

# The Islamic Law of Torts and Product Liability (An Analysis)

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## Abstract

This research paper expounds the emerging legal concept of ‘product liability’ from the perspective of Islamic law of torts. In the developed jurisdictions of the world today the tort regime is considered as one of the most adequate regime to ensure remedy to the affected consumers by defective products especially in cases where there is no contractual relationship between producer of a product and consumer of a defective product, the manufacturer’s liability to the consumer would be based on torts for damages and injuries caused by defective products. It is, therefore, need of the hour to understand Islamic law of torts in the context of product liability as Islamic law is a direct or indirect source of laws in contemporary Muslim states. The basis, nature and salient features of the Islamic law of torts have thoroughly been explained in the context of product liability. In this regard the author has frequently quotes from the classical *fiqh* literature. The research paper evaluates the role that Islamic law of torts can play in protecting consumers against defective products in the era scientific advancement. The paper has thoroughly analyzed the issue that in such cases whether the liability is fault-based in Islamic law of torts or otherwise. Moreover, the key notions, on which the modern tort regimes of product liability are based in the developed countries, such as the notion of product, producer, defect, potential claimants, potential defendants, causation, damage, and time limitation etc. are thoroughly analyzed in the perspective of Islamic law of torts. The chapter also addresses the issue that whether or not the Islamic law distinguishes between the contractual and tortious remedies. It has also discussed that in case a statutory duty is breached whether or not any tortious liability may arise under the Islamic law of torts. These and many other important issues have been raised in order to analyze the modern notion of ‘product liability’ in Islamic law of torts.

**Keywords:** Islamic Law of Torts, Fiqh al- Damān, Al-Taddī, Damages etc.

## Introduction:

### 1. Islamic Law of Tort: Basic Concepts:

In case there is no contractual relationship between a manufacturer and the consumer of a defective product, the manufacturer’s liability to the consumer would be based on the Islamic of tort. Islamic law of tort is termed in Arabic as “*fiqh al-daman*”.<sup>1</sup> The word “*daman*,” has variety of meanings such as liability, obligation, commitment, fine and compensation etc.<sup>2</sup>

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<sup>1</sup>Islamic law of torts is actually refers to the traditional rules of *Shariah* that are contained in the *Fiqh* manuals. To know about the product liability under Islamic law of torts one has to analyze the general principles of Islamic law of torts and then evaluate this specific emerging area of law.

<sup>2</sup> Ibn Manzur, *Lisan al-arab*; Feroz abadi, *Al-qamus al-muhit*; Saadi, Abu Habib, *Al-qamos al-fiqhi*, Dar al-fikr, Damascus, 1993, p.224; Nicholas H D Foster, *The Islamic Law of Guarantees*, *ALQ*, 16, no. 2 (2001), 139.

The classical Muslim jurists have also used the term ‘daman’ in the meaning of surety ship.<sup>3</sup> In Islamic legal context, the word *daman* has been defined as “the duty to compensate damage either by replacing the damaged property or paying its value” or “repaying the value or equivalent of the damaged property”<sup>4</sup>.

These definitions demonstrate that Muslim jurists used the term *daman* to indicate liability or duty to compensate for the damage caused to someone’s reputation, person or property. According to *Majallah (the Ottoman Civil Code)*, *daman* means: “the giving of an equivalent to the thing if it was a fungible, or the giving of its value if it was a non-fungible object.”<sup>5</sup> According to Sheikh Ali al Khafeef the basis of *daman* is the causing of damage through transgression (*ta’addi*) that attracts chastisement, and one of the basis of *Shariah* is that the effect of damage must be eliminated.<sup>6</sup> Therefore, a person doing an act resulting in damage to others is under an obligation to make good the damage he caused. Islamic law’s position in this regard is same with that of classical Roman law, which prohibits illegal acts leading to loss (*damnum injuria datum*).<sup>7</sup>

This is based on the well established principle of Islamic law: “No harm and no counter harm”<sup>8</sup> Therefore, a person doing an act resulting in damage to others is under an obligation to make good the damage he caused. This liability gives rise to an obligation to provide similar thing, the intention being to make good the damage. This liability has a religious basis in Islamic law.<sup>9</sup> The legitimacy of *daman* is proved from Qur’an, Sunnah and Ijma in order to protect and preserve lives and wealth of the people. There are many verses of the Holy Qur’an in this context such as:

“If then any one transgresses the prohibition against you,  
Transgress ye likewise against him.”<sup>10</sup>

Qur’an says:

“The blame is only against those who oppress men and wrong-doing and insolently transgress beyond bounds through the land, defying right and justice: for such there will be a penalty grievous.”<sup>11</sup>

<sup>3</sup> Al-Dardir, *Al-sharh al-kaber*, vol.3, 329.

<sup>4</sup> Al-Ghazali, *Al-Mustasfa*, Dar al-Kutub al-Elmiyyah, 1993, vol.1, 281; Ibn Qudama, Al-Mughni, vol.4, p.403; Zuhaili, *Al-Qawāid al-Fiqhiyyah wa Tatbiqatuhā fi al-Mazāhib al-Arba’a*, Dār al-Fikr, Damascus, 2006, vol.1, 547.

<sup>5</sup> Mejjallah, Art. 415-416. Other rules pertaining to civil liability in general and *daman* in particular, could be found in Book VIII, Arts. 2-100.

<sup>6</sup> Ali Al-Khafif, *Daman in Islamic Jurisprudence* (Cairo: Arab League's Institute of Research and Arabic Studies, 1971), 218.

<sup>7</sup> *Damnum Injuria Datum* is a Latin term used in Roman law. It means ‘damage unlawfully inflicted or wrongful injury to the property of another.’ It refers to damages or loss caused by the actions of a person who was acting without any legal basis. Damage caused by a trespasser; a gratuitous assault on a person or upon property are few examples of *Damnum Injuria*. The word *damnum* refers to economic loss, not the physical damage caused (available at: <http://definitions.uslegal.com/d/damnum-injuria-datum/>, (last accessed on 13.10.2013).

<sup>8</sup> Ibn Nujaim, *Al-ashbah wa al-nazair*, vol.1, 74.

<sup>9</sup> M. Fayyad, *The Transposition of the European Directive 85/374/EEC on Product Liability into Palestine and Jordan: Is it Adaptable to Islamic Law?* Global Journal of Comparative Law 1 (2012), 194-224.

<sup>10</sup> Al-Qur’an, Al-Baqarah:194

<sup>11</sup> Al-Qur’an, Al-Momin:42

Qur'an also says:

“And if ye do catch them out, catch them out no worse than they catch you out: But if ye show patience, that is indeed the best (course) for those who are patient.”<sup>12</sup>

There are many traditions that prove the legality of *daman* in Islamic law. It has been reported that the she-camel of Bara' ibn Azib entered the garden of a man and did damage to it. The Apostle of Allah (pbuh) gave decision that the owners of properties are responsible for guarding them by day, and the owners of animals are responsible for guarding them by night.<sup>13</sup> Similarly it is reported that Ayesha, the prophet's wife, had broken a pot of food given to the prophet by his other wives, and that the Prophet (pbuh) had said to her “*A pot like pot and food like food.*”<sup>14</sup>

It is also reported that the Holy Prophet (pbuh) said: “The hand that takes is responsible for what it has taken until it returns it.”<sup>15</sup>

The famous Zahiri jurist Imam Ibn hazm has said that the property is sacred therefore it is not allowed to make someone liable to pay damages for an act unless proved. The same should be endorsed by a text or consensus.<sup>16</sup> This is based on the narration from the Holy Prophet (pbuh) said: “*It is unlawful for a Muslim to take the wealth of his brother without his consent.*”<sup>17</sup>

Hence, in the context of this research the meaning of ‘compensation’ for the term ‘*daman*’ has been focused. It subsumes compensation as a restitutionary remedy (*restitutio in integrum*), including any form of monetary compensation or material remedy imposed at the party at fault in favour of the injured party, with regard to loss infringing his property.<sup>18</sup>

There are some basic elements to establish *daman* under Islamic law of tort. These are known as ‘*taddi*’ and ‘*darar*’. *Al-taddi* literally means to overstep or exceed.<sup>19</sup> In technical sense it is the violation, breach or infringement of law. In the context of *fiqh* it is used in the context of overstepping the bounds of permissible action.<sup>20</sup> A permissible action means that one which has not been declared impermissible by *Shariah*. *Al-darar* literally means harm. In *fiqh* it denotes the meaning of damage caused to someone's

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<sup>12</sup> Al-Qur'an, An-Nahl:126

<sup>13</sup> Ahmad, *Musnad*, vol.30, p.570; Abul Razzaq, *Mussanaf*, tradition no.18438, vol.10, 82.

