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THE ISLAMIC LAW OF TORT

BY

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ABSTRACT

The aim of this thesis is to discover cases and principles governing tort in Islamic law. The study is divided into six chapters, an introduction and a conclusion. The Introduction contains the explanation of the general characteristic of crime and tort, the scope, the importance of the study, methodology and the relevant literature of the thesis. Chapter one defines Western and Islamic law of tort, the existence of tort in Islām, some similar concepts between Western and Islām on the law of tort, the concept of *ḍamān* (liability) in the Islamic law of tort as well as the discussion of Strict Liability and Vicarious Liability. Chapter two is concerned with the types of tort to person and property, particularly the torts of assault, battery, false imprisonment, kinds of trespass, *ghaṣb* and *itlāf*. Chapter three examines the *Sharīᶜah* conception of liability for premises and liability for animals. Chapter four expounds the liability for chattels and clears up the nature and scope of nuisance in Islamic law, their origins and concepts. Chapter five elucidates the liability for the escape of fire and water, and concerns also the discussion of liability of medical practitioners and medical negligence. Chapter six discusses more generally the topic of negligence. The thesis concludes by taking an overall look at the ways the law of tort operates in the *Sharīᶜah*.

CONTENTS

TRANSLATION NOTE

VERSES OF THE QUR'ĀN

The translation of Quranic verses is generally based on Abdullah Yusuf Ali: The Meaning of the Glorious Qur'ān (Nadim & Co. London, 1983), which was first published in Lahore in 1975.

ARTICLES OF THE MAJALLAH

The translation of articles of the Majallat al-Aḥkām al-ᶜAdliyyah, the Ottoman Civil Code 1876, relies for the most part on C. A. Hooper, The Civil Law of Palestine and Trans-Jordan (Jerusalem, 1933) and C. R. Tyser, The Mejelle (Lahore, 1967).

ABBREVIATIONS

In addition to the use of "H" to designate *Hijrah*, "M" to designate *Masīḥī* or Common Era (CE), the following abbreviations have been used: b.= born, ibn; d. = died; pl. = plural; s. = singular. A list of abbreviations of footnotings follows the list of abbreviations.

THE *HIJRAH* DATE

Dates are given for both the Muslim and Christian eras separated by a diagonal line. When only one date is given, it is usually the Christian date, otherwise it is accompanied by the letter "H" for *Hijrah*. To convert the *Hijrah* year to the Gregorian calendar and vice versa, the researcher has used Wustenfeld, Ferdinand Mahler: Islamic Calendar and Conversion Table.

TRANSLITERATION NOTE

The transliteration of Arabic words in this study is generally that of The Encyclopaedia of Islām, except for ج which is transcribed as "j" rather than "dj" and ڤ which is reproduced as "q" instead of "k". Certain well-known words, proper names, and titles have been rendered in Westernised forms. The *tā marbūṭah* has been written as "h" at the end of a word when it is not part of the *iḍāfah* construction, in which case it is written as "t". The transliterated Arabic words have been italiced.

TABLE

ا = a	غ = gh
ء = '	ف = f
ب = b	ڤ = q
ت = t	ك = k
ث = th	ل = l
ج = j	م = m
ح = ḥ	ن = n
خ = kh	ه = h
د = d	و = w
ذ = dh	ي = y
ر = r	لا = lā
ز = z	س = 2 letters
س = s	املد = ā, ū, ī
ش = sh	بَ = ba
ص = ṣ	بِ = bi

