MODERN PRODUCT LIABILITY LAW
JURIDICAL BASIS IN ISLAMIC LAW

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The term "*Product liability*" is used to identify the body of lawthat seeks to hold manufacturers and sellers financially responsiblefor their products not meeting safety standards. It is the area of juridical studies in which producers, distributors, suppliers, retailers, and others who make productmas available to the public are held responsible for the injuries those products cause and make compensation to the victims of such defective products. This research paper expounds the emerging legal concept of product liability from the perspective of Islamic law. The paper traces the roots of the notion of product liability in classical Islamic legal tradition. It has attempted to explore the theoretical foundations of the product liability in Islamic jurisprudence.It also embarks on defining the important notions such as producer, product, liability etc. from an Islamic legal perspective to provide basis for an Islamic concept of product liability. The examples for holding the sellers liable for defective products have been quoted and analysed from the traditional sources of *fiqh*. Moreover, the paper has highlighted the need for substantive law development in the area of product liability in Islamic law to meet challenges in the modern era of science and technology. The paper has been concluded with the findings that Islamic law has provided concrete theoretical as well as practical solutions for the issues of liability arising out of defective products. The research is basically a legal doctrinal research which is essentially a method of qualitative research and library-based study.

Key Words: Product, Liability, Defects, *Shar'iah,*

Introduction

The jurisprudence of consumer protection is expanding day by day, and it has covered many aspects of human life. There are many aspects

of the consumer law such as quality of goods and services, consumer credit finance, holiday laws, and consumer remedies etc. The area product liability law is a hybrid collection of inter-connected aspects of law. Consumer Protection against defective products has become unavoidable due to the advance technology and rapid increase in number of products and services. Products form an integral aspect of all our lives. "Product liability" is the term used to identify the body of lawthat seeks to hold manufacturers and sellers financially responsiblefor their products' safety. Product liability is the area of law in which manufacturers, distributors, suppliers, retailers, and others who make products available to the public are held responsible for the injuries those products cause. Although the word "product" has broad connotations, product liability as an area of law is traditionally limited to products in the form of tangible personal property.[1] Product liability has to be distinguished from "product safety", which is a separate regulatory regime imposing administrative penalties and regulating control of unsafe products. Both regimes have consumer protection as their common aim.

After the industrial revolution and mass production of products, the necessity of protecting consumers' rights by approving some rules regulating the relationship between producers and consumers is greatly felt. Product Liability law is the outcome of such an effort. It is a body of law which solves this problem and provides compensation for physical injuries and property damage resulting from defective and unreasonably dangerous products, and from the failure of a manufacturer or seller to warn the consumer of product dangers. There are many reasons of the harms caused by the products. The major reasons relate to behaviour and knowledge of product users, environment of use, design or construction of the product using safety analysis. Changing the product or process design and improving quality management is easier than changing the human culture or behaviour and environments. It is for this reason that we observe an increase in manufacturer's responsibility resulting in major changes in product/ process design. Consequently, manufacturing innovation is found to be one major vehicle for reducing the risk of injury. Product safety and liability laws (where they exist) are continuously being strengthened in order to protect the consumer.[2] The basic purpose of the product liability is to insure the consumers right to safety; emphasised in the United Nations Guidelines for Consumer Protection.[3]

Product liability is a modern phenomenon, and so it is easy and interesting to track how legal systems have, within a relatively short space of time, reacted to this new topic.[4] Solutions have sometimes been developed by the courts out of existing legal principles, and at other times, solutions have been created by legislatures. Because preexisting legal principles were similar in most countries, it is interesting to see the extent to which systems were prepared to amend their traditional concepts without having resort to legislation. As the new regimes claim to adopt strict liability, there is plenty of scope for comparison as to the actual extent to which they deviate from traditional forms of liability.[5]

Product liability is actually the attempt to answer the question of to whom the risk of damage resulting from modern machine-guided mass production should be allocated. Should it be allocated to:

– the victim, as the price for his participation in the advantages of the industrial development, but to be borne as an inevitable Act of God,

– to the state, this means to all taxpayers in solidarity, or

– provisionally to the producer having provided the cause of damage by manufacturing a product which did not meet the safety requirements that the public at large expects-provisionally to the producer, because he alone can distribute his expenses to the rather limited group of product users by incorporating them into his sales price?

The answer to this question seems to be one of perspective: the traditionalist prefers the first choice, a citizen believing in state-organised solidarity the second, and the person devoted to state-free liberal convictions the last one. There are no other solutions than these three. One has to decide. Good arguments exist for each of these solutions.[6]

In the developed parts of the world almost all countries have adequate legislation to deal with such issues e.g. Consumer Protect Act, 1987 in United Kingdom and EU Directive on the Liability of Defective Products, 1985 in European Union etc.[7] On the other hand, the situation in most of the Muslim countries is entirely different and in this part of the world it is believed that the harm caused by a defective product is due to the will of God and the manufacturer is not considered to be liable for any of his fault or negligence, hence, there are no product liability laws in these countries.[8] Perhaps this is the reason that this area of law seems to be a new one for Muslim jurists and that’s why very little amount of literature can be found on it from the perspective of Islamic

law. Whether or not such a belief has been endorsed by the *Shari'ah* is the focal point of this research.[9]

It is pertinent to mention here that in Pakistan, the term 'Product Liability' has not been defined in any statute which is a proof of the lack of product liability regime in the country. Currently there are various consumer protection Acts in the country but only one Act (Punjab Consumer Protection Act, 2005) has provisions about the liability of defective products. Pakistani law on product liability is facing disparity and not clear as in many statutes on consumer protection (e.g. Islamabad Consumer Protection Act, NWFP Consumer Protection Act, Baluchistan Consumer Protection Act) there is no reference to the liabilities arising out of the defective products. Moreover, Pakistani regime of contract and tort have failed to provide adequate protection to the consumers in product liability cases, it is, therefore, unavoidable to promulgate legislation based on the notion of strict product liability. Under these circumstances, Pakistan has two options to have an adequate regime for the liability of defective products i.e. to apply the English product liability regime that is based on EU Directive on product liability that suits with the legal landscape of Pakistan being a common law country and the second is to promulgate its own law on the subject based on the principles of Islamic law as it has been highly stressed in the Constitution of the Islamic Republic of Pakistan that all the laws must be in conformity with the injunctions of Islamic law.

It is, therefore, one of the basic purpose of this research paper to trace the issue in the classical Islamic legal literature. Moreover, the research paper, in hand, analyzes the juridical foundations of modern product liability law and compares the same with the unanimously agreed principles of Islamic jurisprudence that could be considered as the theoretical foundations for extending liability to manufacturers of defective and dangerous products.

