2528-9705

Örgütsel Davranış Araştırmaları Dergisi
Journal Of Organizational Behavior Research
Cilt / Vol.: 4, Sayı / Is.: 1, Yıl/Year: 2019, Sayfa/Pages: 89-103

BASIS OF THE LAND TRANSPORTER'S LIABILITY

Mohaimen I. KADHUM[1], Kamal H. HASSAN[2]*

[1] PhD candidate, Faculty of Law, Universiti Kebangsaan Malaysia, 43600 Bangi, Selangor, Malaysia.
[2] Professor, Faculty of Law, Universiti Kebangsaan Malaysia, 43600 Bangi, Selangor, Malaysia.

***Corresponding Author:**
Email: kamalhalili60@gmail.com

ABSTRACT

One of the most important issues in land transportation is the determination of the very basis for assigning liability to the transporter of persons. In this regard, several theories have been proffered, such as the theory of fault and the theory of default in guarding objects. Others are the theory of guarantee, the theory of damage and the theory of risk or liability. Based on a critical evaluation of these theories and analysis of relevant legal provisions and case law particularly in the French, UAE and Egyptian jurisdictions, this article argues that the theory of damage, as a basis for liability, is the most applicable to contracts for the transport of persons. Its contents are clear, specific and consistent with the general rules of guarantee adopted in domestic laws such as the UAE Civil Transactions Law. Above all, it offers affected passengers the quickest access to justice and the opportunity to receive due compensation.

Keywords: *Land transportation, Fault, Guarantee, Damage, Risk*

INTRODUCTION

One of the most important issues in land transportation is the determination of the very basis upon which liability may be imposed on the transporter of persons. In this article, the basis of liability relates to those factors that prompt the legislator to impose liability on the land transporter to pay compensation where harm is caused to a passenger. Such factors may include a fault causing damage. In this sense, the basis of liability is the fault committed by a party. Those factors may also be a reflection of the legislator's desire to protect the injured party, in which case, the fault element plays virtually no role. Rather, liability is established based exclusively on the element of damage (Muluky, 2009: 150).

Several theories of liability have been proffered. These include the individual liability theories namely the theory of fault and the theory of default in ensuring proper custody. Others are the objective theories of liability, which include the theory of guarantee, the theory of damage and the theory of risk.

This article examines and evaluates these theories with a view to determining their applicability to contracts for the transport of persons, especially in terms of the extent to which they alleviate the plight of passengers injured in the course of transportation. In addressing these issues, reference is made to laws and cases in jurisdictions such as France, the UAE and Egypt.

Determining the precise basis of the transporter's liability is critical to effective public transport management as it provides certainty on the rights and obligations of public

Geliş tarihi/Recieved: 21.10.2018 – Kabul tarihi/Accepted: 02.03.2019 – Yayın tarihi/Published: 30.03.2019

transporters and their passengers. It helps particularly in minimising harm to passengers and alleviating their burden of proving the transporter's liability before receiving compensation for harm suffered during transportation. This article illuminates these issues, and in doing so, contributes to awareness creation on one of the most contested subjects in public transportation, especially the transport of persons. The article will be of particular benefit to regulatory authorities, transport operators, passengers and academic institutions concerned with public transport management.

METHODOLOGY

Given its legal nature, this research is doctrinal in approach. Doctrine means knowledge, instruction, or learning. It is the "synthesis of various rules, principles, norms, interpretive guidelines, and values" (Hutchinson and Duncan, 2012: 3).. Characterised by the study of legal texts (Chynoweth, 2008: 29), doctrinal research "provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and perhaps, predicts future development" (Chynoweth, 2008: 32).

The doctrinal approach is most suitable for the present purposes since the central objective of this article is to examine the legal framework for determining the liability of transporters for harm caused to passengers during the transportation process. This approach is evaluative, capable of addressing the issues under study, and enabling the attainment of the overall research objective. As is typical of most legal studies, this research is qualitative and library-based. Qualitative research enriches research data and provides a more comprehensive perspective of the problem investigated, enabling a thorough understanding of it.

Two types of data, primary and secondary, are employed in this research. Primary data include both the law itself and the case law. The secondary data augment the primary data and comprise academic journals, textbooks, newspaper articles, government publications and online databases relevant to the research problem. Secondary data facilitate the exploration of past studies, as well as relevant concepts and ideas, which enable the research problem to be answered, and ensure attainment of the research objective.

An inevitable part of the research process is data collection. In the present research, data were collected mainly from university libraries across several countries, such as the University of Baghdad, Iraq, Utara University of Malaysia, National University of Malaysia, University of Malaya, the International Islamic University of Malaysia and the University of Sharjah in the UAE.