ضَ = ḍ

طَ = ṭ

ظَ = ẓ

عَ = ʿ

بُ = bu

بَيْ = bay

بَوْ = baw

ABBREVIATIONS

Al-Ajwibah al-Khafīfah	Sayyid ᶜAbd Allāh Ḥusayn, *al-Ajwibah al-Khafīfah fī Madhhab Abī Ḥanīfah.*
Ashbāh.N	Ibn Nujaym, *al-Ashbāh wa al-Naẓā'ir.*
Ashbāh.S	al-Suyūṭī, *al-Ashbāh wa al-Naẓā'ir.*
Badā'iᶜ al-Ṣanā'iᶜ	al-Kāsānī, *Badā'iᶜ al-Ṣanā'iᶜ fī Tartīb al-Sharā'iᶜ.*
Badr al-Muttaqā	al-Ḥaṣkafī, *Badr al-Muttaqā fī Sharḥ al-Multaqā.*
Al-Bahjah fī Sharḥ al-Tuḥfah	al-Tasūlī, *al-Bahjah fī Sharḥ al-Tuḥfah.*
Bidāyat al-Mujtahid	Ibn Rushd, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid.*
Bulūgh al-Marām	Ibn Ḥajar, *Bulūgh al-Marām min Jamᶜ Adillat al-Aḥkām.*
Ḍamān al-Mutlifāt	Sulaymān Muḥammad Aḥmad, *Ḍamān al-Mutlifāt fī al-Fiqh al-Islāmī.*
Al-Durr al-Mukhtār	al-Ḥaṣkafī, *al-Durr al-Mukhtār fī Sharḥ Tanwīr al-Abṣār.*
Al-Fatāwā al-Bazzāziyyah	Ibn al-Bazzāz al-Kardarī, *al-Fatāwā al-Bazzāziyyah.*
Fatāwā Qāḍīkhān	al-Farghānī, *Fatāwā Qāḍīkhān/al-Fatāwā al-Khāniyyah.*
Fatāwā Ḥammādiyyah	al-Nākūrī, *Fatāwā Ḥammādiyyah.*

Al-Fatāwā al-Hindiyyah	al-Shaykh Niẓām wa Jamāᶜah min ᶜUlamā' al-Hind, *al-Fatāwā al-Hindiyyah fī Madhhab al-Imām al-Aᶜẓam Abī Ḥanīfah al-Nuᶜmān/al-Fatāwā al-ᶜĀlamgīriyyah.*
Fatḥ al-Bārī	Ibn Ḥajar al-ᶜAsqalānī, *Fatḥ al-Bārī bi Sharḥ al-Bukhārī.*
Fatḥ al-Wahhāb	Abū Yaḥyā Zakariyyā al-Anṣārī, *Fatḥ al-Wahhāb bi Sharḥ Minhaj al-Ṭullāb.*
Al-Fawākih al-Dawānī	al-Nafrāwī, *al-Fawākih al-Dawānī ᶜalā Risālah Ibn Abī Zayd al-Qayrawānī.*
Al-Fiᶜl al-Ḍārr	Muṣṭafā Aḥmad al-Zarqā', *al-Fiᶜl al-Ḍārr wa al-Ḍamān fīh.*
Al-Fiqh ᶜalā Madhāhib al-Arbaᶜah	al-Jazīrī, *Kitāb al-Fiqhᶜ alā al-Madhāhib al-Arbaᶜah.*
Al-Fiqh al-Manhajī	al-Khan, al-Bughā and al-Sharbajī, *al-Fiqh al-Manhajī ᶜalā Madhhab al-Imām al-Shāfiᶜī.*
Al-Furūq	al-Qarāfī, *al-Furūq.*
Al-Hidāyah	al-Marghīnānī, *al-Hidāyah Sharḥ Bidāyat al-Mubtadī.*
Al-Ikhtiyār li Taᶜlīl al-Mukhtār	al-Mūṣilī, *al-Ikhtiyār li Taᶜlīl al-Mukhtār.*
Iᶜlām al-Muwaqqiᶜīn	Ibn Qayyim al-Jawziyyah, *Ilām al-Muwaqqiᶜīn ᶜan Rabb al-ᶜĀlamīn.*
Al-Iqnāᶜ	Muḥammad al-Sharbīnī al-Khaṭīb, *al-Iqnāᶜ fī Ḥall Alfāẓ Abī Shujāᶜ.*
Jāmiᶜ al-Fuṣūlayn	Ibn Qāḍī Samāwanah (Samāwah), *Jāmiᶜ al-Fuṣūlayn.*
Al-Jāmiᶜ al-Ṣaghīr	Muḥammad b. al-Ḥasan al-Shaybānī, *al-Jāmiᶜ al-Ṣaghīr.*