<sup>14</sup> Al-tirmidhi, *Sunan*, tradition no. 1359, vol.3, 33.

<sup>15</sup> Ahmad, *Musnad*, tradition no. 20086, vol.33, p.277. This has become an established legal maxim in Islamic fiqh, see Al-burnu, *Al-wajiz fi idah al-qawaid al-fiqhiya*, 372.

<sup>16</sup> Ibn hazm, *almuhalla, Dar al-fikr, Beirut*, v.6, 404.

<sup>17</sup> Al-dar qutni, *Sunan*, tradition no.2885, vol.3, 424.

<sup>18</sup> Lat. In the civil law. Restoration or restitution to the previous condition. This was effected by the praetor on equitable grounds, at the prayer of an injured party, by rescinding or annulling a contract or transaction valid by the strict law, or annulling a change in the legal condition produced by an omission, and restoring the parties to their previous situation or legal relations (The Law Dictionary available at: <http://thelawdictionary.org/restitutio-in-integrum/> (last accessed on 16.04.2015).

<sup>19</sup> Dictionary of Modern Arabic (available at: <http://www.studyquran.org/resources/HansWehr-cowan.pdf>, (last accessed on 12.08.2014).

<sup>20</sup> Al-Zuhaili, *Nazariat al-daman*, 18.

reputation, person or property.<sup>21</sup> The causational link between the *taddi* and *darar* is known as *al-rabita* (the link).<sup>22</sup>

*Daman* has been classified by Muslim jurists into *daman`aqd*, *daman-al-fa`l* and *daman-al-ghasb*. The concept of *daman al-uqud* have been thoroughly analysed in the chapter five of the thesis while discussion on contract regime of product liability. This chapter expounds the notion of '*daman al-fail*' in the context of liability for defective products.

Modern jurists define '*daman al-fail*' as "the civil liability or duty that obliges or requires a person to compensate others for damage that results from his own act".<sup>23</sup> Therefore, *daman-al-fail*' can accurately be translated as tortious liability. It was upon the following Qur'anic verse, as well as other related *Sunnah*, that the traditional manuals established the principle of *Daman-al-fa`l*:

"To Solomon We inspired the (right) understanding of the matter: to each (of them) We gave Judgment and Knowledge; it was Our power that made the hills and the birds celebrate Our praises, with David: it was We Who did (all these things)."<sup>24</sup>

David, when asked to rule in the above case, decided that the owner of the land was entitled to take the lambs as compensation for damages which occurred to his crops when the lambs grazed upon his land. Solomon, knowing of David's decision, overruled it, stating that a better judgment gave the land owner the right to use and benefit from the lambs for one year during which the shepherd, or owner of the lambs, would cultivate the land and look after the crop until it reached the same height as when it was destroyed by the lambs. The concern here is not with the preference of one rule over the other, but rather with the fact that the explanation of the Qur'anic story established the principle of compensation of damage. Along with the preceding verse there are number of evidences in primary sources of Islamic law on the legitimacy of the doctrine of *Daman*.

The teachings of Prophet Muhammad's (pbuh), also supports this philosophy. The prophet instructed:

"...there shall be neither harm nor reciprocating harm".<sup>25</sup>

The Islamic law of tort is that body of law concerned with civil injury or wrong. Civil injury means any injury, legal action for which is brought to the civil court by the injured party himself, not by the state. Any injury or wrong which is designed to punish the defendant and the legal action or legal proceedings for which are taken and conducted in the name of the state is called as crime.<sup>26</sup> In other words it is the violation of man's rights while crime is the violation of right of Allah and right of state. In Islamic law, the criminal cases have been analysed and discussed by the Muslim scholars in their mutual

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<sup>21</sup> Ibid.. 23.

<sup>22</sup> Ibid.. 26.

<sup>23</sup> Zarka, *Al Madkhal Al Fiqhi Al-am*, 1017.

<sup>24</sup> Al-Qur'an, Al-Anbiyaa:79

<sup>25</sup> Al-Bayhaqi, *al-Sunan al-kubra*, tradition no.11384, vol.6, p.114; Ahmad, Musnad, tradition no.2865, vol.5, p.55; Ibn Majah, Sunan, tradition no.2340, vol.2, 784; Al-dar Qutni, Sunan, tradition no. 4539, vol.5, p.407. This was codified in the *Majallah* as Art. 19.

<sup>26</sup> Abdul Basir Mohammad, *The "Egg-Shell Skull" Rule in Cases of Nervous Shock in Islamic Law of Tort*, *Islamiyyat*, 30, 2008, 3-28.

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texts in the topic of *hudud* (pl. *hadd*, i.e. limits). Cases other than *hudud* which are treated in the topic *jinayah* (offence), or of qisas (retaliation), or of *diyat* (blood-money/blood-wit), or of *arsh* (compensation), or of *siyal* (assault), or of *ghasb* (usurpation), or of *sulh* (compromise) are dealt with as tort.<sup>27</sup> In the words of Sir ‘Abdul Rahim’:

“...the line which divides the two kinds of wrongs, torts and crimes, is sometimes very narrow or as the Muhammadan jurists put it there are some matters in which the rights of the public and of individuals are combined. The test is, to whom does the law grant the remedy, the public or the individual. If to the latter, the wrong which gave rise to the remedy will be regarded as a tort, and, if to the former, it will be called a crime”.<sup>28</sup>

As far as application of Islamic law of torts in the context of product liability is concerned it provides appropriate remedy for any harm caused by anyone to another. In case there is no contractual relationship between a manufacturer and the consumer of a defective product, the manufacturer’s liability to the consumer would be based on tort i.e. *taddi*. This liability gives rise to an obligation to provide similar thing, the intention being to make good the damage. Islamic law of tort ensures the compensation of a harm caused by anyone to others when the fault is proved on their side.

## 2. The Nature of Liability in Islamic Law of Tort:

The nature of liability in cases of product liability under Islamic law of tort can only be analyzed on settlement of some fundamental issues such as whether or not the concept of fault/negligence exists in Islamic law? What is the scope of liability for fault in Islamic Law of torts? Whether or not manufactures or producers of defective products can be held liable for the damage caused to anyone by their defective products?

A person is negligent when he does not take ordinary care in his/her actions or omissions. There are detailed rules regarding the tort of negligence in classical Islamic Jurisprudence.<sup>29</sup>

The tort of negligence in Islamic jurisprudence is older than its counter-part in English law. As Allah has given man reason and made him capable of thinking. Therefore, a person is totally responsible for his actions – a responsibility brought upon him by his reason, his will, inclinations, and choice.<sup>30</sup> An act is generally directed towards an object (*mahall*). In that case intention in order to be complete must be considered with reference to the act itself as consisting of motion of the body as well as the object. Sometimes the act itself may happen, but directly affect an object other than the one intended. This may be attributable to the means actually employed in doing the act or to ignore of the outward circumstances affecting the accomplishment of the object in view. In the employment of such means or such ignorance is due to not using that amount of judgment, attention or effort as men ordinarily use, the act is said to be negligent, heedless or careless otherwise it is called a mistake or accident (*khata*).<sup>31</sup>

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<sup>27</sup> Ibid.

<sup>28</sup> Abdul Rahim, *Muhammadan Jurisprudence*, (Lahore: All Pakistan Legal Decisions, 1977), 351.

<sup>29</sup> Joseph Schacht has negated the notion of negligence in Islamic law. He says: “The concept of negligence is unknown to Islamic law” (Joseph Schacht, *An Introduction to Islamic Law*, 182) However, this is not correct.

<sup>30</sup> Liaquat Ali Khan Niazi, *Islamic Law of Tort*, 234.

<sup>31</sup> Abdur Rahim, *Mohammedan Jurisprudence*, 221.