The last segment of the research methodology relates to data analysis. This is the interpretation and understanding of the research data collected. In this article, analysis of the research data was performed using the analytic approach. This approach is justified since the research draws significantly on documentary materials such as statutes, cases and scholarly articles. The analytic approach allows for critical assessment and thorough understanding of data, enhances the accuracy of results as well as the drawing of the right conclusions. As noted, the central objective of this research is to examine the legal framework establishing the basis of the transporter's liability for harm caused to passengers in the course of transportation. Using the analytic approach, it was possible to critically analyse relevant laws and cases focusing specifically on this issue in such jurisdictions as France, the UAE, Iraq and Egypt.

FINDINGS

Diverse theories have been put forward that seek to explain the basis of the transporter's liability for harm caused to passengers during the performance of the transportation contract. This section of the article reviews such theories.

Theory of Fault

Most legislative provisions have tended to shy away from any definition of the concept of "fault," leaving it to legal commentators. While there are many and varied definitions of the concept of "fault," perhaps the most basic definition relevant to the present study on transportation contracts is that which defines "fault" as a breach of an existing duty (Murkus, 1993: 186-187).

The predication of liability on the notion of "fault," was an outcome of the development of liability in the old French civil law whose provisions on liability were closer to the idea of punishment than of reparation. In the UAE, Article 383 of the Civil Transactions Law provides that unless otherwise stipulated by law or agreement, an obligor, who is required to keep or manage a thing or take precaution to implement a commitment, would be deemed to have discharged that obligation, if he exercises such care as a reasonable man would do, even if the intended objective is not achieved. He would, however, remain liable for any fraud or gross negligence on his part. This article corresponds to Article 1137 of the French Civil Code, which focuses on contractual liability.

Moreover, according to Article 386 of the UAE Civil Transactions Law, if the specific performance of an obligation is impossible for an obligor, he will be liable to pay compensation for the failure to discharge that obligation, unless the impossibility of performance was caused by an unforeseeable event. This article is the equivalent of Article 1147 of the French Civil Code. Under this theory, the transporter is the obligor and is responsible for the performance of the obligation arising out of the transportation contract, which binds him to do so. Failure to discharge this obligation shall be deemed to be a contractual fault. On this account, the transporter is not liable for harm caused to the passenger, unless fault is committed. That fault will be recognised only when it arises from the transporter's personal action, not that of a third party.

The transporter's failure to fulfill its obligation amounts to fault on its part, which renders it liable (Al-Miqdadi, 1997: 96). It may not be discharged from this liability, unless an interruption of the causal link between its wrongful act and the harm suffered by the passenger is established. Fault is an essential element of liability, otherwise it would have no essence. Causation is also an important element of liability, as the transporter would not incur liability in its absence. To be entitled to compensation, the passenger must prove the transporter's fault, and that such fault has caused him harm. As Planiol comments, to impose liability without fault, would amount to social injustice. It is like condemning an innocent person in criminal law (Al-Miqdadi, 1997: 97). Hence, the element of damage *per se* cannot constitute the basis of liability because it would result in accountability without fault; a result which is incompatible with the demands of justice.

Theory of Default in Ensuring Proper Custody

Some commentators base the transporter's liability on the theory of default in ensuring proper custody, which presumes its liability. The transporter may only be discharged from this

liability, if it proves an extraneous cause, such as *force majeure*, the passenger's fault or the fault of a third party. According to this theory, the transporter would be liable for harm caused to the passenger due, for example, to the deviation of the car or train from its normal course, or due to some physical damage. Recent developments in economic life make it necessary to apply legal provisions governing the custody of objects to the determination of the transporter's liability. Therefore, the theory of default in ensuring proper custody presumes the fault of the custodian. This fault is constant and takes effect once harm has been caused to others by the means of transportation.

Default in ensuring proper custody is the breach of a specific obligation, which requires the obligor to ensure proper control of a machine or object so as not to get out of his control and cause damage (Al-Naqib, 1980: 381). Jurists who support the fault theory try to base liability for objects causing damage on the general rules of fault-based tortious liability (Al-Miqdadi, 1997: 103). A person is accountable for his own personal fault and also liable to pay compensation for harm caused to others by an object under his custody. This is because the occurrence of such harm implies that he has committed a fault by failing to take necessary measures to prevent the harm caused to others by that object. He is, therefore, liable for this act of negligence, which constitutes a personal fault (Murkus, 1936: 302).

In that case, the injured party does not have to prove fault because it is presumed. Nonetheless, he is expected to establish the conditions necessary for the attachment of liability for failure to ensure the proper custody of that object. First, he must prove that the defendant is the custodian of the damage-causing object and that he is the owner of the means of transportation, unless the latter proves that the duty to guard that object resides in another party. In such a case, that other party would be liable (Ripert, Roblot 1996: 689). To ensure that the injured party is not denied the right to compensation, this theory makes a legal presumption that the custodian of the object is at fault. This presumption is fixed and may not be rebutted by claims that the custodian hardly commits any fault or that he took a course of action which is consistent with that of a normal man (Danoun, 2005: 103).

