



Aspects of Restitution in the Context of Injurious Act

Derar Al-Daboubi¹, Sahib AL-Fatlawi²,
Mohamed Abdel Khalek AL Zoubi³

¹ Faculty of Business and Law, The British University in Dubai,
Dubai, United Arab Emirates

² Faculty of Law, Al-Ahliyya Amman University, Amman, Jordan

³ Faculty of Law, Amman Arab University, Amman, Jordan



Corresponding Author — Derar Al-Daboubi

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Abstract: The study examines the principles of restitution under Jordanian law from various aspects, with a primary focus on restitution within the context of tortious liability. Restitution is an underlying commitment under contractual liability where the debtor is obliged to perform what he committed to perform under the law, which will achieve the creditor's satisfaction. Restitution under tortious liability is no less critical than other compensation, as it results in restoring the position of the injured party to what it was before the damage was caused, and achieves the satisfaction of the injured party, who will be compensated with the same type of thing that was damaged. This study purports to clarify the perspective of Jordanian law that does not address restitution in the context of tortious liability. It provides a critical analysis of the relevant provisions regarding restitution outlined in the Jordanian Civil Code (JCC) and other applicable legislation that addresses restitution in the context of tortious liability. The paper concludes with findings accompanied by a series of recommendations designed to address the identified gaps in Jordanian regulations.

Keywords: specific performance; injurious acts; Jordanian law

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I. Introduction

Previously, the prevailing view was that restitution is usually conceived in the context of contractual liability, while it was considered exceptional and rarely occurred in the context of tort liability. This is based on the *travaux préparatoires* of Art. 171 of the Egyptian Civil Code (ECC) (Egyptian Government, Ministry of Justice, 1948). However, this kind of compensation can apply in both contractual and tortious liability, bearing in mind that damages within the framework of liability in tort may have other types of compensations that differ in nature from those that are common in the context of contractual liability, especially at present, when we are witnessing scientific, digital and technical progress and an increasing interest in environmental issues and availability of social media. This, in turn, will increase the scope of restitution in many areas.

This study addresses aspects of restitution related to material damage, provided that the nature of the material objects can be restored to their previous state. As for bodily harm, this is also to be thoroughly discussed, as many types of damage to humans cannot be restituted. At

the same time, it may be possible to apply this type of compensation in other cases, particularly in light of technological advancements and the availability of advanced medical devices and equipment.

The importance of restitution is more prominent in the context of moral damage that affects the reputation and dignity of human beings, as well as their financial, social, and employment status, which the media and social media may contribute to infringing such rights. It may also contribute to stopping such prejudice and compensating for damage by means of specific performance.

Furthermore, restitution can also be applied in the context of preserving the environment and ensuring its safety. This type of compensation also plays a crucial role in the framework of commercial transactions, particularly in cases involving infringements of trademarks, trade names, and commercial addresses, as well as in addressing unfair competition.

II. Methodology

To present findings on the topic under study, this paper employs the qualitative research method. The study employs a review design, where the existing body of literature on the underlying aspects of restitution has been reviewed to familiarize the researchers with comprehensive findings in this context. The selected research studies all contained relevant findings concerning the topic. The current literature on the subject provides an inclusive understanding of its potential limitations, enabling researchers to consider ways to overcome them and conduct their research efficiently. Multiple open-access online databases were utilized to compile relevant information, including the major platforms used for data extraction (*ScienceDirect*, *Google Scholar*, *PubMed*) and other online resources that provide access to articles, books, laws, and research papers. The resources cited in the selected publication were further examined to get a broader understanding of the topic. Lastly, the data was also collected by using conjunctions of relevant keywords to the research theme.

III. Literature Review

Numerous research scholars examined the aspects of restitution for injurious acts and how it is implemented and utilized across various domains. One of the early examples of studying restitution is the study carried out by Barnett. The scholar deliberated the idea of restitution as a new paradigm of criminal justice (Barnett, 1977, p. 300). The author believed that, since the criminal justice system had been broken down in terms of what Thomas Kuhn described as a “crisis of an old paradigm — punishment”, restitution is an optimal way to overcome such a crisis. The author concluded that experimenting with restitutionary justice would vary from the trial-and-error of the former setting. In Barnett’s words, “[w]e will be guided by the principle that the purpose of our legal system is not to harm the guilty but to help the innocent — a principle which will, above all, restore our belief that our overriding commitment is to do justice” (Barnett, 1977, p. 301).

Another author who thoroughly studied this concept was Bentwich (Bentwich, 1955). He scrutinized the aspects of restitution on an international stance from the standpoint of compensation for the victims of the Nazis. The researcher discussed the issue from the time of Germany’s unconditional surrender in the war of 1945 and how the law and regulations regarding restitution and compensation of Nazis’ victims were handed over to the four Allied Powers. Similarly, research was conducted within the realm of a post-war scenario and assessed the standing of property restitution considering the case of Mozambique (Unruh, 2005). The author presented an in-depth analysis of Mozambique’s experience throughout the land creation process, as well as the property restitution regime within the post-war context.