Al-Kāfī	al-Namirī al-Qurṭubī, *al-Kāfī fī Fiqh Ahl al-Madīnah al-Mālikī*.
Kashshāf al-Qināᶜ ᶜan	al-Bahūtī, *Kashshāf al-Qinā ᶜan Matn al-Iqnā*.
Kifāyat al-Akhyār	Taqīy al-Dīn Abī Bakr b. Muḥammad, *Kifāyat al-Akhyār fī Ḥall Ghāyat al-Ikhtiṣār*.
Lisān al-Ḥukkām	Ibn al-Shaḥnah, *Lisān al-Ḥukkām fī Maᶜrifat al-Aḥkām*.
Al-Mabsūṭ	al-Sarakhsī, *Kitāb al-Mabsūṭ*.
Al-Maḥallī	Jalāl al-Din Muḥammad b. Aḥmad al-Maḥallī, *al-Maḥallī ᶜalā Minhāj al-Ṭālibīn*.
Majallah	*Majallat al-Aḥkām al-ᶜAdliyyah*.
Majallat al-Aḥkām al-Sharᶜiyyah	al-Qārī, *Kitāb Majallat al-Aḥkām al-Sharᶜiyyah ᶜalā Madhhab al-Imām Aḥmad b. Ḥanbal al-Shaybānī*.
Majmaᶜ al-Anhur	Dāmād Afandī, *Majmaᶜ al-Anhur fī Sharḥ Multaqā al-Abhur*.
Majmaᶜ al-Ḍamānāt	al-Baghdādī, *Majmᶜa al-Ḍamānāt fī Madhhab al-Imām al-Aᶜẓam Abī Ḥanīfah*.
Matn al-Zubad	Aḥmad b. Ruslān, *Matn al-Zubad fī ᶜIlm al-Fiqh ᶜalā Madhhab al-Imām al-Shāfiᶜī*.
Manār al-Sabīl	Ibn Ḍūyān, *Manār al-Sabīl fī Sharḥ al-Dalīl*.
Minhāj al-Ṭālibīn	al-Nawawī, *Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn*.
Minhaj al-Ṭullāb	Abū Yaḥyā Zakariyyā al-Anṣārī, *Minhaj al-Ṭullāb*.

Mishkāt al-Maṣābīḥ	al-Ṭabrīzī, *Mishkāt al-Maṣābīḥ*. (tr. James Robson).
Al-Mīzān al-Kubrā	al-Shaᶜrānī, *al-Mīzān al-Kubrā*.
Al-Mudawwanah	Mālik b. Anas, *al-Mudawwanah al-Kubrā*.
Al-Mughnī	Ibn Qudāmah, *al-Mughnī*.
Al-Mughnī wa al-Sharḥ al-Kabīr	Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*.
Mughnī al-Muḥtāj	Muḥammad al-Sharbīnī al-Khaṭīb, *Mughnī al-Muḥtāj ilā Maᶜrifat Maʿānī Alfāẓ al-Minhāj*.
Al-Muhadhdhab	al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfiᶜī*.
Al-Muḥallā	Ibn Ḥazm, *al-Muḥallā*.
Muᶜīn al-Ḥukkām	al-Ṭarābulsī, *Muʿīn al-Ḥukkām fīmā Yataraddad bayn al-Khaṣmayn min al-Aḥkām*.
Mūjabāt	Ṣubḥī Maḥmaṣṣānī, *al-Naẓariyyah al-ᶜĀmmah li al-Mūjabāt wa al-ᶜUqūd fī al-Sharīᶜah al-Islāmiyyah*.
Mukhtaṣar	Khalīl b. Isḥaq, *Mukhtaṣar fī Fiqh al-Imām Mālik*.
Muntahā al-Irādāt	Ibn al-Najjār al-Futūḥī, *Muntahā al-Irādāt*.
Al-Muqniᶜ	Ibn Qudāmah al-Maqdisī, *al-Muqṇi fī Fiqh Imām al-Sunnah Aḥmad b. Ḥanbal al-Shaybānī*.
Al-Muqniᶜ wa Ḥāshiyatuh	Ibn Qudāmah al-Maqdisī, *al-Muqṇi fī Fiqh Imām al-Sunnah Aḥmad b. Ḥanbal al-Shaybānī*.