Any act that is wrongful in itself the perpetrator of such act will always be held liable e.g. a public road is meant for traffic and any other use of it amounts to trespass. Therefore, if a person makes a projection on a public road and the projection falls on a passer by and injures him or damages his property, the owner of the projection will be liable.<sup>32</sup> In the context of product liability we can take the example of a person who produces wine that is substandard and harms the consumer in a way that it takes his life or caused him severe harm, the producer of such wine will be held liable as the act is void *ab initio* under Islamic law. Every person is under an obligation to take care of others. In negligence cases the defendant ought to have foreseen that his act may cause injury to others.

There are numerous examples that assert the duty of care and holding a person liable under the tort of negligence in classical *fiqh* literature. It is stated in Al-bada'i wa al-Sanai:

“...if a snake or a scorpion is thrown on a road and it bites someone, then the person who threw it is liable, because his act of throwing was intentional unless the snake or scorpion moves from the place in which it was thrown to another.”<sup>33</sup>

Similarly, the duty of care is required from rescuers. The rescue cases show that a defendant who has placed a third party or perhaps even himself in a position of imminent danger, and who is sued by the plaintiff in respect of injuries suffered while taking reasonable steps to effect a rescue, the likelihood of which the defendant ought reasonably to have foreseen, cannot plead as a defense *volenti non fit injuria* and contributory negligence. Imam Al-Qarafi writes:

“Ibn Qasim said: If you fear for your life in trying to rescue a drowning man and you let him go, then there is no liability. If you are teaching someone to swim and you fear for your life and you let him go, you are liable for his indemnity but you are not liable just as in the case of the drowning man. If someone falls into a well and asks you to lower a rope for him and in the process of pulling him up you let him go because it proves too much for you, and consequently the man dies, you are liable for his death.”<sup>34</sup>

Al-Qarafi further writes:

“If you hold a rope for a man in a well to hold on to and the rope breaks, then you are not liable because it is not your (negligent act). You are liable if the rope slips from your hand.”<sup>35</sup>

*Shariah* has also hold a person liable for giving a wrongful advice. Whosoever gives a wrong piece of advice to a person as a *mufti* is said to have committed a sin. Concept of engagement of an agent or a counsel is recognized by Islam.

<sup>32</sup> Ibid.,354-55.

<sup>33</sup> Al-Kāsāni, (d.587 A.H.) *Bīdāi al-Sānāi fī Tartīb al-Sharai*, (Dār al-Kutub al-Elmiyyah, 1986), Vol.7, 273.

<sup>34</sup> Al-Qarāfi, *Al-Dhakhirah*, (Dar al-Gharb, Beirut, Lebanon, 1994), Vol.12, 261.

<sup>35</sup> Al-Qarāfi, *Al-Dhakhirah*, vol.12, 261.

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In case of liability for medical negligence, it is presumed that the medical professionals perform their duties with good intention for the safety and welfare of their patients unless proved otherwise. The basis of the above rule is moral. *Shariah* does not allow a person to practice medicine who is not qualified to do so.<sup>36</sup> In this regard *Mejjala* states:

“Some persons, who are a public harm like an unskilled doctor, are also restrained”.<sup>37</sup>

This principle is based on the tradition of the Holy Prophet (pbuh):

“A person who adopts the medical profession, though he is not a doctor, is liable (for negligence and human loss and must pay compensation).”<sup>38</sup>

There is presumption that every medical professional performs his duty for the benefit and overall welfare of the patient because human life has great sanctity and no doctor wilfully destroys the life of his fellow human being. But this presumption may be rebutted if the negligence committed by the doctor can be proved. If the intention of the doctor is not to cure the patient but to harm him, then he is civilly as well as criminally liable whether the patient dies or not. The general rule is that a doctor or a medical professional must exercise such care as accords with the standards of reasonably competent medical men of his age but he is not an insurer against every accidental slip. In this regard Imam Ibn Qudama is worth to be quoted here who discussed the law of talion in medical negligence cases and writes:

“A surgeon who, on proper authorization, bleeds any one or applies leeches to him, is in no way responsible for the consequences; and an executioner who carries out a sentence of death or of flogging upon the authorization of the Sovereign is merely the latter’s instrument, unless he knows that the order is from tyrant, or given in error. In these two cases he would himself be liable under the law of talion, unless acting under violent compulsion.”<sup>39</sup>

According to the *Hidāya*, it states:

“If a surgeon performs the operation of phlebotomy in any customary part, he is not responsible in the case of the person dying in the consequences of such operation. This is the view taken by *Al-Mabsūt*. The ground on which the law proceeds in this particular is ,that it is impossible for the operators to guard against consequences, as those must depend upon the strength or weakness of the constitution in bearing any disorder or pain, and as this is unknown , it is therefore impossible to restrict the work to the condition of safety.”<sup>40</sup>

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<sup>36</sup> Ibn Majah, Sunan, tradition no.3466, vol.2, p.1148; *Al-nasaī*, Sunan, tradition no. 4830, vol.8, 52; *Al-darqutni*, Sunan, tradition no.3438, vol.4, 265.

<sup>37</sup> *Mejjala*, Art.964.

<sup>38</sup> *Ābdul Qadīr ‘Awadah, Al-Tashri ‘al-jina’I’ fi’ al islām*, Vol.1, 523.

<sup>39</sup> Ibn Qudama, *Al-Mughni*, Vol.5, p.398; vol.9, 165.

<sup>40</sup> *Al-Marghinani* (d.593 A.H.), *Al-Hidāya*, (Beirut: Dar Ihyā al-Turāth al-Ārabī), vol.3, 243.

Whatever is required from a doctor he should not authorize anyone else for doing the same. If the surgeon operated upon a patient and asked someone else (most probably he delegated the duty of stitching the wounds to his subordinate staff or junior colleague and the patient dies as a result of the negligence on the part of the person who was delegated the duty as mentioned above) his legal position will be analogical with the surgeon who asks a patient to take poison for medical purposes for immediate treatment. In case of anaesthesia the doctor should follow all the limits prevailing in the profession and must take maximum care in order to avoid harm to the patient. If has crossed any limits then nothing shall exonerate him from liability. The doctor must exercise best practices in the field and take maximum care of the patient. They are responsible for gross carelessness due their acts and omission. Liability for negligence extends to the hospital and other staff of the hospital as well such as medical officers, house officers, visiting surgeons, physicians, anaesthetists and radiographers etc. The Islamic law regarding medical negligence is so exhaustive that it extends even to druggists, barbers and circumcisers. All of them are liable to pay compensation for their negligent act.

According to Imam Nawawi:

“It is not obligatory before majority, though it is recommended to proceed to this operation on the seventh day after birth and not to put it off unless the child has not yet sufficient strength to support it. Any one, who performs circumcision at an age when child is not yet strong enough to support, is liable under the law of tort, if the operation caused death. On the other hand a guardian is not responsible for the consequences of circumcision effected at an epoch when the child has a constitution sufficiently developed to be able to undergo the operation”.<sup>41</sup>

According to Prof. Heyd, medical negligence entailed punishment in the ottoman criminal code:

“to protect surgeon against claim for *diyyah* it seems to have been normal practice that people formally engaged themselves in the law court not to bring an action against a surgeon who, at their request, was about to treat or operate upon themselves or their next of kin, in case something went wrong. This was certainly a necessary precaution, since a circumciser, who by misunderstanding, cut off a boy’s glans penis, had to pay his father damages.”<sup>42</sup>

Thus an unqualified doctor may be prevented from practicing medicine. Similarly, the Islamic law also recognizes inhibition of a limited character by which unskilled persons may be prohibited from pursuing certain occupations because of the danger to the public. This is rule can be applied to the producers of defective products and they may be prevented from further production of the products.

As it is clear from the above discussion that Islamic law has highly stressed on the fulfilment of duty to take proper care while performing some obligation and the

<sup>41</sup> Al-Nawwawī (d.676 A.H.), *Minhāj al-Talibīn*, 2005, Vol.1, 306.

<sup>42</sup> Uriel Heyd, *Studies in Old Ottoman Criminal Law*, edited by V.L. Menage, (Oxford: Clarendon Press, 1973), 309.



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violation of such duty of care is strongly condemned. In Islamic law of tort the violation of such a duty is termed as '*al-taddi*'. Here Muslim jurists distinguish between acts mentioned in the Qur'an or the Sunnah and those that are not. Thus, if a person violates a duty, *wajib*, imposed by the Quran or if he commits a forbidden act, *Haram*, he is liable.