For studying a few of the prominent aspects of damage and specific performance, Dockar-Drysdale conducted a study that identified the idea within a school setting and yielded noteworthy outcomes in this regard (Dockar-Drysdale, 1953). Aside from this, numerous research scholars have dedicated detailed notes, research, and books to studying the laws and principles of restitution in an all-encompassing and inclusive manner, allowing for the exploration of various underlying aspects of specific performance (Virgo, 2015; Birks, 1985; Burrows, 2011; Hanoch,

2004; Palmer, 1978; Birks, 1992; Kull, 1995; Levmore, 1985; McInnes, 2002; Crowder, 1994; Rendleman, 2011).

In their study concerning the province of the law of specific performance, Smith argued that “unjust enrichment” and “specific performance” are not identical (Smith, 1992). Since most people consider these terms interchangeable and create a vague image of the concept, the author decided to discuss the issue in detail. The researcher emphasized that restitution is a legal remedy for establishing the cause of action in the context of unjust enrichment. It was further declared that erroneous restitutionary remedies are independent of the cause of action in unjust enrichment and should not be determined even close to any form of actual legal specific performance. The researcher also proposed a tripartite scheme for classifying the private law responses.

Blacksell and Born reviewed the enactment of the Restitution process across Central and Eastern Europe (Blacksell and Born, 2002). Their primary objective was to assess the impact on both the economic and social landscapes.

Rajnović, Cico, and Brljak studied restitution in the spectrum of agricultural lands and reviewed the comparative legal aspects of restitution in Serbia (Rajnović et al., 2020). The researchers evaluated the likelihood of returning agricultural property by gaining insight into the relevant legal regulations and then analyzed the implemented solutions currently in practice to mitigate the issue. The outcomes of their research reported that in Serbia, implementing restitution and compensation requires more than just passing a law. It was noted that taking necessary measures is essential for acquiring the required political and social consensus for returning the seized assets, particularly when it comes to returning agricultural land, as the results have not been satisfactory enough in this regard.

The studies presented in this section demonstrate that researchers have examined restitution from diverse paradigms. However, minimal attention has been paid to conjointly assimilating the aspects of restitution from distinct facets under one roof to comprehensively overview them in the given context under the Jordanian law. Therefore, the current study aims to bridge this gap by examining them inclusively. The study will address the aspects of Restitution concerning material

damage provided that the nature of material objects can be restored to their previous state. As for bodily injuries, this will also be thoroughly discussed, as there are many types of damage that cannot be fully compensated. At the same time, it may be possible to apply this type of compensation in other cases, particularly in light of technological advancements and the availability of advanced medical devices and equipment. The primary focus is restitution within the realm of tortious liability.

IV. Results and Discussion

IV.1. Restitution for Material Damages

Restitution for material damage is one of the most common types of compensation addressed by laws and researchers. Islamic Jurisprudence has known restitution as *Dhaman* or civil indemnification. *Dhaman* in Islamic Jurisprudence has two types: the first is the *Dhaman* of the contract (contractual liability), and the second is the *Dhaman* of the act (tort liability), which is the subject of our analysis in this paper.

Under general rules in Islamic Jurisprudence, neither every tortious act that does not cause property damage requires compensation, nor does such damage constitute a source of obligation. However, Muslim Jurists have provided various cases in which restitution is essential when an object is damaged (Al-Sanhouri, 1954). This type of compensation shall apply to the damaged object when its nature and surrounding circumstances allow restoration of such an object to its previous state. At the same time, restitution may not be possible for some material objects due to the impossibility of restoring the object to its previous condition.

IV.1.1. Material Objects Subject to Restitution

Laws and jurisprudence address restitution for material objects damaged by tortious acts that can be restored to their previous condition. This has been enshrined in Section 269(2) of the Jordanian Civil Code (JCC) that states: “Damages shall be estimated in money, but the Court may, subject to the circumstances and on the application of the injured

person, order restoration to the former position of a decree by way of damages, the execution of a certain matter attached to the injurious act”.¹

Section 275 of the JCC addresses Damage to Property, also adopts the same approach (Sultan, 2015): “Whoever damages or spoils the property of another shall, without prejudice to the general provisions related to liability for damages, be liable for its like if it is replaceable and for its value if it is a property of value”² (Jordanian Bar Association, 1985).

In addition, Section 279 of the JCC also enshrined 4 conditions for *Restitution under Usurpation* (Jordanian Bar Association, 1993):³

1. A person shall be liable for what they have taken until they return it.

2. Whoever extorts the property of another shall return it to its condition at the time of its extortion and in the place where it was extorted.

3. If they have consumed or damaged it or if they have lost it or damaged it with or without its trespass, they shall replace it with a similar item or pay its value on the day of extortion and in the place where it was extorted.

4. They shall also be liable for its benefits and any increase.

¹ Similar to Art. 171(2) of Egyptian Civil Code (ECC) and Art. 209(2) of Iraqi Civil Code (ICC).

² Damage to property is the total loss of a property that render it with no value, such as the burning of clothes, or partial destruction of something in a way that takes away all or most of its benefits, as in tearing the cloth to become not suitable for the purpose for which it was intended to be, or changing the thing by destroying all or some of its benefits, as in grinding grains or baking flour, or the absence of object in an unknown or unreachable place.