The Legal Concept of 'Product Liability'

The term '*product'* indicates an item which has been manufactured and then sold, perhaps through an intermediary, to the consumer. In market transactions the term "product' is referred to anything that can be offered to market that might satisfy a want or need. It is also called merchandise. According to manufacturing, products are purchased as

raw materials and sold as finished goods; supplies are usually raw materials such as metals and agricultural products, but a product can also be anything widely available in the open market. In project management, products are the formal definition of the project deliverables that make up or contribute to delivering the objectives of the project".[10] There is no definition of product in the general English law of negligence. Under the new rules, however, 'product' is a central concept – if no 'product' is involved then the new regime of strict liability will not be attracted. In the United Kingdom it is usually taken to mean that class of liabilities to which commercial manufacturers and commercial suppliers of goods are subject because a good has caused some form of actionable loss to either a business, a consumer (someone who intends to use the product for private use) or a bystander.[11] The term "*product liability*" is used to identify the body of lawthat seeks to hold manufacturers and sellers financially responsiblefor their products not meeting safety standards. It is the area of juridical studies in which producers, distributors, suppliers, retailers, and others who make products available to the public are held responsible for the injuries those products cause. Although the word 'product' has broad connotations, product liability as an area of law is traditionally limited to products in the form of tangible personal property.[12] Developments in science and technology constantly exert new pressures on existing legal concepts. The speed and accuracy with which those concepts are able to adapt to such challenges have important social and economic consequences.[13]

This phenomenon is due first to the higher standards of living which have led to an increase in the amount of consumer products and a corresponding increase in the possibility of damage caused by defective products. The quality and quantity of damage and injuries which these new manufactured products may cause has increased. This is due to the increase in number of dangerous products that are used by relatively ignorant customers. Damage caused by a defective wagon in the tenth century was not as serious as injuries caused because of a car with a defective brake or a drug with dangerous side effects. Therefore, someone must be held liable for products that prove to be unsatisfactory or that cause damage.[14] Once this occurred Western legal system has developed its own law to protect consumers. The advancement of technology and change in trading methods has made product liability a very important legal issue of modern times.

Juridical Foundations of Modern Product Liability

Product Liability has been one of the fastest developing areas of law in both US and in Europe in the second half of the twentieth century. The American Law Institute recently issued its Restatement (Third) of Tort: Product Liability (hereinafter Third Restatement), which limits strict liability to manufacturing defects.[15] The impact of this approach on state law is unclear. Meanwhile in Europe, following the enactment of the French product liability law in May 1998, all member states of the European Community (EC) have implemented the EC Product Liability Directive of 1985 (hereinafter EC Directive), which requires member states to introduce strict product liability legislation.[16] The EU Directive became part of almost all the European countries including United Kingdom in the shape of Part-1 of the Consumer Protection Act, 1987. While discussing the legal basis for modern product liability law, Jane Stapleton explaining the views of Tony Honore regarding '*strictmoral enterprise liability*' writes that there is a coherent theme which does not link most existing pockets of tortuous strict liability, including those aspects of the product rules in the US and EC which are stick. It is the taking of risks in pursuit of financial profit.[17] A non-consequential basis of these liabilities might be expressed in terms of a moral argument that if, in seeking to secure financial profit, an enterprise causes certain types of loss, it should be legally obliged to pay compensation to the victim. This is termed by them as the '*strict moral enterprise liability*' argument to distinguish it from the diffused concept of enterprise liability, which has been used in many different and loose ways. The author argues that the moral enterprise liability provides a considerably better fit with those rules than economic theories, although still not a completely satisfactory fit. It is considered as the basis for the modern US and EC product liability laws.[18]

The Nature and Scope of Product Liability Law

The scope of product liability law is increasing day by day. After the industrial revolution and mass production of products, the necessity of protecting consumers' rights by approving some rules regulating the relationship between producers and consumers is greatly felt. Product

liability law is the outcome of such an effort. It is a body of law which solves this problem and provides compensation for harms caused to a person or property due to defective or unreasonably dangerous products, and from the failure of a manufacturer or seller to warn the consumers of potential threats in a product. There are many reasons of the harms caused by the products. The major reasons relate to behaviour and knowledge of product users, environment of use, design or construction of the product using safety analysis. Changing the product or process design and improving quality management is easier than changing the human culture or behaviour and environments. It is for this reason that we observe an increase in manufacturer's responsibility resulting in major changes in product/process design. Consequently, manufacturing innovation is found to be one major vehicle for reducing the risk of injury. Product safety and liability laws (where they exist) are continuously being strengthened in order to protect the consumer.[19] The basic purpose of the product liability is to insure the consumers right to safety; emphasized in the United Nations Guidelines for Consumer Protection.[20]

Islamic Origins of Modern Product Liability Law

The Concept of 'Product Liability' *in the Islamic Law*

In the Islamic law, the term "product liability" specifically does not appear in these exact terms in the classical literature of *fiqh*. Also, the *fuqaha* did not mention this term in their writings and manuals. However, this is not a strange rule in the Islamic law as it has provided concrete principles to deal with such issues. The liability for manufacturing, marketing, importing and selling of defective products can be established under the Islamic *Sharī'ah* through contract, tort and even on the basis of statutory law i.e. any law on any subject can be enacted provided it is based on the sources of Islamic law or at least it does not violate any injunctions of the *Sharī'ah*.[21] The product liability law emerged as a crucial legal topic after the industrial revolution starting in the 18th century while Islamic laws which stopped developing at the tenth century did not provide for such liability in the strict sense of the word. The society at that time did not need such rules because, even though some primitive industry existed, manufactures sold their products directly to consumers,

and the contract of sale was the basis of their relationship. Hence, the traditional rules of law of contract and that of torts were considered sufficient to protect rights of the consumers. In this context, the well-known contemporary Muslim jurist Dr. Wahba Al-Zuhayli writes:

> "… the Muslim jurists in classical *fiqh* could not discuss the liability arising out of the use of manufactured goods and products due to absence of such incidents in their age because in that period the technology and production processes were not much advanced as these are today."[22]

The main concern of this research is with the principles of Islamic law; however it is of great significance to quote some examples that there had been many proofs of liability for a defective product in the classical Islamic legal tradition. In this regard, it is pertinent to quote here the famous *Ḥadīth* of the Holy Prophet (ﷺ). It is narrated that the Messenger of Allah (ﷺ) happened to pass by a heap of eatables (corn). He thrust his hand in that (heap) and his fingers were moistened. He said to the owner of the heap of eatables (corn), "What is this?" "Messenger of Allah (ﷺ), these have been drenched by rainfall." He (the Prophet [ﷺ]) remarked, "why did you not place this (the drenched part of the heap) over other eatables so that the people could see it? He who deceives is not of me (is not my follower).[23]

In another case, the Muslim scholars Ibn il-Asqa said: 'I bought a camel from a seller and when leaving the place of contract 'Uqba b. Nāfi' followed me and said: The camel seems fat and healthy; did you buy it for meat or travel? I said: For travel (*Ḥajj*). He said: Its toe has a hole, and it is not appropriate for your travel. Are you looking to rescind the agreement? The seller asked 'Uqba. 'Uqba responded: I heard Prophet Muḥammad (ﷺ) say that the contracting parties have the choice.[24] There are many instances in which a subject matter thing (or good) was found defective and returned to the seller.

A relevant case is the action of the 'Umar b. Khaṭṭāb (d) who on seeing that a man had diluted milk with water punished him by spilling it away. One group of the jurists who uphold this principle have given this ruling, for it is reported of the Prophet (ﷺ) that he prescribed the watering down of milk for sale – though not for drinking purposes –

because if the milk is diluted the buyer does not know the relative quantities of milk and water, and for this reason 'Umar (d) destroyed it.[25] Moreover, the attitude of Islamic law is to prevent the occurrence of any harm to the consumers; hence, it has encouraged taking initiatives to block the ways that may lead to violation of consumer rights. This is materialized through the Islamic principle of *sadd ul-dharie'* (blocking the ways leading to unlawful results).[26]

Therefore, it has always been considered a duty of the Islamic state to look after the production processes of consumer products and a specific institution called *Ḥisbah* has been assigned the task to take care of business practices. The person who acquires profit from their production is held liable, and moreover any person who has caused harm to the other in one way or the other is bound to make good whatever the loss he has caused to the other. The institution of *Hisbah* as a representative organ of Islamic state is bound to provide adequate protection to consumers. The institution of *Ḥisbah* must take notice of different trades in order to guarantee maximum protection of consumers' interests and maintain just weights[27] and measures.[28] Some of these are such as fodder merchants and millers, bakers, bread makers, eateries (cook-shops), butchers, pharmacists, milk sellers, criers (brokers), weavers, tailors, repairers, ship-men, astrologers, letter writers, and rice merchants etc.[29] The *muhtasib* must stop unfair trade practices. It must also take serious actions against unfair contract terms in order to block all the ways of exploitation. People must be allowed to provision themselves from each other without any intermediary.