Al-Musnad	Aḥmad b. Ḥanbal, *al-Musnad.*
Al-Mustaṣfā	al-Ghazālī, *al-Mustaṣfā min ᶜIlm al-Uṣūl.*
Al-Muwaṭṭa'	Mālik b. Anas, *al-Muwaṭṭa'.*
Nayl al-Awṭār	al-Shawkānī, *Nayl al-Awṭār min Aḥādīth Sayyid al-Akhyār Sharḥ Muntaqā al-Akhbār.*
Nihāyat al-Muḥtāj	al-Ramlī, *Nihāyat al-Muḥtāj ilā Sharḥ al-Minhāj fī al-Fiqh ᶜalā Madhhab al-Imām al-Shāfiᶜī.*
Al-Qawānīn al-Fiqhiyyah	Ibn Juzayy, *al-Qawānīn al-Fiqhiyyah.*
Radd al-Muḥtār	Ibn ᶜĀbidīn, *Ḥāshiyah Radd al-Muḥtār ᶜalā al-Durr al-Mukhtār Sharḥ Tanwīr al-Abṣār fī Fiqh Madhhab al-Imām Abī Ḥanīfah al-Nuᶜmān.*
Rahmat al-Ummah	Muḥammad b. ᶜAbd al-Raḥmān al-Dimashqī, *Raḥmat al-Ummah fī Ikhtilāf al-A'immah.*
Al-Rawḍ al-Murbiᶜ	al-Bahūtī, *al-Rawḍ al-Murbi bi Sharḥ Zād al-Mustaqniᶜ.*
Al-Risālah	Ibn Abī Zayd al-Qayrawānī, *al-Risālah.* (tr. Bello Muḥammad Daura).
Salmond and Heuston	*Salmond and Heuston on the Law of Torts.*
Sharḥ Fatḥ al-Qadīr	Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr ᶜalā al-Hidāyah Sharḥ Bidāyat al-Mubtadī.*
Sharḥ Ibn al-Qāsim al-Ghazzī	Ibn al-Qāsim al-Ghazzī, *Sharḥ ᶜalā Matn al-Shaykh Abī Shujāᶜ.*
Sharḥ al-ᶜInāyah ᶜalā al-Hidāyah	al-Bābartī, *Sharḥ al-ᶜInāyah ᶜalā....*
Sharḥ Muntahā al-Irādāt	al-Bahūtī, *Sharḥ Muntahā al-Irādāt.*

Al-Sirāj al-Wahhāj	al-Ghamrāwī, *al-Sirāj al-Wahhāj Sharḥ ᶜalā Matn al-Minhāj*.
Tabṣirat al-Ḥukkām	Ibn Farḥūn, *Tabṣirat al-Ḥukkām fī Uṣūl al-Aqḍiyah wa Manāhij al-Aḥkām*.
Tabyīn al-Ḥaqā'iq	al-Zaylaᶜī, *Tabyīn al-Ḥaqā'iq Sharḥ Kanz al-Daqā'iq*.
Tafsīr al-Qurṭubī	al-Qurṭubī, *al-Jāmiᶜ li Aḥkām al-Qur'ān*.
Tāj al-ᶜArūs	al-Zabīdī, *Tāj alᶜ Arūs min Jawāhir al-Qāmūs*.
Takmilat Fatḥ al-Qadīr	Qāḍī Zādah Afandī, *Natā'ij al-Afkār fī Kashf al-Rumūz wa al-Asrār*.
Al-Thamar al-Dānī	al-Ābī, *al-Thamar al-Dānī Sharḥ Matn Risālah Abī Zayd al-Qayrawānī*.
Tuḥfat al-Muḥtāj	Ibn Ḥajar al-Haythamī, *Tuḥfat al-Muḥtāj bi Sharḥ al-Minhāj*.
Al-ᶜUddah Sharḥ al-ᶜUmdah	al-Maqdisī, *alᶜ Uddah Sharḥ alᶜ Umdah fī Fiqh Imām al-Sunnah Aḥmad b. Ḥanbal al-Shaybānī*.
ᶜUmdat al-Fiqh	Ibn Qudāmah,ᶜ *Umdat al-Fiqh fī Fiqh Imām al-Sunnah Aḥmad b. Ḥanbal al-Shaybānī*.
ᶜUmdat al-Sālik wa ᶜUmdat ...	Ibn al-Naqīb al-Miṣrī, *ᶜUmdat al-Sālik wa ᶜUmdat al-Nāsik*.
Al-Umm	Muḥammad b. Idrīs al-Shāfiᶜī, *al-Umm*.
Al-Wajīz	al-Ghazālī, *al-Wajīz fī Fiqh Madhhab al-Imām al-Shāfiᶜī*.