³ Article 881 of Ottoman Journal of Equity defined Usurpation as “Taking someone’s property and seizing them without taking its permission, the person who has taking property is called Usurper, and the seized money is usurped, and its owner is the usurped from them.” However, Article 890 of the same journal addressed Restitution within the scope of usurpation. This Article states that “The usurped property must be restituted and handed over to the owner at the place of usurpation if the owner is this place, but if the owner of the usurped property come across the usurper in another town, and the property is with the usurper, the owner of the usurped property can return it back, or they can ask the usurper to handed the property over at the place of usurpation and at the expense of usurper.” Restitution has also been addressed under Art. 891, 892, 797, 899 and 912 of Ottoman Journal of Equity.

This Article also indicates that Restitution entails that the extorted object must be returned to its owner as long as it exists. Namely, the alternative or value of this object would not be accepted unless the owner of this object has already agreed to accept such an alternative or value (Sultan, 2015).

Accordingly, the best material objects that allow for specific performance that can be restored to their previous condition are fungible objects, as they can be replaced with similar objects that can be assessed by number, measure, and weight. Therefore, it has been said that fungibles do not perish, and they shall be replaced with an object similar to it and not by its value. In contrast, if a similar object is not available, financial compensation shall be applied.

Restitution is not merely confined to fungible objects; instead, it might be applied to cases when the damaged object can be restored to its previous status, e.g., when a person restores the vehicle that he damaged by using advanced techniques to paint and repair the vehicle, or when the wall that has been built on a tortfeasor's land is demolished, or big trees that have been planted to block the air or light for neighboring plots are eliminated.⁴ Likewise, the case in which the owner of the lower part is forced to rebuild the lower part that they have unjustifiably destroyed and caused harm to the owner of the higher part follows a similar pattern (AL-Fatlawi, 2020; Sewart, 2001).⁵

According to Section 269(2) of the JCC, restoring the object to its previous condition shall be performed at the request of the injured party, not at the request of the tortfeasor. Nonetheless, the court is not obliged to apply the request of the injured party if it cannot be carried out due to the condition of such an object. Likewise, the aggrieved party cannot assert such a way of compensation, and therefore, the court may rule that the tortfeasor should perform a specific order related to

⁴ According to Section 1025 of the JCC: "Obstruction of light to the neighbour shall be considered as serious damage so no person shall construct a building which obstructs the windows of the neighbour's house in a manner which obstructs light to it and otherwise the neighbour may apply for the demolition of the building in order to abate the damage".

⁵ Another application of Restitution can be seen when a person builds a chimney in arbitrary and harmful manner to its neighbour, as the demolition of that chimney is an aspect of Restitution.

the tortious act as a way of compensation (AL-Fatlawi, 2020; Sewar, 2001).⁶

The Jordanian Court of Cassation ruled that “If it is established from the information that the plaintiff’s building is adjacent to the defendant’s property and that the defendant’s behaviour on its property has caused severe damage to the plaintiff’s building. It can be inferred that the damage must be eliminated in accordance with Sections 1199–1200 of the Ottoman Journal of Equity, as the law did not stipulate a specific way to remove the damage but rather provides that the damage must be removed either through Restitution or compensation, or it can be achieved through a combination of both”.⁷

This Court also held that “The principle is that the damage shall be rectified through Specific Performance; however, if this is impossible, alternative forms of compensation will be applied. Accordingly, the court decides to reject and dismiss the appealed judgment, which obliges the defendant to pay the costs of the damage”.⁸

French courts also emphasized restitution in the context of the tortious act, which obliged the tortfeasor to return the goods they seized or provide a similar object if the goods are fungible. This is to protect the injured party from the constant fluctuation in prices or from the difficulty of obtaining these goods in the market (Al-Hasnawi, 2015).

It can be inferred from this discussion that the JCC provides specific scenarios and examples for restoring material objects through the action of specific performance. Still, the authors believe that the JCC’s approach in this regard would be more straightforward if the law included general rules that could apply to any material object, rather than specifying particular cases, as indicated by the JCC. The necessity of developing such rules lies in their suitability for Jordanian law, which adopts a civil law system that primarily relies on relevant legal texts,

⁶ However, part of the jurisprudence goes that the injured party may not refuse Restitution — if the debtor has request it — in order to obtain monetary compensation, as the debtor will have fully fulfilled its obligation to restore the situation to the status prior damage, unless the debtor is unable to remove the damage before returning the situation to the previous state.

⁷ Decision No. 86/1973 of Jordanian Cassation Court.

⁸ Decision No. (2009/2000) of Jordanian Cassation Court.

in contrast to the common law system, which offers more flexibility in producing legal rules through case law.

IV.1.2. Material Objects not subject to Specific Performance

Non-fungible objects are not subject to specific performance, as they differ in their qualities and value from each other, which is rarely found in negotiation.⁹ Namely, a non-fungible object is one that cannot be represented by a quantity, weight, or number, even if such representation is possible; its individual instances will vary to a degree, influencing their value.

The concept of similarity between objects for which fungibility can be determined is influenced by time, circumstances, industrial development, and technical methods. For example, fabrics and rugs were once considered non-fungible goods, as they were manually woven, resulting in variations in the weaving method, threads, and colors, which in turn led to different values for these items. Nowadays, weaving is done through electronically programmed machines, with designs, drawings, and dimensions that cannot tolerate error, resulting in symmetry in all the characteristics of the products produced. This is what makes them fungible, rather than non-fungible. Gold, silver, copper, and bronze coins, as well as food and drink utensils, paper, and printed books, are considered among the fungible objects, because of their symmetry and absence of difference in their value and size, provided the condition of their availability in the market.¹⁰

Fungible property also includes new electrical, mechanical, and electronic devices, since they are entirely identical, as well as cars, machines, and equipment that are identical in every way. Additionally, modern real estate units that are entirely identical in every respect are now considered fungible due to advancements in science and technology.

