

Compensation for Missed Opportunity within the Scope of Contractual Liability in Jordanian Legislation: A Comparative Study

Sohib Alshurman¹ & Ahmad Albni²

Abstract

Missing the opportunity refers to any potential gain or hope prevented from being incurred by the injured party due to the fault of the party responsible for the damage. Compensation for such losses in contractual liability is only allowed in cases of fraud or gross error. Whereas tort liability includes the loss suffered by the injured party and the lost profits as a result of this mistake. If the victim had the hope and ability to achieve an opportunity based on reasonable reasons, if the harmful act did not prevent him from realizing this hope and the ability to achieve a gain, he deserves compensation for missing this opportunity, not the opportunity itself. The scope of compensation in tort includes expected and unforeseen damage, in addition to moral damage, including the harm suffered by the injured party and the lost profits. Compensation within the scope of contractual liability includes actual damage, as the Jordanian legislator did not address the issue of compensation for lost earnings within the scope of contractual liability.

Keywords: Loss of opportunity, lost profit, gross error, expected damage, contractual liability.

Introduction

Compensation is due in the event of an error resulting in damage, and compensation differs in whether this error resulted from a mistake within the scope of contractual liability or a harmful act within the scope of tort liability (Al-Sarhan & Khater, 2005).

Compensation within the scope of contractual liability includes the actual damage and does not extend to lost profits except in the case of fraud or gross error, while in tort it includes the damage caused and the loss suffered by the injured party and the lost profits as a result of this error (Al-Sanhouri, 1964). The victim should be compensated for missing an opportunity, not the chance itself, provided the damaging conduct did not prevent him from realizing it. (Al-Tamimi, 2011).

This study illuminates Jordanian law on compensation for missing opportunities and distinguishes between the opportunity itself, which is a potential harm and does not require compensation, and missing the opportunity, which is a

¹ The Author is an Associate Professor at the Faculty of Law at the Zarqa University. He can be accessed on sshurman@zu.edu.jo

² The Author is an Associate Professor at the Faculty of Law at the Zarqa University. He can be accessed on aalbni@zu.edu.jo

realized harm that requires compensation. Was lost earnings and missed opportunity recompense confined to tort culpability or contractual liability? Does the Jordanian lawmaker approach pay for the wasted opportunity under contractual duty differently from the Egyptian and French legislators before him?

Methodology

We will deal with this research in two sections. In the first one, we will talk about the nature of lost profits. Then, in the second one, we will discuss the scope of responsibility for lost profits. This study raises the question of whether compensation for lost profits extends to contractual liability in cases other than fraud and gross error, how to estimate compensation for loss of opportunity, how to determine the amount of compensation, and whether a legislative amendment is possible.

What is meant by missed opportunity?

Loss of opportunity is every gain that prevents it from entering the liability of the injured person because of a mistake that caused the damage (Al-Daajah, 2021; Al-Billeh, 2022a). So the hope of obtaining a profit based on reasonable reasons in the future is lost profit, and missing the opportunity to earn is also considered a missed profit and a missed opportunity, so the one who caused the damage did an act that led to the occurrence of damage to the injured; and this harm led to the deprivation of the victim of an opportunity that would, if things proceed in their natural course, to create hope, and if this hope is not certain of obtaining, then this hope is considered a lost profit, as it is based on possibility and expectation because its elements on which it is based are not achieved (Amer & Amer, 1979; Al-Billeh, 2023a). It is necessary to prove the loss of opportunity that resulted from a mistake that constituted damage to the victim. There is no liability for compensation for lost profits without error, and the damage alone is not sufficient to arrange responsibility for the loss of opportunity and lost profits (Bilani, 2012; Al-Billeh, 2024a).

Terms of compensation for missed opportunity.

Merely missing an opportunity does not mean that damage has occurred and that claiming compensation for lost earnings and missing an opportunity requires the fulfillment of combined conditions. These conditions, if available, constitute a compelling reason for compensation (Qassem, 2018; AL-Hammouri et al., 2023a).