INTRODUCTION

> And if ye do catch them out, catch them out no worse than they catch you out.
>
> Al-Qur'ān, 16:126

> There should be neither harming nor reciprocating harm (*lā ḍarar wa lā ḍirār*).
>
> Al-Muwaṭṭa', p.529

Despite the fact that tort law has developed internationally, it is applied in any nation according to the laws and practices of that particular nation. Each state bases its tort law on its "common law", modifying and qualifying it as is deemed necessary. In the Muslim world, the *Sharīᶜah* is the "common law" of the land, and hence, must be considered in all matters. Although there may not exist a distinct Islamic code of tort laws, this should not be construed to mean that the *Sharīᶜah* contains no laws regulating torts and wrongs. Some articles of the Majallat al-Aḥkām al-ᶜAdliyyah (the Book of Rules of Justice), purportedly the first code of tort in general. Majallah or Mejelle of the Ottoman Civil Code which was enacted between 1867 and 1877 as an important source for Islamic civil code.[1] The Majallah is, in fact, based on the doctrines of the Ḥanafī school of law. However, the code of Islamic tort never appears by itself in the manuscripts, but rather is found in conjunction with the *fuqahā*'s writings and treatises.

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[1] In legal terminology, it is named "The Islamic Civil Code". It is divided into sections dealing with domestic relations, civil obligations and legal results. The various parts of Majallah were published and put into effect over a period of several years. The first part (containing an introduction section and a book on sale) was published in 1870 while the sixteenth and last in 1877. See Majid Khadduri and Herbert J. Liebesny, *The Majalla*, Law in the Middle East, p.295.

Tort law 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.

In other words, tort recognizes misdeeds or wrongs committed against individual members of the public, otherwise crime is considered in terms of a violation of the public interest as a whole. In elaboration, we can say that the case of the public interest, the *imām* (ruler)- or as commonly referred to in the modern time by current lawyers, the state- has the absolute power to prosecute and inflict the punishment upon the criminal on behalf of the public. These cases are of divine prescribed punishments. They are categorically stipulated by the verses of the Qur'ān and the texts of the Ḥadīth and they are called and recorded, in the writings of the *fuqahā'* (Islamic jurists or learned people, especially in Islamic jurisprudence), as *al-ḥudūd*. In the punishments of *ḥudūd* no remission, emendation or reconciliation can be granted by anyone, not even the state or the *imām* when the case has been brought to the notice of the authority. For instance, in the case of theft, the person whose property is stolen cannot free the thief from the divine punishment of the amputation of his hand in terms of the conditions which are required to be completed. Even after the owner of a property has collected the stolen property from the thief, the punishment for theft (one of the *ḥudūd*) remains the public right ordained by the Law-Giver, God.[2] Regarding the cases of tort against a man (private rights), the

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[2] Al-Kaḥlānī, Subul al-Salām, vol.4, pp.20-23.

injured or the relative of a dead person has the full power to sue and bring the case to court. Beside that, he or his relative has the right to go into reconciliation with the defendant or wrongdoer, or to remit the reciprocal injury which would have been a possible punishment or death with *diyah* or *arsh*[3] or *ḥukūmat al-ᶜadl*[4]. However, in the case of transgression against a man's property, the man has the option of claiming compensation or remission.

In Islamic law, the criminal cases have been analysed and discussed by the *fuqahāʾ* in their manual texts in the topic of *ḥudūd* (pl. of *ḥadd* i.e. limits). Cases other than *ḥudūd* which are treated in the topic of *jināyah* (offence), or of *qiṣāṣ* (retaliation), or of *diyāt* (blood-money/blood-wit), or of *arsh* (compensation), or of *ṣiyāl* (assault), or of *ghaṣb* (usurpation), or of *ṣulḥ* (compromise) are dealt with as tort.[5] It should be remembered that this study will not discuss directly the famous topics like wilful murder (*qatl al-ᶜamd*), manslaughter (*qatl shibh al-ᶜamd*), homicide by misadventure (*qatl al-khaṭāʾ*), homicide by intermediate cause (*qatl bi al-sabab*), etc. because those topics have been thoroughly