Fault shall not be presumed where there is a contractual relationship between the custodian and the victim. The transporter, which is contractually responsible for the safety of the passenger by exercising due diligence shall be liable under the transportation contract and not tortiously under a presumed fault theory. If a contract is made between a superior and a subordinate, then that contract imposes on the superior an obligation to ensure the safety of the subordinate. In such a situation, the liability of the former shall be of a contractual type, if any harm is caused. Where, however, the contract does not entail an obligation to ensure the safety of the subordinate or where no such contract exists between the subordinate and the superior, the latter shall be tortuously liable to the former on the basis of the presumed fault theory (Al-Sanhuri, 2011: 1229-1230).

Although he refers to the idea of real fault, (Al-Sanhuri 2011: 1229-1230) argues the necessity to apply the presumed fault theory by noting that the presumption does not accept proof of the contrary. This is because the failure to control the object is the basis of the fault, which is proven by the damage caused. Therefore, there is no need to prove it with any other evidence. Any fault presumed in a way that does not permit proving the opposite is, in a way, a conclusive, not a presumed one. The law makes it a conclusive fault such that the mere occurrence of the harm would serve as proof of the custodian's loss of control over the object.

However, one can only arrive at this conclusion where legally acceptable evidence is provided by showing the occurrence of harm leading to an irrefutable presumption.

The Egyptian judiciary has applied the liability-related rules, subject to proof that the custodian has committed a fault. It is, however, liberal in finding such a fault. The least possible degree of negligence, if not mere knowledge of the possibility of risk posed by the object, is sufficient to justify a finding of fault (Danoun, 2005: 107). It is unfair to place the burden of proof on a passenger harmed in an accident since the transporter is better placed to explain what happened. This is the rationale of the legislator's adoption of the notion of presumed fault.

According to Mazeaud, Article 1384 of the French Civil Code imposes a specific legal obligation on the custodian of an object; the obligation to prevent that object from getting out of his control to cause harm to others (Abul-Lail, 1980: 78-79). That obligation is not limited to the exercise of due diligence. It is also an obligation to achieve a result. Hence, it is only fulfilled by preventing an object from getting out of one's control. If a person loses control over an object, which causes damage to others, he is deemed to have breached his obligation to ensure proper custody, obviating the need to prove fault (Abul-Lail, 1980: 113). The custodian can only be discharged from liability, if he proves the intervention of an extraneous cause. In that case, there would be no causality between that object and the alleged harm.

Ripert (1996: 819), argues that if harm is caused by something to which Article 1384 of the French Civil Code applies, it shall be assumed that the custodian has renounced his legal obligation to control and supervise it. On the other hand, if the object is ordinarily harmful (Danoun, 2005: 116), then the mere occurrence of that harm would imply the existence of fault on the custodian's part. The custodian, therefore, has a legal commitment to achieve a result, which requires exercise of control over the object to prevent it from harming others. Where the object causes harm, it would be construed as the result of the custodian's failure to ensure proper custody of same.

Theory of Guarantee

This theory and the ones, which follow, are usually described as the objective theories of liability. They are based on a material factor that considers the relationship of the object to the risk it poses. The owner or custodian of that object has to bear liability for any harm it causes as long as he operates and benefits from it. The theories suggest that liability is based not on fault, but on the notion that whoever carries on a harmful activity in the community shall be liable to pay compensation for any harm resulting from that activity. Among the jurists, who have advocated these theories are Sally, Joe, Saran, Savatier and Demog.

With specific regard to the theory of guarantee, some of the jurists, who have attempted to base liability on this notion, are Starck and Picard. These jurists argue that civil liability fulfils two basic functions, which are guarantee and special punishment. This means that the basis of liability comprises guarantee and a special sanction. According to Stark, the basis of liability for an activity rests on the idea that the party carrying on that activity must provide guarantee to those, who may be harmed by it. For Suleiman though, the theory of guarantee is largely similar to the theory of liability and, therefore, has not been well-received (Zahdur, 1990: 111). Stark, nevertheless, distinguishes his theory, which is based on the protection of the rights of affected parties, from the theory of liability that views compensation as a necessary counterpart to the benefit enjoyed from an activity. Since the affected party is exposed to harm, he ought to be protected by law through the principle of obligation to ensure safety. This

principle helps to secure his physical and material wellbeing. In effect, the law guarantees to the individual the right to receive compensation for any breach of his right to safety (Al-Miqdadi, 1997: 109).

The primary objective of liability, therefore, is guarantee. This is triggered once a party's right is violated. No other party is permitted by law to undermine this right, including the right to the integrity of his physical being and property, whether or not the transporter was at fault. The second function of the theory of guarantee is penalty. This is incurred once the party in charge of custody has committed a fault. In this sense, liability does not consist only in guaranteeing the right of the affected party, but also includes the meting out of punishment to the party at fault by aggravating his obligation to guarantee the rights of others and to pay compensation, where he fails to do so. In Stark's opinion, the transporter is bound to abide by its guarantee. The basis of this guarantee is the legal bond between the transporter and the passenger, which is created by the transportation contract (Al-Miqdadi, 1997: 110).