⁹ Section 56(2) of JCC. Art. 85 of the Egyptian Civil Code did not regulate negotiability of non-fungible goods, while Art. 64 of Iraqi Civil Code stipulated the following: "1. The fungible objects which substitute for each other upon performing of obligation. It is usually estimated by numbers, measures or weight. 2. Any other object is deemed to be non-fungible".

¹⁰ Jordanian Bar Association, (1985). Explanatory Notes of Jordanian Civil Code. *Supra note* 4, pp. 73, 74.

It can be assumed that items of a similar nature can compensate for the damage caused to fungible items, as a replacement of a similar kind is available on the market. Namely, restitution is envisaged in the context of fungible property. However, restitution has no applicability in the context of non-fungible items.¹¹

Section 275 of the JCC regulates compensation when non-fungible property sustains damage. This Section stipulates that compensation shall be paid for the value of the object if the object is damaged. Still, if the object was partially damaged, compensation shall correspond to the damage that the object has sustained, i.e., compensation is estimated by the difference between the value of the object before and after the damage occurred.¹²

This approach is also emphasized in Section 276 of the JCC, which addresses the issue of partial damage resulting in a decrease in the value of the object, whereby the tortfeasor shall compensate for the loss of value. Still, in the case of a gross reduction in value, the owner of the object either takes the value of the deficiency or chooses to leave the object to the tortfeasor in return for taking the entire value of the object, whereas, in the case of a minor damage, the tortfeasor shall be liable merely for the value of the decrease.¹³

There may be situations when it is impossible to apply restitution for material objects, such as in cases of damage caused to a new device. It is impossible to use the kind of compensation claimed by the aggrieved party, because the device is the last on the market. Its equivalent cannot be imported shortly, which means there is no opportunity to obtain a substitute. Hence, the injured party will only be entitled to financial compensation, even though they insist on claiming specific performance.

Sometimes it is difficult to restore the condition to the state that the object was in before the damage was caused, even if the nature of the object allows such restoration, e.g., if the smoke of the chimney resulted in darkening the neighbor's wall, restoring cannot be achieved through the chimney destruction is destructed because the damage

¹¹ Explanatory Notes of Jordanian Civil Code, p. 74.

¹² Explanatory Notes of Jordanian Civil Code, p. 306.

¹³ Explanatory Notes of Jordanian Civil Code, p. 307.

has not been eliminated (Sewar, 2001). Therefore, JCC should explain the main features of the distinction between fungible and nonfungible goods, in particular, under new developments. This is to clarify whether the object is subject to Restitution or not.

V. Restitution for Bodily Injuries

Restitution generates considerable debate concerning its applicability within the realm of tort liability, as some scholars and practitioners restrict this form of compensation solely to matters of contractual liability. In contrast, some others assumed that such compensation is conceivable in specific cases that might be encountered in the context of a tortious act affecting a human being. However, the contemporary trend involves exploring the possibility of applying restitution for bodily injuries that afflict humans due to scientific advancements in the medical field, particularly in the field of plastic surgery.

V.1. Possibility of Restitution in the Context of Tort Liability

Many of those who addressed restitution do not consider the applicability of such compensation outside the framework of contractual liability. Namely, when a surgeon makes a mistake during the surgery and his mistake results in a distortion of the patient that can be eliminated and treated, the court will be able to oblige the surgeon to repair the distortion and eliminate it through a new surgery, when the physician's negligence results in a physical defect or distortion in the face of a girl that affects her beauty and reduces her chance of marriage, when the mistake leads to the inability of the body organ to move, or when the mistake may result in a disruption of one of the senses (Al-Hiyari, 2005, p. 162; Al-Sa'di et al., 2015, p. 94). Thus, some tend to say that the absolute application of restitution is impossible for such a kind of damage, when someone's leg was amputated or the eye was poked. Neither of these organs can be restored because the body of a human being is not repairable as in material objects. Thus, the injured party

is constantly exposed to the risk of not healing or it may be subject to partial recovery, both of which require high financial costs (Al-Hasnawi, 2015).

However, there is another opinion that assumes restitution is applicable in all cases, provided that this kind of compensation is also appropriate, as well as creditors' claims for specific performance. This tendency confirms limited implementation of restitution in some instances, which is almost impossible to achieve (Saad, 1998, pp. 440–441).

As for the third opinion, it acknowledges the existence of restitution within the tort liability framework, in particular when the tortious act is considered to be not connected with a contractual relationship between a physician and a patient, and since the existence of an express or implied contract cannot be noted between the physician and the patient, the liability of the physician would not be based on contractual liability (Al-Husaini, 1987, p. 89). Cases of contract nullity can support this view due to the illegality of its subject matter or a lack of consent. Then, responsibility will undoubtedly be based on tort, like a case involving a physician who made typographical mistakes regarding the dosages of medicine, which led to pathological consequences for a patient. Alternatively, it could involve a physician who issues a medical certificate as a courtesy to admit an insane patient to the hospital for confinement measures, or a physician treats a patient without being asked by the patient or by someone authorized to make such a request.