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[3] *Diyah* means the blood-money or compensation which is payable in cases of homicide and of injury which its sentence is a full *diyah* (*diyah kāmilah*), the blood-money or compensation payable in the case of other offences against the body which their blood-moneys are less than a full *diyah* being termed more particularly *arsh*. See Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.6, p.298. In another definition, *diyah* is the blood-money or compensation which is payable in cases of homicide and *arsh* is the blood-money or compensation which is payable in the case of other offences against the body or injuries. See also The Encyclopaedia of Islām (New Edition), vol.2, p.340; Bahnasī, al-Mawsūᶜah al-Jināʾiyyah fī al-Fiqh al-Islāmī, vol.1, p.86 and vol.3, pp.52-53; Mohamed S. El-Awa, Punishment in Islamic Law, p.71; Amīn, al-Masʾūliyyah al-Taqṣīriyyah ᶜan Fiᶜl al-Ghayr, p.37; Muḥammad Aḥmad Sirāj, Ḍamān al-ᶜUdwān, p.349-350. These tend to be fixed amount for specific injuries.

[4] *Ḥukūmat al-ᶜadl* is the compensation or *arsh* for injuries which are not prescribed by *Sharᶜ*, and which are left to the discretion of a judge to fix after due consideration. For a detailed explanation of this term see Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.6, p.298; Bahnasī, al-Mawsūᶜah al-Jināʾiyyah fī al-Fiqh al-Islāmī, vol.2, p.138-144; Amīn, al-Masʾūliyyah al-Taqṣīriyyah ᶜan Fiᶜl al-Ghayr, p.37; Muḥammad Aḥmad Sirāj, Ḍamān al-ᶜUdwān, p.350.

[5] The word tort meaning *jināyah* has been used by Joseph Schacht. See Schacht, An Introduction to Islamic Law, p.128 and p.160.

discussed by contemporary Muslims and Western scholars in their writings. Nonetheless, the cases which will be touched upon and elucidated in this study sometimes do involve some aspect of homicide. I cover the topics which are included in the typical books of *fiqh* on *jināyah* or *qiṣāṣ* or *diyah*, etc. from a different point of view and with a different mode of organisation. I will limit my discussion in this study to tortious liabilities and trespass (*al-taʿaddī*) that have characteristics of tort. From the discussions of these civil wrongs, we can be able to draw out the essential elements, conditions and rules governing liabilities in tort.

The most important fact to record here is that the early Islamic jurists or *fuqahā'* or the founders of the legal schools such as Abū Ḥanīfah (d. 150H/767M), Mālik b. Anas (d. 179H/795M), al-Shāfiʿī (d. 204H/820M) and Aḥmad b. Ḥanbal (d. 241H/855M) do not make any distinction between both civil and criminal cases in their manual texts. They, in general, used the popular term "*al-jināyah/al-jarīmah*" in dealing with both cases above.

The Importance of the Study

It is well-known that the Western law of tort has been treated as a great discipline by lawyers with detailed rules and doctrines and many books concerning the nature of that law have been published.

Is there any discussion of the law of tort in classical Islamic literatures? Logically, it would be unfair to assert that the Islamic law of tort does not appear. As well as the

ḥudūd, other criminal cases have been broadly and systematically discussed by Muslim jurists, and therefore many cases of tort exist in Islamic legal works. However, they have not been systematically presented.

Therefore, the purpose of this thesis is to recover the Islamic law of tort. In other words, the purpose of this thesis is neither to compare laws (Western and Islām) nor to prove the influence of one upon the other, but rather to discover whether or not there ever existed an Islamic law of tort. So, this thesis will explore the issues of tort in the classical Islamic legal texts. The Majallah has been included as it is based on the classical doctrines of the Ḥanafī school of law. By doing this, I hope to add to our understanding of Islamic law.

Methodology

It must be clearly understood that the present study is not a study of all topics of tort law as set forth in books of Western law of tort. It is a study of a few most popular topics which are adapted from those books. An attempt has been made to elucidate and to scrutinize the principles of the Islamic law of tort as illustrated by the topics which are discussed. This study also tries to collate the opinions and thoughts of various schools of Islamic law.

It should be understood that the topic is very wide. As such, the researcher will try to discover the principles, characteristics and issues of tort law which are scattered throughout the classical books of *fiqh* through any book of the *sunnī* schools. However,

the sources of other schools will also be referred if they appears to be a need for this. Further, this study will be difficult without referring to contemporary books of Islamic law.

In most cases the tort applies to both Muslims and *dhimmīs*; they are treated in the same way as all mankind is regarded as partners. Where the texts have particularly mentioned *dhimmīs*, I have specifically included them.