Although the Qur'an indicates the conduct a Muslim should follow, it does not prescribe the punishment for violations of its rules. The custom is the second criterion used to classify conduct into permissible or impermissible the jurists adopted public customs in deciding cases related to public affairs and private custom for all other. In deciding the liability of a professional, they would look at the custom of the profession of which he is a member. This is based on the well known notion of Islamic law i.e. that "*what is permitted by custom is the same as what is permitted by God*".<sup>43</sup>

Simply, the determinant in deciding if a person has committed a tort is whether he has violated a divinely ordained order or custom thus, the recent classification of the Islamic law of torts as a fault system is questionable because an infringer may be held liable without fault on his part.<sup>44</sup> For example, if a man walks on a slippery floor with due care and without any fault or carelessness and falls and damage property belonging to another he will still be liable under Islamic law; under a fault system he will not be liable because he is not in breach of his duty of care. This applies to all *mubasharah* cases which do not require *ta'addi*.<sup>45</sup>

Even in *tasbib* cases, *ta'addi* does not always coincide with the notion of fault. For example, in a case in which a man digs a well deeper than custom dictates, he will be liable for breaking custom even though he sought the advice of an expert who advised him that he could dig deeper than the usual depth as long as he digs to the normal depth he will not be held liable, regardless of whether he should not have dug in the first place, or whether he should have sought the advice of an expert hence whether the infringer should have reasonably foreseen the likelihood of the damage is irrelevant.<sup>46</sup>

Hence, the liability under Islamic law of tort is fault based. It is pertinent to mention here that according to M. Musleh-ud-Din, civil liability in Islam is neither "*fault liability*" nor "*strict liability*", but may be described as "*damage liability*". Thus general principle of liability in Islam is "no liability without damage" which repudiates the idea of both "*strict liability*" and "*fault liability*" and steers clear of the confusion to which law of torts is subjected.<sup>47</sup>

### 3. Potential defendants in Islamic Law of Torts:

Under Islamic Law, the list of potential defendant is even wider than English law. It means that everyone who causes damage to another will be held liable. As we have gone through the principle that under *Shariah* there is *no harm and no counter harm*, *harm has to be removed* and other principles alike. It is because of this that some Muslim writers named the liability under the Islamic law of torts as damage-based liability rather than fault or no-fault liability. Muslim scholars are of the view that if an

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<sup>43</sup> Al-Burnu, *Al-wajīz fi idāh al-qawā'id al-fiqhiya*, 306

<sup>44</sup> Al-Zuhaili, *Nazariat al-daman*, 196

<sup>45</sup> Ibid.

<sup>46</sup> Majjalla, Art.924; Ali-zuhaili, *Nazariat al-daman*, p.199; Al-zuhaili, *Al-fiqh al-Islami wa adillatuhu*, vol.7, 5646

<sup>47</sup> Musleh-ud-Din, Muhammad, *The Concept of Civil Liability in Islam and the Law of Torts*, 351-3

infant under the age of seven accidentally damage the property of another while walking or riding, he will be held liable and must compensate for the damage out of his own asset. If he owns nothing, his guardian will have to pay out of his own assets here contrary to the law of contracts, in which minors are not allowed to form a valid contract; it is irrelevant whether this infant could comprehend what happened.<sup>48</sup> Similarly, lunatics are liable for their tortuous acts. In spite of the fact that traditional *Shaiah* did not adopt the notion of fault or negligence to determine the liability of an offender, it does use terms like careless, negligent, squander etc. in connection with *ta'addi* these subordinating terms are not criteria upon which liability is based but merely a few examples of different ways in which *ta'addi* can occur.<sup>49</sup> The important point in *Daman al fai'l* whether *mubasharah* or *tasbib*, is not whether the infringer is at fault, comprehends his acts or foresees their results, but the fact that damage caused by his act renders him liable to compensate for it. This leads some modern scholars to conclude that *Daman-al-fai'l* is a system of strict liability. They based their view on the Islamic principle "*Al gurm bi Al gunm*", "damage for profits" which the Prophet used in his statement "*Al Karaj Bi Al Daman*", which means that a person who gains the profit or benefits of a thing should bear the related risks.<sup>50</sup> In the context of manufacturing of products for the commercial purposes according to the well known principle of Islamic commercial law every profit has a corresponding liability i.e. *Al-kharaj bil-daman*, everyone who is gaining some sort of profit can be held liable. Hence, manufacturers, producers, retailers, distributors and sellers can be held liable if the defect in the product is due to their acts or omissions as all of them are entitled to profit. Therefore, the liability imposed upon them should be in proportionate according to their profit.

#### 4. Potential Claimants in Islamic Law:

The role of individuals as complainant of violation of their rights is highly stressed upon in the sources of Islamic law. Therefore Islamic law has assigned the duty of ordaining right and repelling evil to every member of the Muslim society. It has mentioned guidelines for both i.e. individuals and the state to realize the concept of rational consumption and protection of consumer's interests. Hence, every individual especially those whose rights are violated is authorised to file a complaint against the violation of any consumer right to a competent authority. In fact, the individuals obsession to the injunctions of the *Qur'an* and the *Sunnah* regarding commercial activities firstly secure their happiness and of the whole society as it is the foundation for the whole Muslim community especially today when all the people have become materialistic, the return to the direct revelation of the Holy *Qur'an* and the *Sunnah* of the Prophet (pbuh) has become unavoidable to bring all from the darkness to the light.<sup>51</sup>

<sup>48</sup> Al-zuhaili, *Nazariat al-daman*, 265.

<sup>49</sup> Ibid.

<sup>50</sup> Ibn Qudāma, *Mughnī*, vol.3, 489; Shah Walīullah Al-dihlawī, *Hujjat-Allah al-baligha*, (Dar al-jeel, Beirut, Lebanon), vol.2, 174; Al-maqdsī, *Zīa al din*, Al-sunan wa *al-ahkam anil-mustafa alaihi al-salam*, Dar Majid A' siri, Saudi Arabia, 2005, vol.4, 389.

<sup>51</sup> The following teachings of the Holy Qur'an are significant in this regard: "O people of the Book! There hath come to you our Messenger, revealing to you much that ye used to hide in the Book, and passing over much (that is now unnecessary). There hath come to you from Allah a (new) light and a perspicuous Book" (Al-Qur'an, Al-Māidah:15); "Wherewith Allah guideth all who seek His good pleasure to ways of peace and safety, and leadeth them out of darkness, by His will, unto the light, guideth them to a path that is straight" (Al-Qur'an, Al-Māidah:16); "Verily, this is my way,

## 5. Product and Types of Defects in Islamic Law of Tort:

In Islamic Law, only those products may be covered which are produced by human effort such as anything manufactured in factories, bakeries, restaurants etc. Things that are naturally produced such as agricultural products i.e. crops will not be covered in the definition of product because nobody can be held liable for it if there is no such intervention of human being. Such cases may be considered as the act of God which is excluded from the definition of product under Islamic law. As far as kinds of defects in products from Islamic law perspective is concerned, Islamic law has recognized various warranties in favour of the consumers such as *Khiyar al ayb* (Option of Defect), *Khiyar al-tadlis* (the option of fraud), *khiyar al-ru'yah* the option of inspection, and. Muslim jurists have regarded *khiyar al-'ayb* the option of defect as a rubric for the study of options.<sup>52</sup>

The option of defect is the focal point in this context. Defect is anything that is considered by the prevailing custom in a place as a defect”.<sup>53</sup>

Nowadays, inadequate instruction or what is known as “*instruction defect*” is a well established defect in contemporary legislation. In this regard, Islamic law stipulates that the instruction from any instructor must produce an effect direct to the result of destruction. If the result of destruction is outside of any instruction or command, the instructor is not vicariously liable for what had happened. In other words, the instruction should have relation with destruction.<sup>54</sup> If it is separate from it, it is not considered as liability upon the commander. For example, a person commands a minor who has reached the age of discretion to drive an animal. Suddenly, the animal causes injury to a person who dies in consequence, the liability is upon the family (*aqilah*) of the minor not upon the commander because the accident is separate from the command.<sup>55</sup> Hence, its moral as well as legal responsibility to give adequate instruction of a product. Similarly, Islamic law recognize all those defects that are considered as defects in a prevailing custom. Provided it does not violate any established norm of Shariah.