The *muḥtasib* must examine that the fodder merchants and millers may not mix bad wheat with good or old with new. They may not hoard grain. He must check that scales and weights used for the flour and those for money.[30] He must inspect that the flour is fit for consumption. Then the *muḥtasib* should maintain a proper system for bakers and bread makers. They should be ordered to make high roof ceilings for the bakeries-houses and wide vents for smoke. He must order that ovens shall be kept swept kneading-troughs washed and covered with straw mats.[31] The *muḥtasib* must control cookeries-shops them by weighing carcasses before they are placed in the oven and after the removal; if the cooking has been completed there will be a diminution of a third.[32]

Under the Islamic *Sharī'ah* an animal must be ritually slaughtered to make it edible.[33] Qur'ān says:

> "Forbidden to you (for food) are: dead meat, blood, the flesh of swine, and that on which hath been invoked the name of other than Allah; that which hath been killed by strangling, or by a violent blow, or by a headlong fall, or by being gored to death; that which hath been (partly) eaten by a wild animal; unless ye are able to slaughter it (in due form); that which is sacrificed on stone (altars); (forbidden) also is the division (of meat) by raffling with arrows: that is impiety. This day have those who reject faith given up all hope of your religion: yet fear them not but fear Me. This day have I perfected your religion for you, completed My favour upon you, and have chosen for you Islam as your religion. But if any is forced by hunger, with no inclination to transgression, Allah is indeed Oft-forgiving, Most Merciful".[34]

The sale and consumption of things mentioned in the verse of the Holy Qur'ān is not allowed. Similarly sale and consumption of blood is not allowed in Islamic law. The Holy Prophet (ﷺ) has forbidden the price of a dog and the price of blood."[35] Fish and locusts are exempted from this rule.[36] The butchers should not slaughter the animals in the streets and avoid polluting the same.[37] Thus, sale of anything that has been declared unlawful by *Sharī'ah* would be considered void.

In case of weavers, the *muḥtasib* must check that the stuff must be well woven, compact in texture and of the full length agreed upon and the thread to be of good quality. All other specifications should be in accordance with the common practices or demands of the consumers. Hence, the badly woven cloth, for instance, may be ripped apart and burned. It was for this reason that when 'Umar b. Khaṭṭāb saw al-Zubair's son wearing a garment of silk he punished him by tearing it apart and when al-Zubair said, "Would you terrify the boy"? 'Umar (d) replied, "Do not dress him in silk"! Then again, 'Abdullah b. 'Umar (d) burned his yellow dyed garment at the bidding of the Prophet (ﷺ).[38] Similarly some jurists uphold this principle concerning the permissibility of destroying fraudulent work in the crafts.[39] This principle of destruction of defective work in the crafts is quite similar to the modern

day notion of 'product recall' once its defects are proved. The defect is anything that reduces the actual value of the product and is recognised by the commercial custom ('*urf tijari*) in a particular age and place.[40]

It has been made obligatory upon milk sellers that the vessels belonging to them must be covered and their places of trade white-washed and paved and the roof must be new, for flies like places where there is milk. For the mouth of the milk jars is likewise a stopper of clean palm-fiber is necessary. Vats and other containers must be cleaned out daily with new palm-fiber and clean water so that the (milk) shall not too soon deteriorate in hot weather. The milk must be rich and unskimmed; otherwise its taste and fatness are gone. The sale of milk-diluted with water is utterly forbidden. The test for it is to throw in a spring of marsh-lentil.[41]

Moreover, Muslim jurists have also established the liability of ship-men for their negligence. Ship-men shall be compelled not to overload their vessels inordinately for fear of sinking and they shall not set out during a gale. If they carry women they must set a partition between them and the men.[42] In case of astrologers and letter writers, these professions are not allowed in *Sharī'ah.* If the *muḥtasib* finds anyone indulging in these practices he must expel him and punish him.[43] The Holy Prophet (ﷺ) said:

> "He who goes to a diviner and believes on his word, he misbelieves that which had been revealed through Muḥammad."[44]

All the above examples denote that the Islamic law not only imposes liability for the defective products but it also holds liable the service providers for their negligent and faulty services. Hence, in accordance with the Islamic law the state is authorized to promulgate adequate and concrete legislation to prevent violation of the rights of consumers. Similarly, the courts could have jurisdiction to punish those who violate consumer rights under *ta'zir* and in some cases *diyyah* (when it amounts to death) and *arsh* (when it amounts to inflict harm to any limbs).[45]

Tracing the Juridical Foundations of Product Liabilityin Islamic Jurisprudence

Modern Muslim jurists and writers have paid some attention to

criminal liability in the Islamic law, but not much attention has been paid to the civil liability in it.[46] This is a wide area and needs attention for purposes of compensations and damages. Many of the rights of citizens are guaranteed through this area".[47] Civil liability in the context of product liability under Islamic law can be established in two ways: 1) contract and 2) tort. In case there is contract between the manufacturer and the ultimate consumer any liability arising from such a relationship will be dealt under Islamic law of contract. In case there is no contract then the issue can be covered in accordance with the rules of Islamic law of tort. Hence, Islamic law imposes the liability upon the producer/manufacturer for the harms caused to the consumer by their defective products. In order to develop the theory of product liability under Islamic law, *Maqasid al-Sharī'ah* can be of much help and importance. As it has been mentioned earlier that the objectives of *Sharī'ah* in relation to people are to secure their interest and avert harm from them. This objective has been taken care of in various ahkam that provide mechanism to protect the individual against the actual as well as expected harm.

However, under Islamic law the detailed rules about civil liability for defective products are mentioned in the law of contract and the law of torts. The basis of product liability under Islamic law are two-fold i.e. a general theory of redressing the harm and secondly harm caused in due course of a business. The basic purpose is to compensate the person being harmed and give him an adequate remedy. In Islamic law there are a number of principles and legal maxims on the basis of which the notion of product liability can be developed. However, two principles of Islamic law are of great significance in this regard. These are the: (la darar wa al dirar), i.e. no harm and no counter harm and (al-kharāj bil-daman') i.e. every profit has a corresponding liability. These principles are further elaborated in the context of product liability as follows:

Every Profit has a Corresponding Liability (*Al-Kharaj bil-Daman*)

