar of damage, that is, i.e. a person is harmed as a result of this failure.

For the damage pillar to be established, the damage must be real and direct, and also that the harm befalls a right or a legitimate financial interest, and therefore we will deal with these conditions successively:

#### **First: the damage must be realized.**

It is the damage that is surely realized, whether it is present, i.e. actually occurred, or future, if its existence was certain, and if its occurrence was delayed until a later time.

However, it is not permissible to compensate for the potential damage, which is the damage that did not occur, and there is no confirmation of its occurrence in the future. The losing an opportunity to gain is considered a real, not potential harm.

If a person impedes a person's arrival to a test center to obtain a specific job, then missing the opportunity is a real harm, even if the success is a possible result, but the harm in that case is not estimated by the amount of the gain whose opportunity was losing, but rather to the extent of the probability that the gain will be achieved in that opportunity.

#### **Second : the damage must be direct**

From a realistic aspect, the error may cause a series of direct, indirect, expected and unexpected damages. What is the extent of the damage that the debtor or the perpetrator of the harmful act bears responsibility for?

The material damage as a legal concept is either direct or indirect, and direct damage is either expected or unexpected.

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(<sup>15</sup>) See in the same sense: Dr. Hamid Latif, *The tort Liability of the engineer and contractor during the implementation of construction projects*, Al-Sabah Library, Baghdad, 2016, p. 90. And Dr. Abdul Majeed Al-Hakim and others, *ibid*, p. 217.

(<sup>16</sup>) Dr. Reda Metwally Wahdan, *ibid*, p. 130.

(<sup>17</sup>) Kazem Mutashar Al-Zubaidi, *Civil Liability Arising from Car Accidents in Iraq*, Comparative Law Press, Baghdad, 2020, p. 71.

The debtor shall be questioned within the framework of contractual liability for the direct material damage expected to occur upon contracting in terms of its type and amount only, and shall not be questioned for the direct and unexpected damage unless it was caused by fraud or serious error.

As for tort liability, the liability of the debtor (perpetrator of the harmful act) for compensation includes all direct material damage, whether expected or unexpected. However, there is no responsibility for indirect damage in all cases. The criterion for distinguishing between cases of material damage is an objective one.

The expected direct damage is the damage that is a natural result of the error, and it is considered as such if the creditor or the injured person could not avoid it by making a reasonable effort.

Unexpected direct damage is that damage which is not a familiar result of the error.

As for the indirect damage, it is the damage that is not a natural and familiar result of the error, and it is considered as such if the creditor or the victim can avoid it by making a reasonable effort<sup>(18)</sup>.

The criterion of expecting damage is an objective criterion, which is the standard of the usual person. This is what the Iraqi legislator explicitly adopted by saying in its last part, "...what is usually expected at the time of contracting from loss or a gain which is missed<sup>(19)</sup>."

Expected damage is the damage that could normally have been expected at the time of the contracting or at the time of the breach of the general legal obligation, that is, what the usual person would expect in such external circumstances in which the debtor or the perpetrator found the harmful act, and not the damage expected by the debtor himself.

The damage is expected in its cause or amount, so if the debtor or the perpetrator of the harmful act neglects to identify the circumstances that would have made him expect the damage, the damage is considered expected in its cause and amount, because the usual person does not neglect to identify these circumstances, and calculates in advance the expected results of his actions before to take any step towards it.

The Iraqi Civil Code stipulates that: "The court shall estimate compensation in all cases to the extent of the harm befall by the victim and the loss of earnings, provided that this is a natural result of the illegal act"<sup>(20)</sup>.

**Third: If the harm affects a right or a legitimate financial interest of the victim.** It is not permissible to compensate for the damage caused by illegal activities<sup>(21)</sup>.

The judge estimates the amount of compensation objectively and includes some subjective elements with this estimation.

Compensation for material damage in civil liability is based on two elements: first, the financial loss incurred by the creditor, and secondly, what he missed of material gain, and the element of loss is included in the scope of tort liability what was missed the victim from the benefits of the property valued with money that stripped the harmful act to benefit from it.

As for compensation for moral damage, it is not divided into these two elements, but rather is considered an independent element. In the case of its occurrence, the court will determine what compensation it should rule so that it is sufficient satisfaction for the victim.

The judge, when estimating compensation, must take into account the personal circumstances surrounding the victim, such as his health condition, his financial situation and his social status. As for the personal circumstances surrounding the perpetrator of the harmful act, he does not undertake them, because the principle is that the estimation of compensation does not look at the magnitude of the perpetrator's mistake, but rather at the magnitude of the damage caused to the victim as well as the magnitude of the error may affect the judge's feeling when estimating compensation and be an element of his determination, And if the Iraqi civil law is devoid of a text indicating the influence of the estimation of compensation by the circumstances, and this is a matter that is required by reasons of justice and does not conflict with the general rules of compensation.