The instruction defect under Islamic law is concerned it is the duty of the producer of a product to provide adequate warning of the product's danger and direction for safe use. Islamic law makes no distinction between products with concealed dangers and those with patent dangers. In both cases, the manufacturer is liable for inadequate warning but the mere fact that the warning is clear does not exclude the manufacturer's liability unless the warning is sufficient to extinguish the possibility of its occurrence. For example, if a product is flammable and a manufacturer's just says “keep in a cool place”, a consumer might think the product will deteriorate rather than explode when subjected to heat and, hence, the manufacturer's duty is not discharged. If he warns, “flammable, keep in a cool place”, his liability is discharged as there is no “*ta'addi*” on his part. Sometimes, a warning is not sufficient to discharge the manufacturer's liability. This happens when the dangers of the product are not remitted by the mere statement of the warning and, thus, such warnings are ineffectual. Manufacturer's liability here depends on the

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leading straight: follow it: follow not (other) paths: they will scatter you about from His (great) path: thus doth He command you. That ye may be righteous.” (Al-Qur'ān, Al-An'am::153).

<sup>52</sup> S E Ryner, *The Theory of Contract in Islamic Law* (London: Graham & Trotman, 1991), 305.

<sup>53</sup> See chapter 5 of the thesis for a detailed discussion on *Khiyarat*-options in Islamic law.

<sup>54</sup> Ábd al Bašīr Bin Mohammad, *Vicarious Liability: A Study of the Liability of Guardian and His Ward in Islamic Law of Tort*, Arab Law Quarterly, Vol.17, No.1 (2002), 39-49.

<sup>55</sup> Ibid.

manufacturer's knowledge of the danger, but assumes that he is able to discover any dangerous feature of the product and give suitable warning and directions for safe use.<sup>56</sup> This is due to the fact that if the danger exists and does not know about it, this in itself is a *ta'addi* which renders the manufacturer liable. The function of warning is to illustrate the dangers of a product, while the function of instructions is to indicate how to obtain the most beneficial results from the product.<sup>57</sup> The latter alone is insufficient to illustrate the dangers of a product. At the same time, warning of the dangers of the product may be inadequate without direction as to usage. *Shariah* has no objection on holding the manufacturer liable if he fails to recall a dangerous product already marketed once its danger has been discovered. Such attitude constitutes *ta'addi* on the part of the manufacturer.<sup>58</sup>

Islamic law of torts has recognised all these warranties in favour of the consumers and also made him responsible to act vigilantly to prevent violation of his rights. What if the defect cannot be discovered by normal means of inspection as in the case of current age where almost every product is the outcomes of technological mysteries and it is beyond the capacity of a man of common prudence to identify the defects or the harms that the products may cause? Islamic *Shariah* would definitely recognise all means to prevent such harms under the notion of *Sadd al-darai* i.e. block the ways leading to unlawful results.<sup>59</sup>

However, the consumer should give an immediate notice to the seller after such defect is discovered. In such cases the consumer has the option of defect and he can cancel the sale and claim damages or to keep the sale object and claim compensation for the absence of the expected characteristics due to the defect. Not exercising his option would result in losing his right to claim. The question here is that whether or not the seller's ignorance of such defect constitutes a defence? Ignorance on the seller's part in such case is no defence. However, knowledge in the consumer's part is construed as indication of *mala fide*, and is therefore an acceptable defence, be that knowledge actual or constructive. These *daman* rules will be applicable as soon as the product is transferred to the consumer.

In cases where the defect in a product occurred due to the negligence of the workmen in a factory, whether or not the manufacturer can be held liable under Islamic law. Manufacturer must ensure that there is no miscarriage in the production process. It is possible by having a system of quality control to inspect the safety of the products. If an employee makes an error while following the manufacturer's instruction, the manufacturer cannot defend himself in asserting that Islamic law does not know the doctrine of *respondent superior* because Islamic law does hold a master liable if he gives direct orders to his servant. Imam Abu Yusuf has mentioned an example from which we can understand the status of *respondent superior* under Islamic law, he writes:

“If one of the merchants finds in the bazaar, the outskirts of town, or the streets orders one of his employees to water down the outside of neighbouring houses and this act causes

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<sup>56</sup> Nagla Saad Maḥmoūd Nassar, ‘*Manufacturer’s Liability under Islamic law*’, LLM (unpublished) thesis submitted to the Law School, Harvard University, U.S.A. 1985, 14.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> Ibn al-Qaiyyem, *I’lam al-muaqi’en*, Dar al-kutub al-elmiya’, Beirut, vol.3, 108.

death of a person, the one who has given the order is responsible. If, however, he has ordered his employee to make his ablutions and this employee goes out into the street [and causes an accident there], the employee is liable, the reason being that the ablution is for the benefit of the one who performs it, whereas the watering down benefits the one who ordered it.....”<sup>60</sup>

In this context Sahnun is relevant to be quoted:

“A launderer who has much clothing to launder, hires a helper whom he orders to go to the river to wash some of the garments. He is responsible if the helper loses any of the clothes”.<sup>61</sup>

Hence, the liability will be of the manufacturer for the negligent act of workmen in his factory. The definition of defective product depends largely on the types of damages recoverable under a certain system of law. The wider the ‘heads’ of damages recoverable, the wider the scope of defectiveness, and this relative concept depends on the time and place of consummation of the product. The defects causing pure economic loss come within the ambit of *Daman*, with the consequence that the categories of defects included are enlarged, thereby widening the scope of product liability under Islamic law.

#### **6. Evidence and Causation in Islamic Law:**

Under the traditional Islamic law a consumer has to prove the defective condition of the product and the causal link between it and the damage caused to him. If a manufacturer wants to discharge his responsibility he has to prove that he committed no *ta’addi*. He will have difficulty proving this unless he can show that the harm was due to faulty component products or containers. He must then prove that these defects were concealed and that no intermediate inspection or examination could reveal them. Even if the manufacturer of the end product discharges his liability, the manufacturers of components or containers still face liability. In order to establish the liability for manufacturing products under the traditional Islamic law of torts it is very much important to under the concepts of *mubashara* and *tasbib*. Traditional manuals distinguish between the direct, *mubashara*<sup>62</sup>, and indirect, *tasbib*<sup>63</sup> inflictions of harm or destruction.<sup>64</sup> The legal concept of these two expressions is based on their literal meanings, “*mubashara*” denotes cases in which damage is caused due to direct contact by the offender while “*tasbib*” denotes the situation in which harm or destruction has resulted from several causes, one of which is the offender’s act. In the traditional manuals there are endless numbers of examples for both *mubashara* and *tasbib*. For instance, if a

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<sup>60</sup> Abu-Yusuf (d.182 A.H.), *Kitab al-Kharaj*, Al-Maktaba al-Azhariyah Li al-turath, vol.1, 175. Herbert J. Liebesny, *The Law of Near and Middle East*, 218.

<sup>61</sup> Mālik, *Al-Mudawwana*, (Riwayat Sahnun) Dar al-Kutub al-Elmiyyah, 1994, vol.3, 401.

<sup>62</sup> The word *Mubashara* is derived from “*Bashr*” which means to be in direct contact with something or someone, or to practice a job or carry out a task.

<sup>63</sup> The word *Tasbib* is derived from “*Sabab*” which means to be the cause of or to motivate.