The occurrence of the harmful act

For the one who caused the damage to be obligated to pay compensation, it is required that he has done an act that constitutes harm to the victim and that the damage is related to the occurrence of the harmful act (Muhammad, 1964; Al-Billeh, 2022b).

The damage is material and is called (financial) or (economic) damage because it affects a right of material value in the transaction and affects the financial liability. Physical damage is defined as: “The damage that befalls a person in his money, property, financial interests, or in his body, and it reflects negatively on his financial and economic conditions” (Al-Jubouri, 2008; Al-Billeh, 2022c). It is also known as: “The harm that befalls a person by harming his body or money, or by diminishing his financial rights, or by missing out on a legitimate interest for him whose benefit is estimated financially” (Qassem, 2018; Al-Billeh, 2023b).

It is the realized, or inevitable damage that affects the financial interest of the victim, so the damage is material if it affects the one who is harmed with his money and causes him a financial loss. The damage is real if it occurred, or if its occurrence was certain in the future, not imaginary or contingent because it is the damage that has been caused and whose effects have subsided (Al-Daajah, 2021; Khashashneh et al., 2023; Al-Billeh & Abu Issa, 2023a).

It is too late to make a profit.

The case of discrimination is missing the opportunity and depriving it, between the realized harm, especially if this harm is a future harm, and the contingent harm. Is the case of missing the opportunity seen as a potential damage that does not require compensation, or as an actual damage that requires compensation? What is meant here is missing an opportunity and not the opportunity itself, for the opportunity is probabilistic, but missing it is a certain thing because of the harmful act caused by the one who caused the damage. Depriving the victim of this opportunity, with its special intrinsic value, is a realized harm that requires compensation while depriving him of achieving the final gain in missing the opportunity is only a probable harm, so what is compensated for is the realized harm represented in the intrinsic value of the opportunity, not in the value of what it leads to final gain (Bilani, 2012; Al-Billeh, 2022d).

The amount of compensation is determined by partial compensation, which is what is required in compensation for missing the opportunity, by determining the value of the final gain and then estimating the value of the opportunity itself and the percentage of weighting in achieving the final gain, or in avoiding contingent damage. Determining a certain percentage of the lost earnings according to this opportunity and not with all the earnings that he was deprived of (Al-Tamimi, 2011; Al-Hammouri & Al-Billeh, 2023).

Among the results of partial compensation is the multiplicity of compensations with the multiplicity of opportunities and the multiplicity of officials, and the best criterion for estimating the value of the opportunity is the amount and extent of the causal relationship between missing the opportunity and the probable

gain, while an opportunity in itself is worth something, and infringing on it is an infringement on the right to seize it. Hence the attempt to win or profit and the deprivation of this right is considered real harm, even if the result is probable (Qassem, 2018; AL-Hammouri et al., 2023b).

The court has the discretionary power to determine the amount of compensation and the percentage of each person responsible for the damage, if it lists those responsible for the harmful act, and this is what Article (265) of the Jordanian Civil Code stipulates: “If there are several persons responsible for committing the damage, each of them shall be liable in proportion to his share in it, and the court may rule equally or jointly and severally among them.”

Due to the different subject matter of claims and the impossibility of counting them, it is difficult to find a mechanism and a consistent basis for calculating the value of compensation for lost earnings for all compensations. Therefore, the court uses its discretion to compensate for lost earnings and missed opportunities with the help of experts and people of knowledge (Al-Jubouri, 2008; Al-Billeh & Al-Qheiw, 2023; AL-Hammouri et al., 2023c).

An example of that is when the lawyer fails to file an appeal against the ruling within the legal period, he misses the opportunity to win the case, and the result of accepting the appeal does not mean that he will win the case. It cannot be said that the student will succeed in the exam, and all that can be said is missing the chance of success (Al-Daajah, 2021; Al-Billeh et al., 2023a).