This is considered to be ascertaining from the occurrence of the damage and its extent, determining the method of compensation and determining the amount required for compensation, all of this is considered a matter of fact in which judge receives the subject. However, designating this damage in the judgment and mentioning the elements that makes it up legally that must be included in the account of compensation is considered one of the legal issues dominated by the court of cassation, because this designation is a form of legal adaptation of reality, if the judgment decides a certain amount as compensation without indicating the elements of the damage for which it decided this amount, it will be limited that requires rescission if it is possible that the judgment included in the assessment the compensation an element that does not provide the conditions its compensation, or an element that the claimant did not demand compensation.

This is considered the fulfillment of the conditions of damage that must be provided for ruling compensation and estimating because the damage constitutes a violation of a right or a legitimate interest, and categorizing it as an

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<sup>(18)</sup> Dr. Abdul Majeed Al-Hakim and others, *ibid*, p. 214.

<sup>(19)</sup> See: The text of Article 169/3 of the amended Iraqi Civil Code No. 40 of 1951.

<sup>(20)</sup> See: The text of Article 207 of the Iraqi Civil Code No. 40 of 1951 AD, as amended.

<sup>(21)</sup> Dr. Reda Metwally Wahdan, *ibid*, p. 140.

actual or future damage, or as a potential damage, as well as adapting it as material damage or moral damage, saying that the right to compensation for moral damage is transferred to the heirs, or that it is not transferred unless agreed upon or requested by the court before the death of the victim, are all considered among the issues of law in which the subject of judge is censured to the observation of the Court of Cassation<sup>(22)</sup>.

All of this applies to the damage that befell the victim as a result of the state's breach of its duties towards the restoration, repair and maintenance of roads. If a car deviated on the public road and overturned and caused damages such as injuries and death, and the cause of this accident was the presence of a pothole in the public road, the responsibility of the state for this accident arises here.

As for the causal link, it means the causal link in its special meaning that the damage is a natural and direct result to breach of the legal duty in the tort liability, and there is no difference between the natural result and the direct result in terms of meaning.

If the causal link is absent, the responsibility is exiled due to the absence of one of its pillars, and causation is the third pillar of the pillars of responsibility and it is an independent pillar from the pillar of error and the independence of causation from error appears when the latter is assumed as in the case of responsibility for the work of others, and in such a case the error is unquestionable and the victim is not required to prove it. As for causation, it can be exiled by proving the foreign cause.

And if the causal relationship means that the error must be the cause of the damage, if the damage is due to a foreign cause, the causation will be lacked, and the causation is also lacked even if the error is the cause, but it was not the productive cause, or it was productive but indirect.

The estimative activity of the judge in this field is determined in two issues, the first of which is to verify that there is a causal link between the error and the damage, and the second the fact that this causation is a generator for a damage, i.e. productive, and the fact that this damage is direct.

The judge's estimation of the issue of establishing the causal link between the error and the damage falls within the scope of his estimation of the error and his estimation of the damage as previously explained, as for the judge's estimation of his causal link, it is summarized in a research of whether this error in itself would directly generate this damage in particular or not and if it is summarized that the breach or transgression occurred from his nature to generate such damage in a direct way summarizes with the establishment of a causal link, opposite it the causal relationship is exiled, and the judge's estimation of the establishment of his causal link is an objective and abstract estimation, even if the error and damage involve personal or subjective elements in their estimation<sup>(23)</sup>.

From the foregoing, it is stipulated that the traffic accident be a real result of the state's breach of its duties regarding road repair, if the accident was caused by other reasons that do not fall within this scope, the liability of the state will not be realized.

## CONCLUSION

At the conclusion of our research tagged "The civil responsibility of the state for its breach of building and maintaining the road network" a comparative study we reached some results and recommendations, which are the following:

### First: The Results

1. Compensation for the state's breach of its duty to provide and maintain the road network includes compensation for material damage as well as compensation for moral damage.
2. In order for the state's liability to be established, the general pillars of civil liability must be present, which are the error and damage and the causal relationship between the error and the damage.
3. It is required that the traffic accident be a real result of the state's breach of its duties about the repairment of the road. If the accident was for other reasons that do not fall within this scope, then the state's liability will not be realized.

### Second: Recommendations

1. We recommend the need for the legislator to intervene to clarify the mechanisms for achieving the civil state's liability as a result of its breach by providing and maintaining a road network through detailed legal rules.
2. The necessity of establishing a special fund for compensation for traffic accident damages that arise as a result of the state's failure to provide or maintain the road network. The compensation here is separate from the compensation paid by the national insurance company.

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(<sup>23</sup>) See : Dr. Jassim Lafta Salman Al-Aboudi, *Interventions in the Cause of Damage tortuously*, Al-Jeel Al-Arabi Library, Iraq, 2005, p.38-39.

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