Theory of Damage

What leads to liability is damage caused to a party due to the infringement of one of his legal rights or legitimate interests, whether that right or interest is related to the integrity of his body, passion, money, freedom, honour, respect or otherwise. This means that the right infringed upon does not need to be pecuniary in nature, such as the right to property or usufruct. Infringement of any legally protected right, such as the right to life, human dignity, personal liberty and work, is sufficient to incur liability (Murkus, 1993: 133). With the advent of modern means of transportation, the corresponding rise in traffic accidents and the inability of victims to prove the transporter's fault, some jurists pressed for the recognition of a new element namely, damage, as the basis for liability.

Hence, damage forms the foundation of liability, which connotes an obligation to provide compensation for harm caused. Since there can be no liability without damage, there also can be no justification for compensation without damage. Damage is especially vital since its occurrence, which mostly consists in the commission of an act, simultaneously establishes a presumed fault on the part of the implicated party; one that, under many laws, cannot be rebutted (Danoun, 2005: 23).

Theory of Risk

This theory requires the victim to establish the harm caused to him and a connection between that harm and the act of the perpetrator, without bearing the burden to prove fault. It means that liability is incurred once damage occurs (Muluky, 2009: 163). Labbé, is perhaps, the first exponent of the theory of risk in its absolute sense. Nevertheless, the theory first emerged in France and was associated with Sally, who introduced it in 1897. The enunciation of this theory was spurred by the advent of machines, the high levels of accidents that accompanied them, and the inability to establish fault in most of those cases (Danoun, 2005: 121).

Advocates of the theory of risk tend to impose on the custodian of an object an obligation to provide compensation for any damage caused by that object, even where he has not committed fault himself. Since he receives benefit from that object, he has a duty to pay for its cost. In several rulings concerning the theory of risk, the French judiciary tried to improve the position of victims. According to those rulings, liability cannot be avoided only by proving that the accident arose due to an external cause, such as *force majeure*, the victim's own mistake or the fault of a third party (Danoun, 2005: 123).

Owing to the failure of the individual liability theories to secure protection for the victims of accidents in an era characterised by the profusion of machines and large scale industrial projects, there was transition to objective liability theories. French jurisprudence provided three explanations for that shift. First, was that the rising availability and use of cars as means of transportation, coupled with the large numbers of accidents that followed, meant that the people lost their freedom to avoid accidents. Second, the increase in cases of common fault did not allow for the identification of the specific person responsible for a fault among those engaged in the harmful activity. Third, was the immensity of the damage in relation to the fault. For example, those who engage in industrial activities are not able to definitively eliminate the occurrence of harm to others, and, therefore, must bear responsibility for such activities (Desouki, 1972: 168 - 171).

Responsibility for traffic accidents and harm caused by other objects, which by nature, are dangerous and consequently demand special care to prevent harm, rests on the principle of liability. On this basis, the party responsible for the harm can only avoid liability by establishing the existence of an external cause within the limits allowed by law. The theory of risk is confined to the occurrence of damage as a basis for establishing liability so as to guarantee the right of the injured party, who, in accordance with the principles of justice, must be compensated.

DISCUSSION

Having examined the different theories that seek to establish the basis of the transporter's liability for harm caused to passengers, this section of the article subjects those theories to critical scrutiny to determine their merit, particularly their fit with contracts for the transport of persons and the interest of injured passengers.

Theory of Fault

An examination of the individual theories based on the notion of fault shows that, regardless of any contract, a party is liable for the damage he has caused to others, and is obliged to compensate for it. It also means that such a party cannot be held liable, unless he is proven to have committed a fault. According to these theories, liability is based on the notion of fault, whether presumed or actual. Fault is the general basis of tortious liability. This is evident in Article 1382 of the French Civil Code, as well as its UAE equivalent, Article 299 of the Civil Transactions Law, which stipulates that the victim must prove the perpetrator's fault; fault committed by the custodian of the object that inflicted the damage.

The occurrence of damage provides legal evidence of the custodian's fault. Nonetheless, reliance on the notion of presumptive fault entitles the custodian to disclaim liability by proving the intervention of an extraneous cause. What is most important in contracts for the transport of persons is the transporter's liability to passengers, who have been harmed. The characterisation of this liability is of particular importance to the passenger. If the liability is considered to be tortious, then a passenger who suffers harm during the transportation process would have to prove the transporter's fault. This is a difficult and often impossible task.

In addition, such characterisation does not serve the interest of the passenger, who may be deprived of compensation. On the other hand, if the transporter's liability is characterised as contractual; that is, based on a transportation contract, the passenger often would enjoy his right to compensation. This is because, in this case, he is only required to prove the harm

suffered and the existence of a valid transportation contract between him and the transporter (Al-Miqdadi, 1997: 73). The fault theory received the support of such renowned jurists as Ripert, the Henry Brothers and Mazeaud, who contributed significantly to its development (Al-Naqib, 1980: 380).