<sup>64</sup> Here it is pertinent to explain that defining *Mubashara* and *Tasbib* the as direct and indirect must be distinguished from the notion of direct damages which are recoverable and indirect damages which are not because the causal link between them and the offender’s act is weak. Here, using the words direct and indirect must not be taken as an indicator that the causal link in cases of *Mubashara* is stronger than in cases of *tasbib* because this would be a misleading concept.

sleeping person rolls over a thing placed by his side and damages it, this is destruction through *mubashara* because the damage was due to direct contact between the sleeping person and the damage object.<sup>65</sup> The reason is that capacity is not a requirement to hold some one liable under the Islamic law of tort.<sup>66</sup>

However, the direct contract which is a feature of *mubashara* must not necessarily be physical contact. Thus if a person who is hunting mistakenly damage property belonging to someone else with his arrow, he is then liable for damages. This case is considered a *mubashara* case because the shot of the arrow directly caused the damage to the property. Such is not the case if one lights a fire and a gust of wind carries some sparks to a neighbouring house which is burned as a result. Here the offender's act would have not resulted in a fire if the wind had not carried sparks to the neighbour's house and, hence, this is a *tasbib* case. This distinction between *mubashara* and *tasbib* is one of great practical importance. In the former it is irrelevant whether the offender violated an obligation or not because he will still be held liable for the damage he caused in the later case, a person can only be held liable if he violated a duty imposed on him.<sup>67</sup>

## 7. The Notion of 'Damages' in Islamic Law of Torts

*Shariah* secures interests of the people and avert harm from them. It provides mechanism to protect an individual against the actual as well as expected harm. In Islamic law of tort, various types of remedies may be granted to the plaintiff such as injunctions, *qisas* i.e. retaliation e.g. in a situation when the manufacturer produces a harmful product with a mala fide intention, *diyat* (blood-mony), *ghurrah*,<sup>68</sup> *radd* (restitution/refund), recovery, abatement of nuisance, distress damage feasance, action for measne profits, self defence and action in cases of *ghasb* and *itlaf*. Moreover, *arsh* and *daman* may also be granted. Thus, in cases of product liability the possible remedies that may be granted under Islamic law of tort are: *daman*, injunctions, restitution, recovery of pecuniary loss, *diyat*, *arsh*, *ghurrah* and compensation for any loss caused to a person or his property. For example in the context of product liability an injunction may be granted against a manufacturer producing a defective product that is harmful to the consumers. In this regard Majjela states: "Excessive damage in whatever way it may be caused is to be removed".<sup>69</sup> The provisions related to *Qisas*, *Diyat* and *Arsh* may be invoked where the product has caused someone's death or injury in his body. However, *Daman* seems to be the most applicable remedy in cases of product liability. It may be granted as a distinct remedy or jointly with another remedy.

Under the traditional *Shariah* the defendant is liable for all losses resulting from his own act, whether or not foreseeable or normal. Consequently, if a defective heater

<sup>65</sup> Almausa' al-fiqhiya al-kuwaitiya, vol.42, 24; Al-Zuhaili, *Nazariat al-Daman*, 197.

<sup>66</sup> Ibid.

<sup>67</sup> On the other hand modern law of torts on the subject of product liability are divided into two distinguishable approaches. The first is the fault system which bases tortuous liability on negligence or fault. The crucial issue in this system is the definition of faulty conduct. The second system is the no-fault system which is based on the philosophy that he who gains the profits must bear the losses. Therefore, a producer who gains profits out of his products must bear the product' risks. Hence, if his products turn out to be defective then he must bear the losses and compensate the injured person.

<sup>68</sup> Ghurrah: This kind of compensation is due in the case of destruction of an embryo or a full form child stillborn as a result of assault, for example, suffered by the mother during her pregnancy, N.J: Coulson, *A History of Islamic Law*, 195.

<sup>69</sup> Majjallah, Art.1200.

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explodes and burns the house, the manufacturer of such product would not only be liable to replace the house and its belongings; for if there was a precious diamond in the house, he would also be liable to replace it, even if it was not foreseeable that in ordinary circumstances such an expensive item would be kept at home.<sup>70</sup> Also, if in the above mentioned example, the owner of the house dies and his wife upon hearing the news becomes paralysed, the manufacturer would be liable for the *diyat* of accidental homicide plus *arsh* to compensate the injuries of the wife, though they are not normal or foreseeable results of his act.<sup>71</sup>

It is pertinent to answer here the question that whether or not the traditional Islamic law distinguished between contractual and tortious liability. There are two groups of modern writers on this point. According to some modern writers such distinction is not known under Islamic law since it never laid down general principles or legal theories.<sup>72</sup> This is true, but to say that consequently the Islamic law knew no practical distinction is misleading. In cases of *Daman al Aqd*, contract, the two parties must be prudent otherwise they cannot sue since in the first place they were not supposed to contract. Also, if there is more than one party, they may be held jointly liable, while in *Daman al fa'l*, tort, Islamic law does not recognize any kind of joint or several liability. Thirdly, the jurists made such distinction clear in the measure of damages in each case. In this context, it is relevant to discuss various types of damages in Islamic law of torts. In this category, the first is physical damages. Any one intentionally or un-intentionally caused death of a person or injured another is subject to *Diyat* (blood-money).<sup>73</sup> *Diyat* is actually a tortuous remedy for the violation of a private right of the injured person or his heirs who are entitled to recover it from the wrongdoer or his *Aqilah*.<sup>74</sup> Generally speaking, homicide is of five kinds in Islamic law, namely: (i) intentional murder; (ii) quasi-intentional murder; (iii) murder by mistake; (iv) murder equivalent to mistake; and (v) indirect murder.<sup>75</sup> However, it only in case of *Qatl-i-Amad* (intentional murder) that gives the right to *Qisas*

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<sup>70</sup> Nagla Saad Mahmoud Nassar, '*Manufacturer's Liability under Islamic law*', LLM (unpublished) thesis submitted to the Law School, (U.S.A: Harvard University, 1985), 15.

<sup>71</sup> Ibid.

<sup>72</sup> N.J. Coulson, *Commercial Law in the Gulf States*, 67-6; Nagla Saad Mahmoud Nassar, '*Manufacturer's Liability under Islamic law*', LLM (unpublished) thesis submitted to the Law School, (U.S.A: Harvard University, 1985), 42.

<sup>73</sup> In this regard the Holy Qura'n states. "Never should a believer kill a believer; but (If it so happens) by mistake, (Compensation is due): If one (so) kills a believer, it is ordained that he should free a believing slave, and pay compensation to the deceased's family, unless they remit it freely. If the deceased belonged to a people at war with you, and he was a believer, the freeing of a believing slave (Is enough). If he belonged to a people with whom ye have treaty of Mutual alliance, compensation should be paid to his family, and a believing slave be freed. For those who find this beyond their means, (is prescribed) a fast for two months running: by way of repentance to God: for God hath all knowledge and all wisdom" (Al-Qur'an, An-Nisa:92).

<sup>74</sup> *Aqilah* is group of close relative who must pay in the offender's stead. In terms of Islamic criminal law, it means agnatic male relatives of a person on his father's side, or an institution or organisation from which he receives or expects to receive support or help. (Dr. Anwarullah, *The Criminal Law of Islam*, 107).

<sup>75</sup> Awdah, *al-Tashri al-Jinai al-Islami*, Vol.2, 7-9; Anwarullah, *The Criminal Law of Islam*, 55. This is in the view of Imam Abu Hanifa. According to majority of the jurists homicide in Islamic criminal law is of three kinds, namely: (i) Intentional murder (*Qatli-al-'amad*); (ii) Quasi-intentional murder (*Qatl-Shibh-al-'amd*) and (iii) Murder by mistake (*Qatl-al-Khata*). Imam Malik is of the view that murder is only of two kinds, namely: (i) intentional murder and (ii) murder by mistake.

(retaliation) and in all the others *diyāt* is paid to the heirs of the victim. Even in cases of *qatli amad* when *qisas* is not possible right to *diyāt* is always there.<sup>76</sup> In cases of injury, when a person intentionally injures another he is subject to *qisas* i.e. retaliation and fixed compensation i.e. *arsh* and in cases of un-intentional physical injuries the offender is only liable for *arsh*. The term is unanimously used by the Muslim jurists to denote the meaning of compensation for physical injuries.<sup>77</sup> Hence, both *diyāt* and *arsh* are money paid in compensation for death or physical injury. They are both fixed by law and find their basis in the Qur'anic verse.<sup>78</sup> Fixed compensation for physical injury is called *arsh* while unfixed compensation is called *Daman*.<sup>79</sup> The amount of *arsh* is asserted against the amount paid as *diyāh*.

Similarly, Islamic law of torts equally recognizes the property damage. Under Islamic law compensation must not necessarily be a sum of money, and thus, if a person ruins another's car or clothes he has to replace them. Also if the object is partly ruined, such as, a defective heater, the compensation will only be the difference between the price paid for a sound product and the actual price of the defective one. But if the defect completely renders the product useless and unfit for its purpose, the consumer will have the option of giving back the defective product and taking the sale price.