One can argue that physicians, like others, are subject to the general provisions of tort liability. Therefore, once the court becomes satisfied with the expert's opinion and medical reports that the physician is at fault, whether the fault is technical or substantive, minor or severe, a physician shall be responsible for compensating the injured, including restitution if it is applicable (Al-Husaini, 1987, p. 89).

It can be concluded that, although physicians need to be confident in their work, they must also keep pace with new technologies and scientific advancements in the field of medicine. This does not give them the right to abuse such confidence and harm the human body illegally, because they are like other practitioners whose performances

are not absolute; instead, they shall be bound by the legal, scientific, and technical framework (AL-Fatlawi, 1997, pp. 54, 155).

V.2. Nature of Bodily Injuries and Restitution in the Context of Tort Liability

The type and extent of damage, as well as the strength and immunity of a person, are all factors that determine the extent to which restitution can be performed, as some injuries will not entitle a person to such a sort of compensation, as compared with the case that results in loss of human life. However, there is another type of injury when a mere Restitution will not be sufficient to achieve justice and satisfaction for the injured party; instead, restitution must be combined with monetary compensation as well. This scenario is observed when a person donates an organ to someone else, where the transplantation of artificial organs may not be sufficient for compensation, because artificial organs cannot be considered a substitute for real human organs.

A contemporary view goes to the need to consider all modern scientific developments in the world of medicine, especially concerning transfer and transplantation of human organs and plastic surgery operations, which may provide room for the application of restitution in that context, as was opined in Decision No. 224/1995 of Jordanian Cassation Court (Al-Hasnawi, 2015). Organ transplantation is a medical procedure that aims to replace a damaged organ in the human body with a healthy organ extracted from another person, provided all the necessary legal conditions are met and the donation is made per the guidelines to preserve human life and alleviate pain.¹⁴ This shall not be considered restitution because it falls within charitable deeds that a person cannot be obliged to perform. However, scratches, bruises, minor wounds, and superficial burns can be subject to specific performance, in which case the court may uphold a claim of restitution, as this form of indemnification may be applicable in such cases.

¹⁴ Decision No. 257 (10/2018) of Jordanian Fatwa Council provided conditions for donating human organs: 1. Donor must be fully competent for such donation. 2. Donor's valid consent. 3. Donor must not be exploited. 4. Donor must be subject to medical verification for the purpose of its safety.

Restitution can also be applied when a court obliges a dentist, or when the latter agrees with the injured patient, to provide a new denture instead of the one that fell out and was broken due to poor installation. This form of compensation is further noted when a tortfeasor is obliged to restore the teeth lost due to their physical assault, whereby they are required to implant teeth that are very similar to the natural teeth and achieve the same benefits.

It is worth mentioning that the JCC does not regulate restitution in the context of bodily injuries, because the general rules of Restitution provided in this law may not be entirely suitable or accurate for regulating restitution in the framework of physical injuries, as specific performance has only been regulated within the ambit of contractual performance.

VI. Restitution for Moral Damage

Restitution might be applied within the scope of moral damage, which is directly attributable to the tortious act, such as the damage that affects the reputation and dignity of humans or their rights. The moral damage could be considered collateral damage, similar to the effects on health, psychological stability, and tranquility, as well as environmental damage or damage arising in the context of human rights or intellectual production.

Restitution can also be conceived in the context of the moral damage arising in the realm of trade law, such as violations committed against trademarks, commercial addresses, and trade names, as well as cases related to unfair competition.

VI.1. Restitution for Moral Damage Affecting Human Beings

The protection of personal rights is the focus of various legislations, which are deemed to be among the moral rights closely attached to the human being, as they entitle the party whose personal rights were violated to request cessation of the violation and claim indemnification for the damage suffered.¹⁵

¹⁵ This has been provided in Section 48 of JCC: “Whoever shall be subject to unlawful assault in respect of any right which attaches to its person shall be entitled to apply for the abatement of that assault together with compensation for any damage they may have suffered”. This Section also corresponds to Art. 50 of ECC.

One of the personal rights is the right of a person to choose a name that distinguishes them from others, as a name typically consists of two elements: the first name and the surname. The name is the expression that is usually used to identify and distinguish a person, and hence, every person, whether a natural person or a legal entity, must bear a name that distinguishes them from other people. The word “*name*” has a narrow meaning and refers to the person’s name alone, while a broad meaning includes both personal name and surname. The surname is the expression given to the family to which a person belongs, and all family members share it. A personal name, however, is the expression given to a person to distinguish him from other members of their family. Hence, one can say that both the name and surname contribute to identifying and determining the person and their family simultaneously.

In addition to the name and surname, there is the expression of a nickname, which means a name that people used to call a person. A nickname is different from the original name, the holder of which is known to the public by such a name. As for a pseudonym, it is a name that a person chooses for themselves, other than their real name, and shares it with others. This name is typically used in literary and artistic contexts to conceal their real identities; members of national resistance movements against occupation also adopted pseudonyms (AL-Fatlawi, 2011, pp. 480–481).