Fault-based liability is, however, out of tune with recent developments in the economic and social spheres. This is more so, given the large numbers of vehicles in use today and the dramatic rise in the rate of traffic accidents, which leave many victims without compensation (Al-Miqdadi, 1997: 97). The fault theory has faced several other criticisms one of which is that the predication of civil liability on the element of fault creates overlap and confusion between civil and criminal liability, since the latter is also based on fault, which results in punishment. Arguably then, civil liability ought to be based on the element of damage, rather than fault, since the primary goal is to restore the situation back to what it was before the occurrence of the damage in question (Al-Miqdadi, 1997: 99).

Also, huge increases in traffic accidents, expansion in industrial development, profusion of machines and diversification of the means of transportation have all combined to accentuate the difficulty faced by passengers in proving the fault of transporters. This creates asymmetry between parties to transportation contracts. Further, the fault theory is incompatible with the principles of justice, which demand that the transporter, and not the injured passenger, should bear the consequences of the harm caused. Thus, modern laws tend to reflect recent developments in the economic sphere. On this basis, it becomes the transporter's obligation to pay compensation for any harm caused to the passenger, regardless of the presence or absence of fault on its part (Al-Miqdadi, 1997: 101).

Theory of Default in Ensuring Proper Custody

This theory arguably creates confusion between fault and damage in that it relies on the idea that the mere occurrence of damage is enough to prove fault. The theory leads to illogical consequences. It leaves a party, who inadvertently causes harm to others by means of an object in a more unfortunate position than one, who does so intentionally. In line with Article 1382 of the French Civil Code, the latter would be subject to the general rules of liability, which require proof of fault on the part of the one allegedly responsible for the harm. The former, on the other hand, would be subject to the provisions of Article 1/384 of the French Civil Code, which provides for presumed fault (Danoun, 2005: 116). Since the theory relies on default in ensuring proper custody as the basis for liability, it requires positive intervention by the object causing the harm. Thus, the theory would not protect a passenger, who has been harmed, if the object did intervene in causing the harm, as in the case of a passenger's collision with trees or poles. In such situations, it would be difficult for the passenger to prove the transporter's fault (Suleiman, 1984: 119).

To ensure that the injured party enjoys the right to compensation, this theory presumes the fault of the custodian of the object. This presumption is irrefutable by claims that the custodian hardly commits any fault or that he took the normal course of action. This position is, however, contrary to Article 1384 of the French Civil Code, which stipulates that legal presumptions are as simple as a general rule and cannot be conclusive, unless there is an explicit provision to the contrary. The legislator did not provide for irrefutable liability for the failure to guard objects (Al-Naqib, 1980: 381). Any suggestion of the existence of this conclusive evidence is, therefore, contrary to the stipulations of the law (Al-Miqdadi, 1997: 106). Faced with this

objection, proponents of this theory acknowledged that the presumption of fault could be refuted by proving that the custodian never commits a fault, or by proving the existence of an extraneous cause.

The law imposes on the custodian of an object an obligation to guard and not lose control over it. Failure to do so would breach this obligation and provide evidence of fault on his part. The mere occurrence of harm is proof of that fault. The custodian, who, in this case, is the transporter, would be unable to refute fault. The only way to discharge liability in such a case would be for the transporter to prove the existence of an extraneous cause. Here, the evidence is not fault-based, but causality-based. The impossibility to discharge liability through a rebuttal of fault is not based on any idea that there is a conclusive legal presumption demonstrating the custodian's fault, but refers, instead, to an objective rule that hinges on the notion of social solidarity (Al-Miqdadi, 1997: 108).

To prove the intervention of an extraneous cause, which dispenses with the element of fault, however demands more than simply showing the non-existence of fault. According to the proponents of the theory of presumed fault, proof of the extraneous cause is the complete and convincing demonstration of the non-existence of fault since the accident in question may be the result of an internal defect in the machine about which the custodian had no knowledge. In such a situation, the custodian cannot be considered to be at fault. He will be exonerated conclusively from fault, but would still remain liable, despite the non-existence of fault (Al-Naqib, 1980: 382).

If the essence of the theory of presumed fault is that there exists an obligation on the custodian to achieve a result, then the existence of that obligation is questionable. To claim that the custodian has breached his obligation and, therefore, has committed a fault suggests that he has the capacity to fulfil that obligation. Moreover, the transporter's obligation, namely, its ability to control the means of transportation, cannot always be guaranteed. This is because, quite often, harm may still be caused to passengers even though the transporter has taken all necessary precautionary measures. Put in another way, the custodian's discharge of the obligation to guard an object does not always preclude the occurrence of harm. That object could still cause harm even where the custodian has not breached his obligation to guard and not lose control over it.