In order to establish the concept of 'Product Liability' under Islamic Law in the context of commercial transactions,[48] the well known principle of Islamic law *'Al-Kharāj bil-daman'*[49] "*Al-Ghunum bil Ghurum"* i.e. every profit has a corresponding liability is quite relevant.[50] For example, the lessor bears all risks in respect of leased property. He takes liability

of loss, or damage, to his property. So he is also entitled to reap benefit from it in the form of rentals.[51] The basis of this principle is a *Tradition* of the Holy Prophet (ﷺ) that a person purchased a slave, who stayed with him for some time. After some period, the buyer discovered a defect in the slave. He complained to the Holy Prophet (ﷺ), who ordered his return to the owner. The owner asked that the buyer has used his slave, so he should be held liable to pay for the use. The Prophet (ﷺ) said: "*Benefit accompanies liability and risk",* meaning thereby that this benefit is against the risk and liability that he has borne, with regard to property, while in his custody, since if he had died before being returned, it would have died as his property.[52] According to the principle, all types of profits in the Islamic law are justified on the basis of liability (*daman*). This may be translated as: Entitlement to profit (revenue) is based on a corresponding liability for bearing loss. This principle provides that a person is entitled to profit only when he bears the risk of loss. The principle operates in a number of contracts such as contract as sale, hire or partnership. A business man is entitled to profits and gain in his business because he is ready to bear loss. Similarly, owner of a house is entitled to the rent of his house in the hiring contract because he subjects himself to the risk of its destruction and damages to it. This risk makes him the rightful owner of its rent. All profit that has occurred to the partners in a partnership contract is also attributable to this principle of liability. On the other hand, any access over and above the principle sum paid to the creditor by the debtor is prohibited because the creditor does not bear any risk with regard to the amount lent.[53]

The jurists have applied this principle consistently throughout the entire Islamic law of contract and also in the law of business organization. Almost every issue of the Islamic commercial law is directly or indirectly traced back to this principle such as entitlement to profit, the issue of limited liability, the retaining of ownership in capital by the investor, as well the ratios in which the profit is shared etc. As the producer of goods and service provider both intend profit from their activities and therefore they should bear the loss as well. Now the question of civil liability may be resolved here so any loss that accrues because of the manufacturer's negligence may be corrected by putting a liability on him in favour of the consumer. Thus, if the *kharaj* (profit) belongs to him, the liability for

bearing loss falls on him too. An explanation of this principle may be found in the words of Al-Kasani, the Hanafi jurist. He states:

> "The rule, in our view, is that entitlement to profit is either due to wealth (mal'), or work ('amal) or by bearing a liability for loss (daman). As for entitlement due to wealth, it is obvious, because profit is a growth in wealth and belongs to its owner. It is for this reason that the rabb ul-mal in a contract of muḍārabah is entitled to profit and likewise the partner (sharik). In the cases of daman (liability for bearing loss), if the mudarib were made to bear the liability for loss, he would be entitled to the entire profit."[54]

In the context of product liability consumers should expect to receive products that are safe as well as in working conditions and priced fairly, they should also be notified of any deficiencies. The basic issue in order to ascertain liability for the defective product is that who should bear the responsibility i.e. the manufacturer, the retailer, the importer, the seller etc. This situation becomes very clear after consulting the well known principle of Islamic law which suggest that the perpetrator who has caused the wrong is bound to redress the victim. In this context, the basic principle that establishes the liability of manufacturers, retailers and sellers etc. for the damages caused by defectives products is "*Al-Kharāj bil-daman*" i.e. every profit has a corresponding liability.[55] This is a well-established principle of Islamic law. The liability arising from defective products is covered under the notion of *daman al 'uqud (contractual liability)* under which if the seller sells anything defective that causes harm to any one, he can be held liable for that under the general principles of Islamic law.This seems to be in compatibility with the theory of strict moral enterprise liability that is considered the basis of modern product liability law. This theory is advanced by Jane Stapleton according to which everyone who gains some sort of profit from an enterprise will be held liable in accordance with their proportionate in profit.[56]

No Harm and No Counter Harm (*La Darar wa La Dirar*)

Islamic law prescribes certain rules which should be observed while redressing harm. These rules have been embodied in certain secondary

maxims. These maxims serve as controllers for the above mentioned primary maxims. These are: a greater harm may be avoided enduring lesser harm; to avoid the public injury a private injury may be suffered; repelling an evil will be preferred to securing a benefit and harm is not removed through another of the same nature. *La darar wa La dirar*, or *Al-dararu Yuzal*: there must be no incipient or retaliatory injury, or Harm must be eliminated is the basic rule in this context.[57] These principles of *Shari'ah* provide the basis for product liability under the Islamic law of torts. The principle means that the harm and retaliation by another harm is not allowed. It has been interpreted in two ways: harm is not allowed whether as an initiative or in response and no harm should be caused and none should be suffered.[58]

The source and phraseology of this maxim also cited as *al-dararu Yuzal*[59] is the *ḥadīth* reported by several compilers.[60] Causing initial harm to another in any way, shape or form is forbidden in Islam, and retaliatory harm is also forbidden. If someone were to harm another's fence or wall, it would likewise be forbidden for the victim of such action to respond by retaliatory destruction; rather, the solution would be to seek recourse through the judicial system. An example of the eradication of incipient harm is where the state/municipality may order a person to redirect his gutter if it flows into the public thoroughfare in such a manner that it causes harm to the passersby, or to tear down an addition to his property if such addition protrudes beyond his property line. Article 345 of the *Majallah* cites a more intricate illustration:

> "If an ancient defect in the thing sold appears after a defect has come to it while with the purchaser, the right of the purchaser to return it to the seller no longer exists, but he has a right to demand a reduction of the price."[61]

Thus, if a consumer buys cloth and becomes aware of a defect in the material, such as its being frayed or rotten, after having cut it into garments, he cannot return the cloth to the seller, because he has caused a new defect by his having cut the cloth. However, he can petition for a reduction in price based on the old defect.

Similarly, one of the sub maxims of the above mentioned maxim is *Al-Ḍarar al-Ashadd Yuzal bil Ḍarar al-Akhaff:* i.e. the greater harm is removed by a lesser harm. Ibn Nujaym illustrates this maxim in the

ruling regarding someone who takes illegal possession of a particular piece of lumber in his building. If the value of the building exceeds that of the lumber, then the owner of the building is given possession of the lumber after paying its due price. If, however, the lumber is more valuable than the building, then the ownership of the rightful possessor of the lumber is upheld.[62] This rule can be applied in cases where there is clash between the interests of a producer and the general body of consumers in favour of the later because their interest is greater than that of the producer.

It is also a well-established notion of the Islamic law that the private harm is borne in order to avert a more general harm (*Yuta ḥammal al-Ḍarar al-Khāṣ li Daf'i al-Ḍarar al-'Amm*).[63] This allows, for example, the proscription of a doctor from practice if it is determined that he is incompetent, and that permitting him to continue practice would endanger the lives of patients.[64] Another example is where the government could impose price restrictions on food suppliers, thereby causing them to profit less, but ensuring that their customers are not exploited.[65] Thus, the meaning of these maxims is that no injury be done to anybody in any circumstances and that injury should not be met with injury. It suggests that a person, who has suffered some grievance, should not inflict the grievance as he had suffered on another.

The maxim is applicable to a considerable number of rulings of Islamic law. The liability arising from a defective product is covered under the above discussed principles of Islamic law of tort i.e. *fiqh al-daman*. If the seller sells anything defective that cause harm to any one, he can be held liable for it under the general principles of Islamic law. The principle of elimination of detriment has been especially observed in the sphere of contracts and business transactions. The perpetrator who has caused the wrong is bound to redress the victim in all the cases. The above mentioned principle of Islamic law has shown that under what rules of the Islamic law of torts, anyone who causes harm to another directly or indirectly can be held liable for which the rule of *privity* was never a barrier under the Islamic law of tort.