#### **8. Breach of Statutory Duty and Post-Marketing duty in Islamic Law:**

Islamic law has also put responsibility on the manufacturer not to commit *ta'addi* or *taqser* is a continuous one. Therefore, if after marketing, the product is discovered to be defective and possibly dangerous, the manufacturer has to withdraw the product from the market and do whatever possible to prevent harm; otherwise he will be held liable for it. The duty imposed on manufacturers not to cause harm to consumers emerges from the general rules of tort, but is also a statutory obligation imposed by the ruler out of his right to *Tazir*. To ensure the preservation and protection of *Maqasid al-Shariah*, Islamic law has mentioned different types of punishments for various offences. In this regard the Islamic penal system should briefly be analysed. The offences for which specified penalties are provided are called *Hudud*. Those in which *Qisas* or reparation is provided are called *Jinayat*. Punishments that are at the discretion of the judge when the offence is related to a private injury are called *ta'zir*. Offences that are mainly directed against the system and society or where the pure right of the state is affected are called *siyasah* penalties. Some offences that are corrected by acts of personal penance are called *kaffarat* (expiation).<sup>80</sup>

Thus, it is clear that Islamic law allows the Islamic state to ordain punishments for the protection of community interest under the concepts of *Taz'ir*. Keeping in view the gravity of offences and penalties related to the issues of consumers some of the characteristics of *Tazir* have been highlighted here. The broad purpose of *Tazir* punishment is the prevention of any conduct prejudicial to the good order of the state. The state may intervene under this head in cases of a strictly civil nature; in particular, it may punish persons who have committed homicides or assaults when they have been pardoned

<sup>76</sup> Qisas is based on Quran; see chapter no. 2, verse no. 178.

<sup>77</sup> Ibn Qudama, *Al-Mughni*, vol.4, 111; Al-ghanim, *Majma' al-damant*, vol.1, 48; Ibn Abidin, *Rad al-Muhtar*, vol.5, 16.

<sup>78</sup> Al-Qur'an, An-Nisa:92

<sup>79</sup> Anwarullah, *The Criminal Law of Islam*, 118.

<sup>80</sup> Nyazee, *Outlines of Islamic Jurisprudence*, (Islamabad: Centre for Islamic Law and Legal Heritage, 1998), 243.



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by the victim or his representatives.<sup>81</sup> *Taz`ir* punishments vary in both quantity and quality according to the seriousness of the offence. To protect the interests of the consumers, Islamic state may inflict punishments for omission of duties and commission of wrongs.<sup>82</sup>

Moreover, once any product is proved to be defective its further supply should be stopped by the concerned authority. This action is also endorsed by the well established principle of Islamic law *sad al-zarari* i.e. (blocking the means). Hence, a mean which leads to an evil, or an unlawful end, will be regarded unlawful, though it may otherwise be valid.<sup>83</sup> The notion of *sad al-dharai`* refers to an act which has a benefit but it leads to an evil. Thus, it is prohibited by the lawgiver and there are number of verses of the Holy Qur`an and traditions of the Holy Prophet (pbuh). Qur`an says:

“And insult not the associators, lest they insult God out of spite and ignorance”.<sup>84</sup>

The means to an evil is blocked by putting a ban on the idol-worshippers. Similarly, the Prophet (pbuh) forbade to be alone with a woman who is not within prohibited degree of marriage. He said: “if you do that, you will cut off your kinships”.<sup>85</sup>

Similarly, in the context of defective products they may cause harm to the general body of consumers, hence its further sale and supply has to be controlled and the already supplied products are to be recalled. The manufacturer may suffer great loss the loss in order to avoid greater harm from the general body of consumers. This is endorsed by the Islamic notion of ‘*al-maslah al-ama tuqadamu ala maslaha al-khasa`*’ i.e. public interest is to be preferred over private interest.<sup>86</sup> In imposing this duty upon the manufacturer there is no distinction between chattels dangerous per se and others; in both cases, manufacturers have to give adequate warning of danger and proper direction for use. The fulfillment of this duty may not always free the producer from liability. It is not important under Islamic law that whether or not the manufacturer has anticipated the damage or ought to have reasonably foreseen it. A manufacturer will be held liable even if he could not have reasonably foreseen the damage.

## 9. Defenses under Islamic Law of Tort:

In Islamic law the liability in tort can only be avoided in case of: force majeure or act of God; act of a third party; the act of the victim itself.<sup>87</sup> However there are five exceptions to this rule (a) when the direct action is founded on the cause, (b) when the indirect injurer misleads or forces the direct injurer, (c) when there is an ill intention on the part of the direct injurer but not on the part of the indirect injurer, (d) when the indirect action is most effective in creating injury, and (e) when it is impossible to make direct injurer liable for the injury.<sup>88</sup>

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<sup>81</sup> N.J. Coulson, *A History of Islamic Law, Edinburgh*, 1971, 120-34.

<sup>82</sup> Ibid.

<sup>83</sup> Ibn al-Qaiyyem, *I`lam al-muaqi`en*, Dar al-kutub al-elmiya`, Beirut, vol.3, 108.

<sup>84</sup> Al-Qur`an, Al-An`am:8

<sup>85</sup> Al-Tabrani, *Al-Mu`jam al-kabir*, vol.11, 337.

<sup>86</sup> Ahmad Al-raisoni, *Nazriyat al-Maqasid inda Imam al-shatibi*, Al-dar al-alamia lilkitab al-Islami, vol.1, 167.

<sup>87</sup> Monzer Khaf, “*Economics of Liabilities: An Islamic View*” (2000) 8(2) *Journal of Economics and Management* 92.

<sup>88</sup> M. Fayyad, *The Transposition of the European Directive 85/374/EEC on Product Liability into Palestine and Jordan: Is it Adaptable to Islamic Law?* *Global Journal of Comparative Law* 1 (2012), 194-224.

When the plaintiff's sustained injuries because of his own fault, the court may apportion damages according to the respective degrees of fault. Islamic law has also recognised the defence of contributory negligence. In cases where both the parties have acted, the principles of contributory would apply by attributing damage to the act of both and the loss is divided.

The person, who does an act, even if he does not act intentionally, is held liable. In this context, it is pertinent to quote Al-Hidaya:

“If a person knowingly and wilfully passes over a road in which water has been spelt and perishes in consequences of falling in it, nothing whatever is incurred by the person who spilt the water, since here the deceased has perished from his own wilfulness or obstinacy”.<sup>89</sup>

Thus, Islamic law has treated contributory negligence as a valid defence in favour of the defendant which can be used in the context of product liability and the court is having the discretion to consider it and apportion the damages accordingly.

a) **Vis major:** It means an irresistible force, e.g. a storm, or an earthquake.<sup>90</sup> In Islamic jurisprudence the circumstances that generally affect the legal capacity of a person are classified into two types: Natural causes (*Samawi*) are those which are beyond the control of man and acquired causes (*Maksuba*) that is, those which are created by man.<sup>91</sup> If someone usurps the property of another, he is liable for any damage which may include removing earth from the land, damaging the foundation of the building, digging a well or cultivating the land or any other injurious act. If such land is damaged by Act of God while in the possession of the usurper, the wrongdoer will not be liable to pay compensation. This is the view of Imam Abu Hanifa and Imam Abu Yusuf. Whereas Imam Muhammad and Imam Shafi make the wrongdoer responsible in such a situation. Act of God may include severe damage to property, e.g. if some house or building collapses or is eroded by flood. The defendant has to prove the same.<sup>92</sup>

b) **Mistake:** Mistake is not a defence as far as the rights of people are concerned. It has been laid down in Mejjallah:

“If someone destroys the property of another under the impression that it is his own property, he will be held liable”.<sup>93</sup>

If an act which under ordinary circumstances would amount to an offence be done under a mistake, the person doing it will be given benefit of the doubt, so that sentences of the nature of *hadd* and retaliation will not be inflicted on him.<sup>94</sup>

Though the general view in Islamic law of torts is that when the cause of damage is both *mubashir* and *mutasib* only the *mubashir* is subject to liability if it was a vital cause of the harm. But, if the *mutasib* and not the *mubashir* was the main cause of the

<sup>89</sup> Al-Marghinani, *Al-Hidaya*, vol.4, 474.

<sup>90</sup> John Burke, *Osborn's Concise Law Dictionary*, 342.

<sup>91</sup> Abdur Rahim, *The Principles of Muhammadan Jurisprudence*, 219.

<sup>92</sup> Abul-Hussain al-yamani (d.558 A.H.), *Al-Bayan fi mazhab al-Imam Al-shafi*, Dar al-minhaj, Jeddah, 2000, vol.6, 497.