The availability of reasonable reasons

The injured party has the hope and the ability to achieve an opportunity based on reasonable reasons, if the harmful act did not prevent him from realizing this hope and the ability to achieve a gain, then its realization would not be impossible, but rather possible. Missing the opportunity is not limited to the prejudice of mere hope, but rather the right to seize this opportunity, and the deprivation of this right is considered a real harm and not just an illusion (Al-Tamimi, 2011; Al-Billeh et al., 2023b). A horse competing in a race with ten horses has one chance out of ten, and its delay in arriving is a mistake that costs it the chance to win, which necessitates compensation (Bilani, 2012; Al-Billeh, 2024b).

Scope of liability in compensation for lost profits

Liability is an obligation incurred by a person to guarantee his actions, and civil liability either arises from a breach of a contractual obligation then is called contractual liability, or it may arise from an act that causes harm to others and is called tort liability (Qassem, 2018).

Compensation for lost profits within the scope of tort

Tort liability is the penalty incurred by a person because of breaching the legal obligation not to harm others in various forms of damages (Al-Daajah, 2021; Al-Hammouri et al., 2024).

The scope of compensation in tort includes expected and unexpected damage, in addition to moral damage that is not considered in contractual liability. As Article (266) of the Jordanian Civil Code states: “The guarantee shall be assessed in all cases according to the extent of the damage sustained by the injured party and the lost profits, provided that this is a natural result of the harmful act.” Likewise, Article (267) of the Jordanian Civil Code stated: “1. The right of guarantee deals with moral damage. Every infringement upon a third party regarding his freedom, honor, reputation, legal status, or financial consideration makes the infringer liable for the guarantee.”

The compensation here is general and includes all damage caused to the victim, so it is not possible to determine the extent of the consequences of the error and that the obligation arises now of committing that mistake, without order, agreement, or the possibility of determining the quantity and size of the obligation (Al-Daajah, 2021).

The court estimates the amount of compensation with its discretionary power, with the help of specialized experts, if it is not estimated by law or by agreement. This is what was stated in the Jordanian Civil Code, where Article (363) stipulates that: “If the guarantee is not assessed in the law or the contract, the court shall assess it in an amount equal to the damage occurring at the time of its occurrence.”

Herein lies the wisdom behind the wide scope of compensation in tort liability, unlike contractual liability. Expectation cannot play a role in the existence of the obligation, or in defining its scope. Article (1280) of the French Civil Code states that: “Every act of one of the people that results in harm to others compels the one who happened through his fault to compensate.” We find that it is not confined or limited to a specific scope. Contractual liability and tort liability are different, but if an act damage one of the contract parties, it is both a contractual breach and a tort breach, and it is not allowed to choose between the two responsibilities. Exceptions include fraud, criminal violation of contractual commitment, and serious mistakes (Al-Sarhan & Khater, 2005; Al-Khawajah et al., 2023; Isa et al., 2022).

The scope of tort liability encompasses various forms of harm, such as material damage, lost profits, and moral damage. In its ruling, the Jordanian Court of Cassation acknowledged that the responsibility of the guarantee for such harm extends to material damage, lost profits, and moral damage. This interpretation aligns with the provisions outlined in Articles 266 and 267 of the Civil Code, which

specifically address the moral damage that is legally guaranteed to the insurer. This is because physical injuries cause the injured person, in addition to the material damages, moral damages, such as the physical pains that the injured person feels in his flesh and bone, the psychological pains that he suffers because of the disfigurement caused by the injury, and the pains that he suffers. After all, he is deprived of the joys of life. These physical and psychological pains are agreed upon by jurisprudence and the judiciary that compensation should be made for them, and where the Court of Appeal reached this, its decision is appropriate.”

Compensation for lost profits within the scope of contractual liability

Contractual liability is the penalty that results from the debtor's breach of his contractual obligation, a breach that causes harm to the creditor, and this penalty is represented by the debtor's obligation to compensate for the damage (Qassem, 2018; AL-KHAWAJAH et al., 2022). The contractual liability compensation is based on direct and expected damages to the creditor, including expected loss and profit, which can be imagined at the time of contracting. It does not include unexpected damage, and it can be in kind or cash (Al-Daajah, 2021; Al-Billeh & Abu Issa, 2022; Alkhseilat et al., 2022; Block, 2022).