Tracing the Basic Notions of Product Liability in Islamic Law

The modern product liability regime is based on the notions of

"producer", "product" and the "liability" etc. It is, therefore, pertinent to explain the meanings of these basic notions from an Islamic law perspective.

The Notion of Producer and Islamic Law

Islam encourages all types of lawful commercial and business activities such as agriculture, manufacture, business, trade, and all the works and labour within the limits of *Sharī'ah* that produce any goods or services for the benefit of community is considered as worship. In this context, it is pertinent to quote the verse of the Holy Qur'ān:

> "He knoweth that there may be (some) among you in ill-health; others travelling through the land, seeking of Allah's bounty; yet others fighting in Allah's Cause, read ye, therefore, as much of the Qur'an as may be easy (for you); and establish regular Prayer and give regular Charity; and loan to Allah a Beautiful Loan. And whatever good ye send forth for your souls ye shall find it in Allah's Presence,- yea, better and greater, in Reward and seek ye the Grace of Allah. for Allah is Oft-Forgiving, Most Merciful."[66]

Islam has emphasized on more and more production so human needs be fulfilled but it gives a comprehensive code for consumption. The Prophet (ﷺ) endorsed the importance of legitimate ways of earning in the following words: *"Asked 'what form of gain is the best? [The Prophet (ﷺ)] said, 'A man's work with his hands, and every legitimate sale"*.[67] Islamic commercial law stress a lot on the fulfilment of human needs along with achieving a great spiritual satisfaction therefore it gives a balance system for earning and consumption of goods and services to stabilize the worldly life and life here after. *Sharī'ah* has encouraged the production of all beneficial things and condemned the production of harmful things to humanity. Hence, many Muslim scholars are of the view that production of tobacco is not allowed and smoking is prohibited. Similarly the cultivation of opium is not allowed as it harms the society. For Muslims consumption of alcohol is not allowed either. The point here is that in the Islamic *Sharī'ah* the term producer has not been defined in any specific words by earlier jurists.

The Islamic *Sharīʻah* has not focused on the definition of producer rather it has focused on the product that is produced that whether it is good for consumption or not. All those things that are harmful to human life, intellect, family and wealth are declared prohibited both in its production and consumption as mentioned earlier in discussion on *Masāliḥ* (interest). This is one of the primary objectives of the *Shariʻah* to acquire *manfaʻah* (benefit) and to reject *madarrah* (injury, harm) because the acquisition of *manfaʻah* and the repulsion of *madarrah* represent human goals, that is, the welfare of humans through the attainment of these goals.[68] Hence, it is at first duty of Islamic state to ensure that the products and production process are safe and not going to cause harm to the general body of consumers. If any statutory duty is violated the producer will be responsible for that.

Here it is pertinent to raise the issue that does the producer etc owe any duty towards the consumer being harmed by a defect in the product under the Islamic law? The principle of Islamic law that states: *"Every profit has a corresponding liability*".[69] It covers all the stakeholders i.e. producer, manufacturer, retailers and suppliers etc. to be liable for any shortcoming on their part. Thus the notion of liability in the Islamic law is wider and it covers all those who extract benefit from the product and it is in conformity with the English product liability regime. Though there is a debate among the Muslim scholars about the acknowledgment of corporate personality.[70]

Here producers and manufacturers include both natural as well as legal persons because the basic purpose of this thesis is to assess the liability of the manufacturers for producing defective products and their responsibility to compensate the victims of such products. Anything that is explicitly prohibited by the Qur'an and the *Sunnah,* such things are not considered *mal* (property) in the *Sharīʻah* and their production is also strictly prohibited such as wine etc. Apart from that there is no constraint from the perspective of *Shariʻah* to define the term producer. In Islamic law, a Muslim producer would be held strictly liable when he produces prohibited (*ḥaram*) products.

The Notion of 'Product' and the Islamic Law

In the classical Islamic law no specific definition of the term 'product'

exists; instead the term '*mabi*' has been used by the *fuqahā'* that means subject matter to indicate all sold 'valuable' things including 'product' in its contemporary meaning.[71] Islamic law has explicitly mentioned the criteria for *ḥalāl* and *ḥaram*. Besides, *ḥalāl* and *ḥaram* there are certain things on which the Islamic law is silent. The Muslims are required to abstain from such doubtful things also.[72]

The general principle of Islamic law regarding the 'products' is permissibility. All the beneficial and harmless things are permissible, unless explicitly prohibited by the *Sharī'ah*. This is based on the well-known principle of Islamic law: "… the original rule for all things is permissibility unless the prohibition is proved."[73] This principle explains the scheme of *Sharī'ah,* regarding *ḥalāl* and *ḥaram.* Allah (S.W.T.) out of His infinite and boundless mercy, has permitted certain things, and prohibited certain others. While doing this, He has secured human beings' interests, and averted harm from them. There is another rule of *Sharī'ah* that: "*Al-Aṣl fī al-Manāfi' al-Ibāḥa wa fī al-Maḍār al-Taḥrīm*" i.e. the original rule about beneficial things is permissibility, and for harmful things is prohibition".[74] Anything that is beneficial for the people is lawful, and a thing which is proved harmful, for them is unlawful.[75]

The Notion of 'Liability' in Islamic Law

As far as the notion of liability is concerned, Islamic law termed it as responsibility (*dhimmah).* In the the Islamic law, the general principle is freedom from liability which is incorporated in the well-established principle of Islamic law: "*Al-Aṣl Bara't ul-Dhimmah*" i.e. freedom from liability is the fundamental principle.[76] According to this principle of Islamic law no one is liable to be penalized until his guilt is established by lawful evidence. Till that time, he is presumed to be innocent. The reason is that innocence is a state of certainty, and guilt is doubtful.[77] This presumption of innocence from liability is based on a *ḥadīth* of the Holy Prophet (ﷺ) which places the burden of proof on the plaintiff. The Prophet (ﷺ) said: "*The burden of proof is on plaintiff and the defendant must take an oath*".[78] The liability under Islamic law is classified into three kinds i.e. liability for worship, criminal liability and civil liability. This explains that how and when liability in Islamic law can be assigned to the perpetrators.

STRICT LIABILITY IN CASES OF DEFECTIVE PRODUCTS UNDER ISLAMIC LAW

Here, it is pertinent to address the issue that whether or not Islamic law approves strict liability in torts cases. Further can such liability be extended to the cases of defective products? In this regard in the primary source of *Sharīʻah,* the Holy Qur'ān in a number of verses propounds the strict liability of a tort-feasor in committing wrong. Some of these are given below:

> "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."[79]
>
> "If any one does a righteous deed, it ensures to the benefit of his own soul; if he does evil, it works against (his own soul). In the end will ye (all) be brought back to your Lord."[80]
>
> "O our Lord! truly Thou dost know what we conceal and what we reveal: for nothing whatever is hidden from Allah, whether on earth or in heaven."[81]
>
> "Not your desires, nor those of the People of the Book (can prevail): whoever works evil, will be requited accordingly. Nor will he find, besides Allah, any protector or helper."[82]
>
> "Say: "Shall I seek for (my) Cherisher other than Allah, when He is the Cherisher of all things (that exist)? Every soul draws the meed of its acts on none but itself: no bearer of burdens can bear of burdens can bear the burden of another. Your goal in the end is towards Allah: He will tell you the truth of the things wherein ye disputed." [83]

While explaining the above verse, Sayyid Abū Al A'lā Mawdūdi (d.1400/1979) writes: "Every person is responsible for whatever he does, and no one is responsible for the deeds of others".[84] So, a man cannot deny his liability after his intention is established. All these verses mean that a person will not be liable except for his own torts and wrongs. He cannot be accountable for the torts or mistakes of other people.[85] The traditions of the Prophet (ﷺ) further elaborated the above principle. There are number of traditions regarding the matter, following are some of them: *"You will not do him wrong and he will do you wrong";*[87]

"*Indeed, your son does not commit any offence against you, nor do you commit any offence against him*";[88] and the Holy Prophet (ﷺ) said: "No person should be apprehended for an offence committed by his father or brother".[89] Similarly, it has been mentioned in the last sermon (*Khuṭbah Hujjat ul Widā'*) of the Holy Prophet (ﷺ) is as under:

> "Beware; no one committing a crime is responsible for it but himself. Neither the child is responsible for the crime of his father, nor the father is responsible for the crime of his child."[89]

All the above *Traditions* denote that in a tort action for what is committed by a person, he who acts is liable for what he has done, not another.