The theory of default in ensuring proper custody highlights the fact that the legislator imposes a somewhat impracticable obligation on the custodian. As an illustration, it is not always possible to detect internal defects in the means of transportation and this failure cannot rightly be attributed to the transporter. The drawback of this theory, therefore, lies in its readiness to consider every breach of the obligation to guard an object as evidence of fault, without due regard to the course of action taken by the custodian. Consequently, the theory focuses only on the material element of the breach of obligation, to the neglect of the moral dimension. Viewed in this way, the theory is bereft of moral value, with liability being based on a purely theoretical premise.

The notion of fault has received many other adversarial comments, which are reviewed in the following paragraphs, along with the position of the UAE legislator. According to Article 313 of the UAE Civil Transactions Law, no person shall be liable for the act of another person, although a judge may, upon the application of an injured party, and if he deems it justified to do so, render any of the following persons liable to pay any amount awarded against a person

who has done harm: a) a person obliged by law or agreement to supervise a person requiring supervision because he is an infant or due to his mental or physical condition, unless it can be shown that he carried out his duty of supervision or that the damage would inevitably have occurred, even if that duty was carried out with proper care, or b) any person who has actual control through supervision over the person causing the damage, even if he did not have a free choice, where the subordinate committed the act causing the damage in the execution of his duty.

Therefore, this theory is flawed in that it does not ensure the full liability of the transporter for harm caused to the passenger. In many cases, the transporter is liable for harm other than that emanating from its failure to control the means of transportation. It is also responsible, for example, for any assault of the passenger by its employees, based on the liability of a superior for the acts of his subordinates. As well, the transporter is liable for harm caused to the passenger due to the collapse of one of the buildings or walls at its station. The transporter's liability, in this case, is based on the failure to exercise control over the building in accordance with the provisions of Article 315 of the UAE Civil Transactions Law.

On 29 April, 1896, the Egyptian Court of Appeal ruled as follows: "the railway company has to transport its travellers to a place where they can land off without risk, or at least require them, in time to wait until the train reaches the pavement, or authorize its employees to help those who need assistance in getting off the train." On 1 June, 1998, the same Court also ruled that, "it (the Railway Company) shall maintain the entrances to the stations in a state that does not give rise to any risk for travellers, otherwise it shall bear the liability in case of any accident" (Ali, 2004: 39).

The development of the notion of fault as a basis for civil liability took place at the same time as the prevalence of intellectualism in Europe during the 17th and 18th centuries, when individualism took centre stage. At that time, the notion of fault served as a tool for the attainment of the demands of individual justice. As a result, the individual could not be required to pay compensation for damage, unless his fault was proven (Danoun, 2005: 120). Based on that view, many transporters, including car owners, were able to evade liability. Victims of vehicular accidents were saddled with the burden of proving the existence of fault on the transporter's part or that the car owner caused the harm they suffered. Individual justice became an instrument for protecting certain classes of people, to the utter neglect of the conditions of other affected parties.

The advent of technological and industrial development, while beneficial, also leaves people feeling that they have lost their freedom and become vulnerable to accidents as they constantly have to move from one place to another to meet their daily needs. Passengers, who have been harmed, are unable to prove the transporter's fault. This enables the latter to profit at their expense. This creates conflict between the notion of fault and legal developments as legal provisions lose their ability to fulfil the ends of justice. Such a scenario creates the need for new rules that more fairly govern relationships in society. As long as a party benefits from the use of humans and machines or from the use of objects in its custody in the pursuit of its interests, it ought to be made liable for the costs that arise from the use of those machines, persons or objects, even in the absence of fault.

That realisation has led to claims that liability for machinery should rest on an objective basis and not on fault. The assumption of fault as a basis for liability is viewed as no more than a

ploy by jurists and the courts to entrench fault as the basis for liability, even though liability, as originally conceived, was not dependent on fault on the part of the custodian of objects. Based on this analysis of the fault theory, it can be concluded that, where harm is suffered, the contractual party here, the passenger, is put in the position of third parties, rather than a party to a contract for the transport of persons. Therefore, this theory cannot rationally be adopted and applied to contracts for the transport of persons because it is unrealistic. Moreover, it lacks a legal basis in transportation contracts, which require the application of contractual liability rules.

Theory of Guarantee

Although this theory recorded some positive achievements, it remained anchored on the element of fault as the basis of liability. Key limitations of the theory that have been identified include the fact that it integrates two principles of liability; guarantee and specific punishment. This neither conforms to law nor reality since compensation is determined on the basis of the gravity of the harm caused to an affected party. Also, espousal of the theory of guarantee leads to the re-adoption of the notion of fault as a basis for liability in that the party harmed can only receive compensation, if fault is proven. This reliance on the fault theory introduces inconsistency into the theory of guarantee. The endpoint is that this theory cannot be applied in the determination of the transporter's liability for harm caused to passengers. This is because of the duality of its foundation namely, guarantee and punishment, whereas liability is very distinct from punishment, which is only meant to be reparation for harm.