<sup>93</sup> Mejjallah: Art. 914.

<sup>94</sup> Abdur Rahim, *The Principles of Muhammadan Jurisprudence*, 225.

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damage, then the former and not the latter is liable to compensate such damage.<sup>95</sup> For example, if a person falsely testifies as to the ownership of property and the judge gives it to someone other than the real owner, the witness is liable to compensate such property, and not the judge, who is the *mubashir*. Same rule would be applied in cases of product liability. In cases of product liability, which are usually cases of *Tasbib* and not *Mubashara*, such as if an electrical heater was defectively designed in such manner that it could not be used continuously for a long time, the manufacturer, the *Mutasbib*, and not the user, the *Mubashir*, would be held liable for any damage caused by it. In some cases *mutasbib* alone is made liable such when the harm cannot be attributed to the *mubashir* i.e. seller in this case.<sup>96</sup> Under Islamic law manufacturer's defences will not be effective unless they extinguish the *ta'addi* and *taqser* on the part of the manufacturer. Also, if more than one person contributed to causing the damage, each will incur a proportionate share of responsibility. This rule applies even if the *ta'addi* contributing to the manufacturer's liability is that of the consumer or a third party. Similarly in Islamic law, advertisement will not excuse the manufacturer's liability because it does not remit the danger and is ineffective. It also does not extinguish the fact that the manufacturer committed *ta'addi*. The most an advertisement may do is entitle the manufacturer to a reduction in damages because of contributory *ta'addi* on the part of consumer.

#### 10. Limitation as a Defence:

In classical era of Islam a person's rights were not barred by the lapse of time and the *Qazi* was obliged to hear the claim under the law. However, *Shariah* has not put any bar on the adaptation of means to ensure speedy justice and reduce the number of undue litigation. The limitation period in Islamic law varies from case to case. In cases of criminal nature such as *Qatli-shibh-Amd*, the *Aqila* of the offender must pay compensation within three years. This period may be extended in suitable cases wherein the compensation may be recovered in installments and paid to the heirs of the victim. In case of *Isqat al-Janin*, the *ghurrah* must be paid within the period of one year according to the *Hanafi* School while *Shafi* School is of the view that the period in such cases is 3 years.<sup>97</sup> This applies only to cases in which the defendant denies the facts, but if he confesses, the judge is obliged to view the case and the limitation period never runs out. Thus, limitation periods like that of English law are absolute defences under Islamic law, and case cannot be heard after the limitation period.<sup>98</sup> However, in some cases permission to time barred suits may be given especially in cases in which the damage is still maturing or in which even though the manufacturer had denied the facts, there is strong evidence on the part of the consumer. The judge in such cases has much discretion in allowing the hearing.

#### Conclusion:

The research paper has thoroughly analyzed the most important regime of product liability i.e. the tort regime of product liability from the perspective of Islamic law of torts. Islamic law of torts ensures compensation of the consumers in cases of product liability. The primary purpose of Islamic law of torts is to define the circumstances in which a person whose interests are harmed by another may seek compensation and to

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<sup>95</sup> Al-Zuhaili, *Nazriyat al-Daman*, 191.

<sup>96</sup> Ibid. 188-193.

<sup>97</sup> Al-Ghanim (d.1030 A.H.), Abu Bakr, *Majma' al-damanat*, Dar al-kitab al-Islami, vol.1, 200; Ibn Abidin, *Rad al-muhtar*, Beirut: Dar al-fikr, vol.6, 588; Al-Marghinani, *Al-hidaya*, vol.4, 471.

<sup>98</sup> Al-Zuhaili, *Nazariyat al-daman*, 104.

impose responsibility or duty on a *tortfeasor* to compensate the damage he caused to another.<sup>99</sup> In Islamic law of torts the dominant view is that liability in such kind of cases is fault-based, however some scholars are of the view that it is a damaged-based liability which means that it is strict liability and it does not require establishing negligence on the part of the defendant that is the producer in the context of product liability. Islamic law has also given due importance to the rights of neighbours and numerous moral obligations have been stressed by *Shariah* towards neighbours. However, in legal context there are various well established principles in Islamic jurisprudence to deal with situations like *Donoghue v Stevenson*. These principles as discussed earlier are: harm has to avoided, no harm and no counter harm, greater harm should be avoided with lesser harm etc. Hence, situations like *Donoghue v Stevenson* could have been easily decided under such principles. Such legal principles were not known to English legal system. Thus, Lord Atkin resorted to the neighbouring principle. While on the other hand, to establish liability of the manufacturer there is no need for such principles under Islamic law as it has already contained legal principles in the basic sources. A thorough analysis of both the legal systems reveal that the manufacturers owe a duty of care to the ultimate consumer for the violation of which he will be held liable under the neighbouring principle in English law and transgression (*taddi*) under Islamic law.

In the Islamic law of torts the list of potentially liable defendants in product liability cases is wide. It includes repairers, assemblers and erectors, installers, importers and distributors, retailers, designers, testing agencies, distributors marketing defective products without adequate instructions etc. This list is not exhaustive. It means that everyone who causes damage to another will be held liable. It is because of this that some Muslim writers named the liability under the Islamic law of torts as damage-based liability. The scope of potential claimants is wide under the Islamic legal system and it includes every person who is so closely and directly affected by the acts of the defendant. As far as the notion of product under the Islamic law of torts is concerned it is to be valuable (*mutaqawwam*) products and those which are manufactured through human efforts. Hence, the agricultural crops that may cause harm to anyone will not be considered as product to hold the farmer liable unless some pesticide or adulteration has been proved on the part of the seller. Islamic law is flexible to recognize various kinds of emerging defects e.g. instruction defect and there is nothing repugnant to *Shariah* in this regard. Hence, in the Islamic legal system, the consumer may sue for damages in tort when his civil right is violated by the use of a defective product. In this regard, the Islamic law the burden of proof lies on the consumer whose allegation is not in accordance with the normal state of affairs because people are ordinarily free from liability.

Therefore, if after marketing, the product is discovered to be defective and possibly dangerous, the manufacturer has to withdraw the product from the market and do whatever possible to prevent harm; otherwise he will be held liable for it. The duty imposed on manufacturers not to cause harm to consumers emerges from the general rules of tort, but is also a statutory obligation imposed by the ruler out of his right to *Tazir*. In imposing this duty upon the manufacturer there is no distinction between chattels dangerous per se and others; in both cases, manufacturers have to give adequate warning of danger and proper direction for use. The fulfilment of this duty may not always free the producer from liability. It is not important under Islamic law that whether or not the manufacturer has anticipated the damage or ought to have reasonably foreseen it. A

<sup>99</sup> Ibn Qudama, *Al-Mughni*, vol.4, 403.

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manufacturer will be held liable even if he could not have reasonably foreseen the damage. Hence, the stance of both the legal systems is same regarding breach of statutory duty. Under Islamic law manufacturer's defences will not be effective unless they extinguish the *ta'addi* and *taqser* on the part of the manufacturer. Also, if more than one person contributed to causing the damage, each will incur a proportionate share of responsibility based on the principle of '*al-kharaj bil-daman*'. This rule applies even if the *ta'addi* contributing to the manufacturer's liability is that of the consumer or a third party. It is also the purpose of Islamic law of tort however compensation under Islamic law does not only aim to replace pecuniary damages but also emotional losses. In Islamic law of torts, the liability in tort can be avoided in case of: force majeure or act of God; act of a third party; the act of the victim itself.<sup>100</sup>

Islamic law has also recognized the defence of contributory negligence. In cases where both the parties have acted, the principles of contributory would apply by attributing damage to the act of both and the loss is divided. The person, who does an act, even if he does not act intentionally, is held liable. As far as the limitation period as a defence is concerned Muslim jurists have different opinions but the dominant view is that it is up to the state which can prescribe time limit for each and every kind case. However, the disadvantage of Islamic law on the subject is that there is no codification of this law in the modern context. In fact, Islamic law of tort is not a static and immutable body of rules, but is capable to meet needs of a changing society. It can equally contribute in providing justice to the people in accordance with the contemporary needs. But it needs to be contextualized.

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<sup>100</sup> Monzer Khaf, "*Economics of Liabilities: An Islamic View*" (2000), 8 (2) *Journal of Economics and Management*, 92.