Muslim *fuqaha'* have also applied the rule of strict liability in their manuals. Some examples are given below:

1. "If a person drowns people by opening up a river dam, or spreads fire, or destroys a building and causes loss of life, he is liable for his action".[90]
2. "If any person destroys property of another, whether intentionally or unintentionally, and whether in his own possession or in the hands of some person to whom it has been entrusted, he is liable for the loss".[91]
3. "If a person slips and falls upon and destroys any property belonging to another, he is bound to make good the loss."[92]
4. "If a person destroys the property of any other person under the mistaken belief that it is his own, he is liable for the loss".[93]

In the above cases the defendant is held strictly liable for accidental harm, independently of the existence of either wrongful intention or negligence.

The *fuqahā'* have also followed the rule of strict liability in a number of cases e.g. "If a person, in the exercise of his right, does an act which involves a risk to another person or property of others, he will be held liable for the damage, if damage occurs. He should be held liable to ensure safety of those other persons. For instance, if a person carries timber along a public road and a piece of timber falls on a passerby and

causes damage to the person and property, the carrier (*ḥāmil*) will be held responsible (*ḍāmin*) for the damage caused."[94]

The contemporary Muslim jurists termed strict liability as *'al-Mas'ūliyyah al-Taqṣīriyyah'*.[95] This clearly shows that the rule of strict liability appears in Islam and is not alien to the Islamic law of tort. In both the defendant is liable because he has acted intentionally or negligently causing harm to the plaintiff's interest. Hence, the concept of strict liability is compatible to the Islamic law. However, the English law is in a developed form today and the rule of strict liability is extended to many new situations including strict product liability as in English law this rule has been practised and applied intensively and thoroughly over a long period of time. Muslim jurists should consider all the legal developments that have taken place in modern times.

It is also pertinent to mention here that according to M. Muslih-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.[96] In this case, establishing the liability will be comparatively easy.

In the context of product liability, it is pertinent to mention that Muslim jurists (*Fuqahā'*) held craftsmen (*Ajir Mushtarak*) strictly liable for destruction or harm to the products in their possession.[97] *Ijārah* (hire) has been legalised by Islamic law due to the need of the general body of consumers to acquire goods and services and if the contract of lease is not legalized people will fall in trouble (*mashaqqah*). There are two types of *Ijārah* contract; *Ijārat ul-Ashkhās* (hire of employees) and *Ijārat ul-Ashyā'* (hire of things).[98] Then *Ijārat ul-ashkās* (services of persons) is further classified into two *ājir mushtarak* (one who renders his services to everyone like a tailor, shoemaker and the like) and *ājir khās* (one who renders services to specific person).[99]

As a general rule a trustee is not liable for the loss of trust property if the loss occurs without any fault and negligence on the part of trustee. But in case of craftsmen and tradesmen, such as tailors, goldsmiths, shoemakers etc. the Muslim jurists ruled that if the goods are lost or destroyed in their custody they would be liable to compensate. Thus, if a tailor received a piece of cloth from his customer and while in his

custody some loss occurred to it, the tailor will be held liable to compensate the loss was a result of some calamity and act of nature.[100] The reason for this ruling is that adopting the rule of non-liability for paying compensation by craftsmen whose trustworthiness is taken for granted may make them negligent about the goods in their custody with the result that the owners have to suffer great loss. They may abuse the trust and misuse the facility. Now through this new ruling the burden of proof was shifted to the craftsmen, who had to show of negligence. Hence, the craftsmen (*ājir mushtarak*), according to the dominant view in *fiqh,* wereheld accountable for the loss of goods in his possession if they are destroyed by his fault or transgression, the craftsmen were held liable for paying compensation.[101] This ruling has been given by the jurists (*fuqahā'*) on the grounds of public interest so that trustees and tradesmen exercise greater care in safeguarding people's properties.[102] It is reported that Hazrat 'Ali (d) held craftsmen liable for the loss occurred to the property in their custody.[103] This ruling, *inter alia*, highly ensures protection of consumers' interests against harms etc.

This illustration shows that the Islamic law recognises the application of strict liability in cases of negligence by craftsman in order to safeguard interests of the consumers. The same rule has to be applied in cases of product liability.

Conclusion

The 'product liability' is an emerging legal concept. The scope of product liability law is expanding day by day. The modern notion of 'product liability' is based on the well-established legal theory of '*strict moral enterprise liability*' advocated by many renowned jurists such as Tone Honore and Jane Stapelton etc. The theory implies the taking of risks in pursuits of financial profits. If, in seeking to secure financial profit, an enterprise causes certain types of loss, it should be legally obliged to pay compensation to the victim. This is based on 'moral grounds as well. Hence it is termed as 'the strict moral enterprise liability'. It has been argued by many jurists that the '*strict moral enterprise liability'* as compared to other theories provides a considerably better fit for the issues of product liability. The theory is therefore considered as the basis for modern US and EU product liability laws.On the other hand,

in the Islamic law, the term 'product liability' specifically does not appear in these exact terms in the classical *fiqh* literature.However, product liability is not a strange concept to Islamic law and the roots of liability for defective products can be traced in many rulings, principles and maxims of the *Sharī'ah.* The rules of Islamic law exist in the Holy Qur'ān and the *Sunnah* of the Prophet Muḥammad (ﷺ) and numerous instances can be extracted from the classical legal literature. In Islamic law, the producer, retailer and seller etc can be held responsible for the defective products and compensate the victim under the Islamic law of contract as well as the Islamic law of tort. In this regard the Islamic principle '*Al-Khāraj bi al-Daman*' i.e. every profit has a corresponding liability makes it very clear to hold all the stakeholders in profit liable for their defective products and services. Similarly, the Islamic principle '*Lā Ḍarar wa Lā Ḍirar'* i.e. no harm and no counter harm makes it very clear that all types of harms has to be redressed. Moreover, to cater for public interest or *maṣlaḥa* any legislation that benefit the community can be promulgated such as strict liability in cases of defective products and services etc. Muslim jurists in this sphere can even take benefit from the measurements taken in other jurisdictions in order to ensure protection and promotion of rights of the consumers. Hence, the Islamic jurisprudence is more comprehensive in cases of defective products provided and adaptable to the changing circumstances.