Although the person has suffered no damage, under the circumstances of misusing their name, they would be entitled to stop this violation, as a person’s name is one of the personal rights that must be protected under the law. Therefore, they enjoy the right to claim compensation for the damage they have suffered in accordance with the rules of tort liability. This was regulated by Section 48 of the JCC (see earlier in this study). Section 49 also provided for an application of this type of compensation, as it stipulated: “Whoever is disputed by others in the use of their name or surname or both without justification, and whoever suffers usurpation of their name or surname or both without legal ground, shall be entitled to apply for the abatement of that assault, together with compensation for any damage they may have suffered”.

We can infer that a violation of the right to the name can be noted when somebody challenges the right of a person to be named by

a specific name and claims the immediate cessation of such a name. Moreover, this right shall also entitle the person to compensation if such a misuse resulted in damage to the claimant. An infringement may occur through misappropriation of another's name, i.e., someone illegally uses the name of a particular person, and the holder of the name claims to stop such misappropriation, even if it does not result in damage. The aggrieved party is entitled to claim indemnification if the damage occurred. The legal protection provided for the name can also be enjoyed in the context of misusing the nickname and pseudonym (Al-Saddah, 1994, p. 426).

The damage resulting from the harm caused to an individual's reputation and dignity is considered one of the forms of moral damage that may be carried out through comments or the dissemination of advertisements on walls, newspapers, or through programs on television, websites, or social media. In these cases, the court may order, based on specific performance, the defendant to destroy, erase, or eliminate these advertisements or publish statements condemning the defendant in newspapers, television, or social media through which the violation has been committed. Thus, one can assume that this is deemed to be restitution for the moral damage incurred by the claimant (Al-Budairi, 2017, pp. 93–112).

Restitution is further conceivable in the context of environmental pollution, as such damage can be recovered by eliminating the effects that have affected the environment. For instance, pollution may result from the act of disposing of garbage or waste in agricultural land or a forest. Restoring the environment to its pre-pollution state can be achieved by removing garbage and trash and then repairing damaged soil and plants using scientific methods.

It can be concluded from this discussion that the act of returning the environment to its pre-pollution state is the most appropriate solution to protecting the environment, as Restitution contributes to restoring what has been spoiled and reforming the environment. This solution is also considered as a proper solution, as it deters the polluter, who would realize the enormity of their mistake while attempting to

rectify it and restore the environmental situation to its previous state (Arhouma, 2000, p. 322).

Most human activities result in damage to the environment and its elements. Therefore, it is necessary to stop the activities that harm the environment, even if this leads to the closure of factories, the sources of environmental pollution, or, at least, obliging the owners of such factories to take necessary measures to mitigate the effect of environmental pollution (Al-Dhaher, 1999, p. 70; Thannoun, 2006, p. 371).

Environmental protection laws in Jordan also adopt the same approach. This can be derived from the provisions of Art. 9(b) of Jordanian Environmental Protection Law No. 52(2006) that states that “A master of a vessel, ship, tanker, or boat is obliged within the period specified by the court to remove the polluted materials that have been thrown, poured, discharged, or dumped in the territorial waters of the Kingdom or in the beach area. In the case they fail to do so, the Ministry of Environment or its delegate shall remove it at the expense of the violator”.

The same approach is enshrined in Art. 11 of this law. The Article provides a general rule prohibiting the disposal or collection of any substances that could be harmful to the environment’s safety, whether solid, liquid, gaseous, radioactive, or thermal, in water sources. The violator is obligated to remove the reasons for the violation within the period specified by the court, as stated in a technical report. However, if they fail to do so, the Ministry of Environment or its delegate shall eliminate them at the violator’s expense.

Article 19 of the same law obliges the owners of factories, vehicles, workshops, or any entity that carries out an activity negatively affecting the environment and emits environmental pollutants to install devices that prevent or reduce the spread of such pollutants, and to remove such violation within the timeline specified by the Minister of Environment or its delegates. Otherwise, the matter shall be referred to in the court that is entitled to issue a decision to close the factory. New Environmental Protection Law No. 6(2017) also stipulates that the hazardous materials

and waste brought into the Kingdom must be returned to their sources at the expense of the violating party, in addition to prohibiting the use of machinery, engines, vehicles, or any other source that exceeds the permissible limits for noise and vibration.¹⁶

The other form of restitution for moral damage can be found in the context of intellectual property, particularly in cases involving copyright infringement. This kind of compensation is much better for the author than monetary compensation because recovery under restitution leads to eliminating the damage that befalls the author, rather than merely compensating the author with a sum of money. Moreover, in this regard, restitution is consistent with the rules of tort liability (Injurious Act).

Thus, restitution can take several forms, depending on the nature of the subject matter of the violation. It might be found in the form of removing the distortion from the subject matter and returning it to its origin, as if a person deforms a statue by placing material on it or removing material from it. Therefore, one can assume that restitution is the form of obliging the defendant to remove what they have placed or returning what they have taken, both of which will result in returning the subject matter to the form created by the author.

Restitution may also be seen in the form of erasing the additions made to the recordings due to the infringement and returning them to the original form and manner. Restitution may be in the form of re-dissemination of the subject matter among the public or, if the infringement is focused on copyright, the work can be withdrawn from circulation (Al-Nawafleh, 2021). Restitution could also be made by publishing the work that holds the name of the plaintiff if the attribution of work to its author is infringed. It might be observed in the form of obliging the defendant to publish the work immediately if they have been reluctant to show it to miss the opportunity to display the infringed work at the appropriate time chosen by the author (Al-Nawafleh, 2021; Kana'an, 1992).