The theory of guarantee is not referred to by the UAE legislator in transportation contracts. Nonetheless, other theories considered to be compatible with such contracts, in terms of content, were adopted. These theories are reviewed below. However, there seems to be no sufficient justification to completely ignore the theory of guarantee in transportation contracts. It can be applied easily with the condition that the harm caused to the passenger be based on direct action and not causation. In that case, the affected passenger will only have to prove the harm he has suffered and the existence of a valid transportation contract. This, indeed, is the prevailing practice in most contemporary jurisdictions.

Theory of Damage

The old theories, particularly those that determine liability on the basis of fault, are no longer adequate to secure the right of affected parties to compensation. With the advent of machines and their widespread use in factories and transportation, there was a coinciding increase in accidents. This coupled with the difficulty faced by accident victims in discharging the onerous burden of proving the fault of custodians or transporters, compelled some commentators to denounce the notion of fault as a basis for liability. Their aim was to ensure justice and guarantee the rights of affected parties to compensation for any damage caused to them by requiring those responsible to make reparation so that equality can prevail in society.

The theory of damage brought about an evolution in legal thought on civil liability rules to address situations that the theory of fault could not tackle. The law aspires to maintain order and justice in society and this result is only attainable by guaranteeing the rights of citizens. Since the determination of liability on the basis of fault often ends in the denial of those rights when they suffer damage, it became imperative to introduce the theory of damage, which took damage as a means for establishing liability, thereby ensuring protection for the rights of

affected parties. Justice demands that a party be entitled to reparation for any damage suffered from an accident (Wasef, 1958: 126).

One of the benefits of the theory of damage lies in the respite it provides to affected parties through its reliance on damage as the basis for the determination of liability. The present authors are of the view that this theory is most suitable for proving liability in contracts for the transport of persons. The reason is that damage is the fundamental element of a transportation contract, and the goal of this theory is to guarantee the rights of passengers to compensation for damage caused to them during the execution of that contract.

It can be concluded from this whole discussion that compensation and the elimination of damage is the goal of a well-meaning society. Compensation has to be provided whenever damage is caused and it is this very result that the theory of damage seeks to achieve. In the same vein, belief is expressed in the existence of a presumed causal relationship between the act of the transporter and the damage caused to the passenger.

The point will also be made that the presence or absence of fault on the part of the transporter has no bearing on the establishment of its liability according to the theory advocated above. This, however, does not suggest a rejection of liability resulting from fault. Instead, the point being made is that the establishment of that liability on the basis of fault is unacceptable. The reason for this is to prevent a situation where the passenger is made to bear the burden of proving the existence of that fault. The transporter is liable irrespective of the existence or otherwise of fault on its part, and where such fault exists, it should all the more be liable, if the damage resulted from it.

Theory of Risk

The demands of justice argue in favour of the adoption of the theory of damage as the basis of liability. This is because it fits with practical reality. This is even more the case since the purpose of legislation is to provide maximum protection to the rights of citizens, including victims of rights abuses. Among the most important justifications for this theory are first, the increasing sophistication of human life, widespread use of machines in different spheres of human endeavour and the high levels of related accidents that have claimed many lives. Second is the failure of the fault theory to play an effective role as a basis for liability, given that it saddled accident victims with the onerous burden of proving the transporter's fault, coupled with the possibility that the transporter might avoid liability by successfully proving the intervention of an external cause. Moreover, the interest of justice requires that a party should provide compensation to those who have suffered damage due to his action, without any consideration of fault. Third, the theory of damage was endorsed internationally in many legislative provisions as a basis for liability since the real essence of the law is to protect all rights in the interest of an orderly society. This goal demands that compensation should be provided to those whose rights have been violated, irrespective of the presence or absence of fault.

The liability of the transporter in contracts for the transport of persons rests on the element of damage and the causal relationship assumed between the transporter and that damage. In this case, the transporter is liable for any damage caused to the passenger, whether or not it is at fault. This theory has relieved accident victims of the burden of proving fault by placing exclusive emphasis on the element of damage. The focus is no longer on fault because it has

proven inimical to the interest of large numbers of accident victims by denying them their lawful right to compensation (Zahdur, 1990: 110).

Finally, it should be noted that while the transporter will generally be contractually liable if harm is caused to the passenger during the performance of the transportation contract, in certain situations, the law allows it to avoid liability. Such situations constitute what may be described as an extraneous cause or "reasons for discharge from liability." Although space does not permit fuller elaboration, a non-exhaustive list of extraneous causes, as outlined in French, UAE and Egyptian legal provisions, include *force majeure*, natural disaster, unavoidable accidents, the act of a third party, as well as that of the passenger. The transporter may escape liability by proving that its failure was due to any of these external causes for which it cannot be held responsible (Braheem El-Desouki Abou El-Layl, 1980: 196). This position is affirmed in Article 1147 of the French Civil Code, Article 165 of the Egyptian Civil Code and Article 287 of the UAE Civil Transactions Law.