Notes and References

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20. See '*United Nations Guidelines for Consumer Protection (as expanded in 1999)*', Department of Economic and Social Affairs, United Nations, New York 2003, available at: http://www.un.org/esa/sustdev/publications/consumption_en.pdf, accessed on 23-07-2013.
21. The Islamic contract regime of product liability has been thoroughly expounded in chapter 5, the Islamic tort regime in chapter 6 and the Islamic strict product liability regime in chapter 7 of the thesis.
22. Zuhaylī, *Nazriat ul-daman*, Dār ul-Fikr, p. 258.
23. Al-Tirmidhī, *Sunan,* Tradition No. 1315, vol. II, p. 597; Muslim, Ibn al-Hajjāj, *Saḥīḥ, Ihyā al-Turāth' al-'Arabi,* Beirut, vol. I, p. 99.
24. Aḥmad b. Hanbal (d. 241 A.H.), *Musnad,* Tradition No. 16013, Mu'assisah *Al-Risālah,* 2001, vol. XXV, p. 394.
25. Ibn Taymiyyah, Aḥmad b. Abd al-Halim, '*Public Duties in Islam'*, Translated by M. Holland, Leicester, the Islamic Foundation, U.K, 1982, p. 50.
26. Ibn al-Qayyem, *I'lam ul-Muwāqīn,* Dār al-Kutub al-'Ilmiyyah', Beirut, vol. III, p. 108.
27. Qur'ān says: "Woe to those that deal in fraud" (LXXXIII:1). Other related verses are: XI:84; XXVI:182; IV:107.
28. It is duty of a *Muḥtasib* to see that the traders and shopkeepers do not indulge in short measuring. He must order possessors of scales to keep them free of oil and dirt. Scales must be brought to rest before being used for weighing and the pans must not be touched by the thumb with fraudulent intent. Scales must not be suspended from the hand. A trick used in weighing gold is to blow into the pan containing it or to fasten a fine strand of hair to one side. The *Muḥtasib* must not forgive fraud in the use of measures and weights (Al-Māwardī, *Al-Aḥkām al-Sulṭāniyah,* vol. III, p. 168; Ibn Taymiyyah, *Al-Hisbah,* vol. I, p. 55).
29. Ibn al-Ukhuwwah (d.729 A.H.), Ma'alim al-Qurba fi Aḥkām el Hisbah, Dār al-Funun, Cambridge, vol. I, p. 238.
30. *Ibid.,* vol. I, p. 90.
31. *Ibid.*
32. *Ibid.,* vol. I, p. 107.
33. See Ādāb ul-Dhibḥah in *Al-Mawsisa' al-Fiqhiyyah al-Kuwaitiyyah,* vol. XXI, p. 197; Shah Waliullah al-Dihlawi, *Ḥujjat ullah-i Albalighah'* Dār al-Jel, Beirut, Lebanon, vol. II, p. 281. It is preferable that the slaughterer should be a Muslim of full age and understanding who shall utter the name of God over the animal. Slaughter by minors, blind or intoxicated persons is disapproved for the reason that they may err in making the sacrificial cut. Any instrument which has a sharp cutting edge, even a reed or sharpened stone, is lawful for the sacrifice. Camel should be slaughtered standing, oxen and sheep lying down.
34. Qur'ān, V:3.
35. Al-Bukhārī, *Saḥīḥ,* Tradition No. 2086, vol. III, p. 59.
36. Al-Jiziri, *Al-Fiqh 'ala Madhhah al-'Arba'h*, Dar al-Kutub al-'Elmiyyah, vol. I, p. 10.
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39. *Ibid.*
40. Al-Marghinānī, *Al-Hidāyah,* vol. III, p. 36.
41. Ibn al-Ukhuwwah, *Ma'alim al-Qurbah fi Ahkalab al-Hisbah,* vol. I, p.1 29.
42. Ibn al-Ukhuwwa, vol. I, p. 222.
43. *Ibid.,* vol. I, p. 183.
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47. *Ibid.*
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50. The principle according to majority view point does not apply to a case where a person has usurped, or unlawfully appropriated, property of another person. As such the usurper cannot be held entitled to benefit from the property, on account of his liability towards its real owner.
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54. Al-Kasānī, (d. 587 A.H.), *Badā'i' wa al-Sana'i',* Dār al-Kutub al-'Elmiyyah, 1986, vol. VI, p. 62.
55. Al-Sarakhsi, *Al-Mabsūt,* vol. V, p. 72; Al-Ghanim, *Majma' ul-Damanah,* vol. I, p. 224; Al-Suyūṭī, *Al-Ashbah wa al-Nazā'ir,* vol. I, p. 135; Ibn Nujaim, *Al-Ashbah wa al-Nazā'ir,* vol. I, p. 127.
56. To learn more about the *strict moral enterprise liability* read Jane Stapleton's book on *Product Liability*, Butterworths, 1993.
57. The counterpart of the above maxim in Western law is the maxim '*injuria non excusat injuriam'* meaning that one wrong does not justify another. See Bryan A. Garner, Chief Ed. *Black's Law Dictionary*, p. 1645.
58. Ibn Nujaim, *Al-Ashbah wa al-Nazā'ir,* vol. I, p. 74.
59. *Ibid.,* p. 72; Muḥammad Siddīq b. Aḥmad al-Burnu, *al-Wajiz fi 'Idah Qawā'id al-Fighiyyah al-Kuliyyah*, p. 192.
60. Ibn Mājah (d. 275/888), *Sunan,* Tradition No. 2340, vol. II, p. 784; Tradition No. 2342, vol. II, p. 785.
61. The *Majallah,* Art. 345.
62. Ibn Nujaim, *Al-Ashbah wa al-Nazā'ir min Madhhab Abi Ḥanīfa al-Nu'mān,* p. 88.