¹⁶ This is provided in Art. 6(a), 7 and 10 of Environmental Protection Law No. 6 (2017).

VI.2. Restitution for Moral Damage within the Scope of Commercial Law

As explained earlier, restitution for moral damage is also conceivable in the context of business. This may be noted through illegal infringement of the right of patent, trademark, commercial address, and trade name. Regarding a patent, its holder can claim a halt to the infringement of their invention and claim compensation for the damage they sustained due to this infringement through a civil lawsuit (Zeineddin, 2015; Hamdallah, 1997).¹⁷

According to Art. 32 of the Jordanian Patent Law (JPL), an illegal infringement of a patent may take the form of imitation of the subject matter of the patent, or an infringement through selling or exporting counterfeit products, or offering such products for sale and negotiation, or having them in possession for selling. Patent infringement can also be carried out by placing data to deceive others into believing that the defendant has obtained a patent or the right to exploit it.

For the patentee to claim protection of a right under the patent, Jordanian Law stipulates that the infringed patent must be registered in the name of the claimant. This was explicitly indicated in Art. 13(b) of the JPL, which states that “After granting the patent, the applicant shall be entitled to take legal measures to prevent infringement of their invention and to claim compensation if the infringement continues”.

The Jordanian Court of Appeal, in its case No. 5188/2023, relied on this article to reject the plaintiff’s request to stop the infringement of its invention, because the application for registration of the invention was not proven to have been accepted by the competent authority.

It is worth mentioning that the application of restitution is also possible in the context of trademark infringement.¹⁸ Jordanian Law grants the trademark owner the right to claim the cessation of the

¹⁷ See Art. 32(c) of Jordanian Patent Law No. 22 (1999). A patent is the certificate issued by designated authorities to the inventor, through which it recognises its right in terms of what they have invented and enables them to monopolize the exploitation of its invention for a certain period and with specific restrictions.

¹⁸ Art. 2 of Jordanian Trademark Law defines a trademark as: “Any visible sign that the person uses or wants to use to distinguish its goods, product or services from the goods, product or services of others”.

trademark infringement and to claim compensation for the incurred damage because of an unlawful breach of trademark rights. However, Jordanian Law stipulates that to exercise this right, the trademark must already be registered with an authorized official entity.¹⁹ However, this condition shall not apply if the trademark has misled the public; in such cases, the claimant can claim cessation of an illegitimate infringement of the trademark, as well as compensation, even if the trademark has not yet been registered with the authorized official entity.²⁰

Restitution can also be identified in the context of trademark protection. This has been enshrined in Art. 37 of the Jordanian Trademark Law that grants the trademark owner the right to claim cessation of trademark infringement, as well as a preventive attachment on the goods subject to trademark infringement.

An illegal breach of the trade name may also be a reason for Restitution, as the owner of the trade name has the right to protect their trade name through the court. They will be entitled to claim a cessation of this infringement, restitution, or compensation for the damage incurred. However, the Jordanian Supreme Court of Justice, in case No. 75/1994, held that such liability shall be based on general rules of civil liability.

It is worth noting that the requirement to file a lawsuit to stop the breach of the trade name or to compensate for the damage resulting from this breach does not necessitate prior registration of the trade name. Instead, the injured party shall be entitled to file such a lawsuit, even though the trade name has not yet been registered with the designated authorities.²¹

As is the case with the trade name, it can also be applied against the violation of a commercial address (Al-Oqaili, 1995).²² Therefore, a person whose commercial address has been infringed shall be entitled

¹⁹ See Art. 37 and 33(1) of Jordanian Trademark Law.

²⁰ As provided in Art. 2(b) of Jordanian Law of Unfair Competition and Commercial Secrets No. 15 (2000).

²¹ As provided in Art. 8 of Paris Convention for the Protection of Industrial Property.

²² The commercial address is the name used by the merchant to distinguish themselves from other merchants by mentioning its real name and title, which may be associated with an innovative designation.

to sue a violator for such an infringement, because this infringement is considered to be an aspect of unfair competition, through which the defendant is illegitimately benefiting from the fame of that address, as they have misled customers about the truthfulness of the address (Sami, 1993). Accordingly, Art. 49 of Jordanian Commercial Law granted the holder of the commercial address the right of restitution by claiming a cessation of the continuation of this infringement, in addition to the right that entitles the holder to claim compensation for the damages imputable to that infringement (Al-Nawafleh, 2021).

It can be inferred from the foregoing analysis that the lawsuit filed to protect a patent, trademark, trade name, and commercial address is mainly based on the claim of unfair competition.²³ through which the holder of such a right can claim the cessation of any of the aforementioned forms of infringement, in addition to the right they may enjoy in terms of claiming compensation if such an infringement resulted in damage to the claimant. Namely, such a lawsuit shall be grounded on the provisions of liability in tort that is based on a tortious act that has a causal relationship with the damage sustained by the injured party. However, the study suggests that regulations related to a patent, trademark, trade name, and commercial address should expressly indicate that the aggrieved party would be entitled to enjoy privileges of restitution in the same way as the rights enjoyed under specific performance claimed in the context of contractual liability, and particular rules have to be developed to regulate restitution under tort liability that has its characteristics and legal elements that distinct from those attached to contractual liability.