CONCLUSION

This discussion has shown that, in contracts for the transport of persons, the basis of the transporter's liability can be explained by two conflicting types of theories. One relates to the individual theories subdivided into the theory of fault, and the theory of default in guarding objects. The other relates to the objective theories, three subcategories of which are identifiable namely, the theory of guarantee, the theory of damage and the theory of risk or liability. There is also the theory of irrefutable presumed fault recognised by the UAE legislator in transportation contracts, but this does not fit within the subject of transportation at all.

Based on the forgoing discussion and analysis of the theories, it is concluded that the theory of damage as a basis for liability is the most applicable to contracts for the transport of persons. Its contents are clear, specific and in consonance with the UAE Commercial Transactions Law. Above all, it offers affected passengers the quickest access to justice and the opportunity to receive due compensation in judicial proceedings. The theory aligns well with the general rules of guarantee adopted by the UAE legislator in the Civil Transactions Law.

References

Abdul Razzaq Ahmed Al-Sanhuri (2011). Al-Wasit to explain the new civil law , Sources of Obligation, Part I , Cairo – Egypt, Publication Egypt's Renaissance , pp. 1229-1241.

Adel Ali Al-Miqdaadi (1997). Inland transport carrier's liability toward passengers: a comparative study, Jordan - Amman, Culture House Bookshop for Publication and Distribution, pp. 73, 76, 97, 103, 108, 109, 110.

Ali Suleiman (1994). Studies in Civil Liability in the Algerian Civil Law, University Publications, Algeria, p. 119.

Atef al-Naqib (1980). The General Theory of Liability arising from Doing Things, Oweidat Publications, Lebanon - Beirut, First Edition, pp.380, 381,382.

Ayad Abdul-Jabbar Muluky (2009). Liability for Objects and its Application to Moral Persons in Particular, Comparative Study, Amman-Jordan, Dar Al-Thaqafa for Publishing and Distribution, 1, 1430H, pp.150 , 163, 216.

Chynoweth, P. (2008). Legal research. In A. Knight and L. Ruddock (Eds.), Advanced research methods in the built environment. Oxford, UK: Wiley Blackwell. pp. 29, 32.

Egyptian Civil Law No. 131 of 1948

Egyptian Commercial Law No. 17 of 1999

French Civil Code Created by Law 1804-03-14 Promulgated on March 24, 1804

Georges Ripert, René Roblot In (1996). Philippe Delebecque, Michel Germain, (eds.) Commercial law treaty, vol. 2, commercial paper bank, commercial contracts, collective proceedings, 15th ed. General Library of Law and Jurisprudence (LGDJ), Paris, pp. 689, 819.

Hutchinson, T. and Nigel, D. (2012). Defining and describing what we do: Doctrinal legal research. Deakin Law Review, 17(1), 3.

Ibrahim Al-Dessouki Abul-Lail (1980). Responsibility of the Carrier of Persons in Domestic and International Law, Cairo - Egypt, Arab Renaissance House, p. 78-79 214, 217-219.

Mohammed Ibrahim Desouki (1971). Estimation of compensation between sins and harm, Publisher Alexandria University, Egypt - Alexandria,, pp. 168-171.

Mohammed Zahdur (1990). PhD thesis entitled "Liability for doing non-living things and the liability of the owner of the ship in Algerian Maritime Law", Faculty of Law, University of Algiers, Dar al-Hadatha, pp. 110, 111.

Saad Wasef (1985). Liability Insurance, A Study in Land Transport Contract.- PhD thesis, Cairo - Egypt, Cairo University, Publishing House of Egyptian Universities, p. 126.

Samir Suhail Danoun (2005). Civil Liability for Mechanical Machinery and Compulsory Insurance (Comparative Study), Tripoli, Lebanon, Modern Book Foundation, pp. 23, 99, 103, 107, 116, 121, 123.

Suleiman Murkus (1936). Theory of Discharging the Civil Liability, Sudden Accident and Force Majeure, the Act of the Obligor and the Act of the Injured, the Act of the third party, a comparative study of contractual liability and tort liability in French and Egyptian laws, PhD thesis from Cairo University. pp. 302.

Suleiman Murkus (1993). Al-Wafi in Explaining the Civil Law in the Obligations in the Harmful Act and Civil Liability- Section I - General Provisions, Cairo - Egypt, Institute of Arab Research and Studies, 5, pp. 133, 186-187 Volume I.

United Arab Emirates Civil Transactions Law of the Federal Law No. 5 of 1985 as Amended by Federal Law No. 1 of 1987.

Wajdi Abdul Wahed Ali (2004). Compensation for Violation of the Obligation to Ensure the Safety of Passenger and Passenger, Cairo, Egypt, Egyptian Book House, 1, 1424H , pp.39, 158-159, 167.