63. *Ibid.*
64. Al-Burnu, Muḥammad Siddiq b. Aḥmad, *al-Wajiz fi 'Idah Qawā'id al-Fiqhiyyah al-Kuliyyah*, p. 207.
65. Khalil Muḥammad, *The Islamic Law Maxims*, Islamic studies, Occasional Papers 62, pp. 25-27. This sub-maxim has its counterpart in western law as "*Lex citius tolerate vult privatum damnum quam publicum malum"* – The law would rather tolerate a private wrong than a public evil," and its corollary "*Privatum incommodum public bono peusatur"* – private inconvenience is made up for by public benefit (Bryan A. Garner, Chief Ed., *Black's Law Dictionary,* pp. 1653, 1676).
66. Qur'ān, LXXIII:20.
67. Aḥmad b. Hanbal, *Musnad*, Tradition No. 17265, vol. XXVIII, p. 502; Ibn Abi Shaibah, *Mussanaf,* Tradition No. 23083, vol. IV, p. 554; Al-Baihaqī, *Al-Sunan al-Kubrā,* Tradition No. 10397, vol. IV, p. 432.
68. Al-Ghazālī (d. 505 A.H.), *Al-Muṣṭasfa,* Dar al-Kutub al-'Elimiyyah, 1993, vol. I, p. 174.
69. Ibn Qudāmah, *Al-Mughnī,* vol. III, p. 489; Shāh Waliullah, *Hujjat-ullah al-Bālighah,* Beirut, Lebanon, vol. II, p. 174; Al-Maqdisi, *Ziya' ul-Din, Al-Sunan wa al-Ahkām 'anil-Muṣṭafa 'alaihi al-Salam,* Dar Majid A'siri, Sa'udi 'Arabiyyah, 2005, vol. IV, p. 389. This is based on the well known *ḥadīth* of the Prophet (ﷺ), see Ibn Majah, *Sunan*, Tradition No. 2243, vol. II, p. 754; Abū Dāwūd, *Sunan*, Tradition No. 3508, vol. III, p. 284; Al-Tirmidhī, *Sunan*, Tradition No. 1285, vol. II, p. 572; Al-Nasā'i, *Sunan*, Tradition No. 4490, vol. VII, p. 254.
70. Malik, Muhammad Hafeez, An Analysis of Corporate Entity and Limited Liability in Islamic and Western Perspectives of Corporate Governance, *International Journal of Business, Economics and Law,* Vol. II, Issue 3 (June) ISSN 2289-1552, available at: http://ijbel.com/wp-content/uploads/2014/07/An-Analysis-of-Corporate-Entity-and-Limited-Liability-in-Islamic-and-Western-Perspectives-of-Corporate-Governance-Dr.-Malik-M.-Hafeez.pdf, last accessed on 12.05.2015.
71. M. Fayyad, 'Misleading Advertising Practices in Consumer Transactions: Can Arab Lawmakers Gain Advantage from European Insight'? (2012), XXVI(3), *Arab Law Quarterly Journal,* p. 287.
72. Ahmad, *Musnad,* Tradition No. 18368, vol. XXX, p. 320; Al-Darimi, *Sunan,* Tradition No. 171, vol. I, p. 269; Ibn Majah, *Sunan,* Tradition No. 3329, vol. III, p. 243; Al-Nasā'i, *Sunan,* Tradition No. 4453, vol. VII, p. 241; Ibn Abi Shibah, *Al-Mussanaf,* Tradition No. 22003, vol. IV, p. 448.
73. Ibn Nujaim, (d. 970 A.H.), *Al-Ashbah wa al-Naẓā'ir,* Dar al-Kutub al-'Elmiyyah, Beirut, Lebonan, 1999, p. 56. The principle (الأصل في الأشياء الإباحة حتى يدل الدليل على عدم الإباحة) is based on a number of verses of the Holy Qur'ān such as "It is He Who hath created for you all things that are on earth; Moreover His design comprehended the heavens, for He gave order and perfection to the seven firmaments; and of all things He hath perfect knowledge (II:29); "And He has subjected to you, as from Him, all that is in the heavens and on earth: Behold, in that are Signs indeed for those who reflect (XLV:13); and traditions of the Holy Prophet (ﷺ) such as the Prophet said: "*God has enjoined certain enjoinments, so do not abandon them. He has imposed certain limits, so do not transgress them. He has prohibited*

certain things, so do not fall into them. He has remained silent about many things, out of mercy, so do not ask about them" *Al-Bayhaqī,* vol. X, p. 23, *Ḥadīth* No. 20283.

74. Al-Qarafi (d. 684 A.H.), *Al-Furūq,* 'Al-'Ilm al-Kutub, n.d. vol. I, p. 220; Jamal ud-Din, *Al-Tamhid fi al-Takhrij al-Furu' 'ala Usul,* Mu'assisah al-Risalah, Beirut, p. 487.
75. Smoking etc. is impermissible on the basis of this maxim because its harm has been proven, even though, no clear text prohibits it.
76. Zarqa', *Al-Madkhal al-Fiqhi al-'Amm,* vol. II, p. 270.
77. Mansoori, *Sharī'ah Maxims: Modern Applications in Islamic Finance*, p. 144.
78. Al-Tirmidhī (d. 279 A.H.), *Sunan,* Dar al-Gharb al-Islami, Beirut, 1998, vol. III, p. 19.
79. Qur'ān, XLII:42.
80. *Ibid.,* XLV:15.
81. *Ibid.,* XIV:38.
82. *Ibid.,* IV:123.
83. *Ibid.,* VI:164.
84. Mawdudi, Sayyid Abu Al a'la, *Towards Understanding the Qur'ān,* Leicester, The Islamic Foundation, 1408/1988, vol. II, p. 299.
85. 'Abdul Basir, Muhammad, *Strict Liability in the Islamic Law of Tort,* Islamic Studies, IRI, International Islamic University, Islamabad, vol. XXXIX, No. 3 (Autumn 2000), pp. 445-462, available on http://www.jstor.org/stable/23076062 accessed on 23/08/2013.
86. Ibn Mājah, *Sunan Ibn Mājah*, Cairo, 'Isa al-Babi Halabi wa Shrukah, n.d.), vol. II, p. 890.
87. *Ibid.*
88. Al-Nasā'i (d.303 A.H.), *Sunan,* Maktabah al-Matbuat al-Islamiyyah, Halb, 1986, vol. VII, p. 127; 'Abdul Qadir Awda', *Al-Tashri' al-Jini' al-Islami Muqarinah bil Qānūn al-Wadi, Mu'assisah al-Rissālah,* Beirut, 1993, vol. I, p. 395. It means that in a tort action for what is committed by a person, he who acts is liable for what he has done, not another.
89. Al-Tirmidhī, *Sunan,* Tradition No. 2159, vol. IV, p. 31; Ibn Majah, *Sunan,* Tradition No. 2669, vol. II, p. 890.
90. Ibn Hazm (d. 456 A.H.), *Al-Muhallah,* Dar al-Fikr, Beirut, vol. XI, p. 219.
91. *Majallah,* Art. 912.
92. *Majallah,* Art. 913.
93. *Majallah,* Art. 914. Similarly *Majallah* states in Art.916: "Every person has a right of way on the public highway, subject to the safety of others. That is to say, provided no harm is caused to others in circumstances which can be avoided e.g. if a porter drops the load he is carrying on the public highway and destroys the property of another, the porter must make good the loss. If sparks fly from a blacksmith's shop while he is working iron and set fire to the clothes of a passer-by in the public highway, the blacksmith must make good the loss".
94. Al-Marghinani, *Al-Hidāyah,* vol. IV, p. 194; *Tabyin al-Haqā'iq, Kanz ul-Ḍaqa'iq,* vol. V, p. 146.
95. Al-Zuhaili, *Nazriat ul-Ḍaman*, p. 251.

96. Muslih-ud-Din, Muhammad,*The Concept of Civil Liability in Islam and the Law of Torts*, pp. 351-353.
97. Ibn Qudamah (d. 620 A.H.), *Al-Mughnī*, vol. V, p. 391.
98. Al-Marghinanī, *Al-Hidayah,* vol. III, p. 242.
99. Some professions are strictly prohibited in *Sharī'ah* (Qur'ān, V:4) such as astrologers and if the *Muḥtasib* finds anyone indulging in these practices must expel him and punish him(Ibn al-Ukhuwwah *op. cit.,* pp. 67-68). The Prophet (ﷺ) said: "*He who goes to a diviner and believes his word misbelieves that which had been revealed through Muḥammad* (ﷺ) (Al Baihaqi, *Al-Sunan al-Kubrā,* Kitāb ul Qasamah, Bāb al-Takfīr, *Ḥadīth* No. 16494). Similarly, prostitution, gambling and other unlawful services should be stopped by the authorities.
100. Al-Salami, Muhammad al-Mukhtar, *Al-Qiyās and Its Modern Applications,* Translated into English by Muhammad Hashim Kamali, Islamic Research and Training Institute, Islamic Development Bank, available at: http://uaelaws.files.wordpress.com/2012/05/al-qiyas-analogy-and-its-modern-application.pdf, pp. 108-109.
101. Al-Sarakhsi, *Al-Mabsūt,* vol. XV, p. 82.
102. Al-Marghināni, *Al-Hidayah,* vol. III, p. 242.
103. Ibn al Qudāmah, *Al-Mughnī,* vol. V, p. 390.