VII. Conclusion

Restitution in the context of tort liability is considered one of the most controversial issues among jurists and commentators, with some views denying the applicability of restitution within the scope of tort liability. In contrast, such compensation is conceived in the context of tort liability merely in limited and specific cases. Therefore, this

²³ The right to file an unfair competition lawsuit was granted to the aggrieved party in accordance with Art. 3(a) of Unfair Competition and Trade Secrets Law.

paper is dedicated to addressing restitution within the scope of tort liability, particularly in light of the emergence of new technologies and developments that have widely encouraged the adoption of this form of compensation.

It has been concluded that restitution in tort liability is one of the best solutions, not because of the room that it may provide to compensate for material damage, but because it also allows moral compensation that may affect humans directly or indirectly, particularly the damage related to human dignity and personal rights that are naturally attached to humans.

This study also found that the transfer and transplantation of human organs, such as hair transplantation and dental implantation, are topics in the context of which restitution can be applied in addition to plastic surgery, which demonstrates significant progress. Moreover, it has been explained that this type of compensation is also noted within the area of environmental protection and the commercial realm, such as intellectual property, trade names, commercial addresses, patents, trademarks, and unfair competition.

The outcomes also suggested that a distinction should be drawn between specific performance and restoration, as specific performance obliges the debtor to carry out what they have committed to do, if feasible, and this is envisaged solely under contractual liability. However, restoration stipulates that the aggrieved party return to the situation they were in before sustaining damage, which can be achieved by eliminating the damage, if feasible. This applies to both tort and contractual liability.

The study also noted a difference between the phrase “returning the situation to what it was before damage” that represents the essence of restitution and the phrase “carrying out a specific act connected to the tortious act” as has been explained earlier under the relevant provisions of Environmental Protection Law that have obliged the tortfeasor to eliminate the violation that caused environmental damage, which is deemed to be an application to the Second Part of Section 269 of the JCC that has been addressed before.

Additionally, a scarcity of Jordanian judgments regarding restitution applied in the context of tort liability is also noted, as the

courts have resorted to monetary compensation as a means of resolving such disputes. The present paper further notes that Section 269(2) of the JCC stipulates that priority must be given to monetary compensation, contrary to civil law jurisprudence, which prioritizes restitution among other forms of compensation. The importance of prioritizing restitution as a form of compensation has been elaborated through the examples provided in this paper, in the context of physical, moral, and environmental damages, as well as the damage observed within the intellectual property field. Hence, the study suggests that the JCC should prioritize restitution, and if this is not applicable, recourse can be made to the rules of monetary compensation.

Accordingly, the authors found that Jordanian Law does not regulate restitution in the context of tort, where the rules for such compensation can be impliedly derived from several legal texts scattered throughout different legal sets, such as the Civil Code, the Commercial Code, the Patent Code, and the Trademarks Code. Namely, the legal framework of restitution is not clear under Jordanian Law, because some rules can be impliedly derived from the general rules in the JCC. In contrast, the remaining rules can be derived from specific examples provided in several texts across different codes. As such, the study suggests that the Jordanian Legislator may review all relevant Jordanian legal sets to highlight and identify the legal issues impeding the satisfaction of restitution under liability in tort.

It has further been recommended that Section 269 of the JCC must be amended to deprive the discretionary authorities of the court in terms of restitution and suggest that restitution must be considered an obligatory route, provided that circumstances of the case allow the application of such a compensation and in turn, the aggrieved party can avail more privileges due the compensation attained through the right to restitution. Moreover, the section mentioned above has to be rectified. This can be achieved by not confining a claim of restitution to the injured party, as this restriction would deprive the defendant of the opportunity to claim restitution, forcing the court to refrain from responding to this claim. Such an amendment will undoubtedly be in favor of justice and consistent with the requirements of development in various fields.

It can further be recommended that though Art. 48 of Jordanian Copyrights Protection Law adopted Restitution as a mean compensation, Jordanian law should further pay more attention to restitution as a form of compensation that should be given priority over other types of compensation or penalties, especially in the context of the Environmental Protection Law, as international and national efforts seek to recover the environmental situation by removing violations or closing the factories that affect the environment instead of imposing fines or penal sanctions. Such a solution will be consistent with an international approach of environmental sustainability. Moreover, restitution should also be consolidated in Jordanian commercial laws including laws related to matters of infringement of moral rights like patents, trademarks, trade names, and commercial address rights, whereby the situation will be returned to the state that existed before the damage was sustained. For all of these recommendations to be effective, there is a need to develop a comprehensive legal framework.

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Information about the Authors

Derar Al-Daboubi, PhD in Law, International Commercial Law, Faculty of Business and Law, The British University in Dubai, Dubai, United Arab Emirates
derar.aldaboubi@buid.ac.ae (Corresponding Author)

ORCID: 0000-0002-6278-6374

Sahib AL-Fatlawi, PhD in Law, Civil Law, Faculty of Law, Al-Ahliyya Amman University, Amman, Jordan

fatlawi.sahib@yahoo.com

ORCID: 0000-0001-5800-5865

Mohamed Abdel Khalek AL Zoubi, PhD in Law, Civil Law, Faculty of Law, Amman Arab University, Amman, Jordan

m.alzoubi@aau.edu.jo

ORCID: 0009-0009-1263-6691

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