The basis for the claim for compensation for the contractual breach is the search for the elements of contractual liability, from a contractual error represented in the debtor's failure to implement his obligation arising from the contract, which may be an obligation to exercise care or an obligation to achieve a result, then liability is established, and the error may be by refraining or delaying the implementation of the obligation, and it may be by implementing it in a defective manner or negligence, and it may be by infringement or by a grave or easy error., And the second pillar is damage, which includes expected direct damage, but the potential damage does not fall within the contractual liability and does not require compensation. As for lost profits, there is no compensation for it within the scope of contractual liability except in cases of fraud and gross error, with the condition that there is a causal relationship linking the contractual error with the damage (Al-Jubouri, 2008; Al-Billeh & Abu Issa, 2023b; ALMANASRA et al., 2022).

The Jordanian legislator set out to establish a general rule, stipulating that compensation should match the amount of damage caused, without specifying the ceiling for compensation or the type of damage, leaving the matter to the judiciary. It was stated in Article (363) of the Civil Code that:” If the guarantee is not assessed in the law or the contract, the court shall assess it in an amount equal to the damage occurring at the time of its occurrence.”

In the explanatory memorandum to the civil law and Article (275) thereof, which interpreted Article (363) of the Jordanian Civil Law, it was stated: “2.

Contractual responsibility, in both cases of fraud and gross error, shall have the same ruling as liability for the harmful act. In other than these two cases, the debtor is not liable for the natural consequence of failure to pay on its own, but rather it is stipulated that the result be what could normally be expected at the time of contracting. If it is not achieved as a result, this condition has gone out of the scope of contractual responsibility and the obligation to compensate for it has fallen. In this regard, it is considered that the expectation of the contracting parties for the damage that must be compensated must not be limited to the source or cause of this damage, but rather it should deal with its amount or extent.”

The Jordanian judiciary interpreted Article 363 of the Civil Code by referring to an explanatory memorandum. The Jordanian Court of Cassation ruled that the contractual liability compensates for the actual expected damage, as established by the Court of Cassation's jurisprudence. According to Article (363 of the Civil Code), if the guarantee is not assessed in the law or the contract, the court estimates the damage to be equal to the actual damage when it occurs.

The concept of direct expected damage does not encompass the loss of profit if the rescission of the sale contract is grounded in a judicial decision that definitively establishes the right of pre-emption, rather than being a consequence of a defect in the sale contract or an error made by the defendant. The experts of the trial court's estimation regarding the lost profit resulting from the difference between the value of the plot of land, which is the subject of the lawsuit, on the date of sale and its value on the termination date of the sale contract, violates the law. This is particularly true because the appellant did not argue that fraud or gross error had taken place, as stated in the explanatory memorandum of civil law regarding Article (363) of the Civil Code. According to this article, the debtor who did not commit fraud or gross error is only obligated to compensate for the damage they anticipated at the time of the contract.

As it is agreed judiciously and according to jurisprudence to distinguish between the opportunity and missing the opportunity, and the Jordanian Court of Cassation went in this direction, as stated in its judgment the following: “It is agreed judiciously and according to jurisprudence that the due distinction should be made between the opportunity itself and missing the opportunity, since the opportunity itself is like Possible damage, which does not entail compensation for damages, while missing the opportunity is a type of realized damage that requires compensation.”

The researcher believes that the Jordanian judiciary relied on the explanatory memorandum of the civil law in interpreting Article 363 of the Civil Code, but the Jordanian legislator should have included fraud and gross error as an exception to compensate for missed opportunity within contractual liability.

In Article (221/2), the Egyptian legislator stated the nature of the damage resulting from the contractual error and provided the text of compensation if needed to clarify the concept of damage that must be compensated in Article (221) of the Egyptian Civil Code: “If the compensation is not estimated in the contract or stipulated in the law, then the judge is the one who estimates it. 2- However, if the obligation stems from the contract, the debtor who has not committed fraud or gross error is only obligated to compensate the damage that could normally have been foreseen at the time of the contract.”

While the French legislator specified the scope of compensation here for the losses incurred by the creditor in addition to the lost profits as a result of the debtor’s contractual error, it stipulated in Article (1231/2) of the French Civil Code that: “The compensation due to the creditor is in general what he suffered from loss and what he missed of earning, subject to the exceptions and modifications set forth later”.

It should be noted here that the Jordanian legislator did not address the issue of compensation for lost earnings within the scope of contractual liability, but rather limited compensation to the damage caused. It does not include lost profits, and the Jordanian Court of Cassation ruled that it is not permissible to include lost profits in the scope of contractual liability (Al-Jubouri, 2008; Al-Billeh, 2022d; Alshible et al., 2023; Khashashneh et al., 2023).

The Jordanian Court of Cassation determined to reimburse the creditor for genuine harm without lost profits if the breach of contractual commitments caused it. The Jordanian Court of Cassation similarly settled on the premise that the damage caused, since a contractual error alone does not establish contractual obligation.

The Jordanian Court of Cassation confirmed the impermissibility of ruling on lost profits within the scope of contractual liability, and in its judgment, which stated: “On the other hand, the court ruled for lost earnings allowance and applied rules that contradict the provisions of the Jordanian Civil Law and what the jurisprudence of the Court of Cassation settled on, as compensation is limited to covering actual damage without lost profits, and this was emphasized in many decisions of the Court of Cassation and has always been. The lawsuit is built on the basis of contractual liability, so it is supposed to prove that it has established its pillars and elements from a mistake that is represented by a breach of a contractual obligation, which could be the debtor’s failure to implement his contractual obligation or delay in its implementation or implementation in a defective or partial manner, and to prove the element of damage in which the contractual liability revolves. With him, whether or not it is immediate damage, i.e. actually occurring, and that this damage is a natural and direct result of the contractual breach, i.e. the

availability of a causal relationship between the contractual error and the realized damage. missed or not.”

The lawyer's responsibility for missing the opportunity arises from an agency contract, which is governed by Civil Law and the Bar Association Law. Article (55) of the Jordanian Bar Association Law requires the lawyer's responsibility to arise when the client makes a serious mistake or exceeds his agency limits. Where Article (55) of the Jordanian Bar Law stipulates: “The lawyer must defend his client with all honesty and sincerity, and he is responsible in case he exceeds the limits of the agency or makes a serious mistake.”

The researcher believes that Jordanian civil law did not allow compensation for missing an opportunity within the scope of contractual responsibility and did not provide for it, but the Jordanian legislator and Jordanian Bar Association law have authorized compensation if the agent exceeded his agency or committed a serious mistake, even if we move to tort liability (Al-Daajah, 2021).

Conclusion

The scope of compensation in tort includes expected and unforeseen damage, in addition to moral damage, the harm suffered by the injured party, and the lost profits. Lost profits and missed opportunities are not compensated within the scope of contractual liability, except in the cases of fraud and gross error, and in the presence of these two cases, the contractual liability turns into a tort liability. The Jordanian legislator did not address the issue of compensation for lost earnings within the scope of contractual liability. Rather, compensation was limited to actual damage. The Jordanian judicial jurisprudence has settled on the permissibility of claiming lost profits for damages resulting from tort liability. The jurisprudence settled on the impermissibility of claiming missed opportunity for damages resulting from contractual liability, except in the cases of fraud and gross error.

The Jordanian judiciary intervened by setting an explicit definition of the concept of missing the opportunity based on reasonable reasons that determine the amount of compensation and legal foundations that lead to judicial stability in compensation for missing the opportunity. The Jordanian legislator should intervene and amend the legislation by granting the injured person in his claim for compensation for the damage by choosing between contractual liability and tort liability to achieve appropriate compensation.

The Jordanian legislator should intervene and amend the text of Article 363 of the Jordanian Civil Code so that the text of Article (363) of the Jordanian Civil Code becomes as follows: It was stipulated in Article (363) of the Civil Code that: “If the guarantee is not assessed in the law or in the contract, then the court assesses it equal to the damage occurring at the time of its occurrence, and if the obligation

stems from the contract, then the debtor who did not commit fraud or gross error is only obligated to compensate the damage that could have been normally expected at the time of the contract.”

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