Review of the Literature

The primary source, of course, the Qur'ān. The translation of Quranic verses is generally based on Abdullah Yusuf Ali: The Meaning of the Glorious Qur'ān (Nadim & Co. London, 1983), which was first published in Lahore in 1975. Where necessary the works of the standard classical exegetes have been referred to.[6] In addition, the researcher has consulted the modern exegesis Tafhīm al-Qur'ān written by Sayyid Abul Aʿlā Mawdūdī, translated and edited into English by Zafar Ishaq Ansari which was published by The Islamic Foundation, Leicester in 1408H/1988M-1416H/1995M.

Another primary source is the Ḥadīths or Traditions, based on *kutub al-sittah* of al-Bukhārī, Muslim, Abū Dāwud, al-Tirmidhī, al-Nasā'ī and Ibn Mājah. Other than those *kutub al-sittah*, there are a few popular *kutub al-Ḥadīth* which have been used: Muwaṭṭa', al-Musnad, Sunan al-Dārimī, Bulūgh al-Marām min Adillat al-Aḥkām, Nayl al-Awṭār and Subul al-Salām.

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[6] Such exegetes are al-Ṭabarī, al-Baghawī, al-Zamakhsharī, al-Qurṭubī, Ibn Kathīr, al-Baydāwī and Sayyid Quṭb.

Besides the primary sources mentioned above, the major books which were written and compiled by jurists of four major schools of jurisprudence have been essential material for this study. The four major schools of jurisprudence are those which have been followed throughout the *sunnī* Islamic world during the past twelve centuries. They were founded respectively by Nuᶜmān b. Thābit Abū Ḥanīfah (80-150H/699-767M) who founded the Ḥanafī school, Mālik b. Anas (93-179H/712-795M) who founded the Mālikī school, Muḥammad b. Idrīs al-Shāfiᶜī (150-204H/767-820M) who founded the Shāfiᶜī school, and Aḥmad b. Ḥanbal (164-241H/780-855M) who founded the Ḥanbalī school. Their opinions as well as the opinions of jurists who were their followers are periodically referred to throughout this thesis. Although there are differences among these authorities, all are within the general framework of the *Sharīᶜah* and are considered acceptable interpretations. The existence of these schools and the variety of viewpoints expressed within each one further attests to the adaptability of the *Sharīᶜah*.

Further, there are several secondary sources which have been important references for this study. Among them are the works written by contemporary *fuqahā'*. Their works are normally written by the way of comparative study among the *madhāhib*. In particular, the beneficial works of Wahbah al-Zuḥaylī: Naẓariyyat al-Ḍamān, Muḥammad Fawzī Fayḍ Allāh: Naẓariyyat al-Ḍamān fī al-Fiqh al-Islāmī, Ṣubḥī Maḥmaṣṣānī: al-Naẓariyyah al-Āmmah li al-Mūjibāt wa al-ᶜUqūd fī al-Sharīᶜah al-Islāmiyyah, Aḥmad Fatḥī Bahnasī: al-Mas'ūliyyah al-Jinā'iyyah fī al-Fiqh al-Islāmī, Muḥammad Aḥmad Sirāj: Ḍamān al-ᶜUdwān fī al-Fiqh al-Islāmī, ᶜAlī al-Khafīf: al-Ḍamān fī al-Fiqh al-Islāmī, Jabbār Ṣābir Ṭāhā: Iqāmat al-Mas'ūliyyah al-Madaniyyah ᶜan al-ᶜAmal Ghayr al-

Mashrūᶜ ᶜalā ᶜUnṣur al-Ḍarar, Fatḥī al-Duraynī: Naẓariyyat al-Taᶜassuf fī Istᶜmāl al-Ḥaqq fī al-Fiqh al-Islāmī and ᶜAbd al-Qādir ᶜAwdah: al-Tashrīᶜ al-Jinā'ī al-Islāmī have been examined.

In the early sixties, two works have appeared in the Arabic language forcusing in general on analysing cases related to Islamic civil wrongs. Those theses are al-Mas'ūliyyah al-Taqṣīriyyah bayn al-Sharīᶜah wa al-Qānūn written by Muḥammad Fawzī Fayḍ Allāh (Unpublished Phd. Thesis, The University of al-Azhar, 1382H/1962M) and al-Mas'ūliyyah al-Taqṣīriyyah ᶜan Fiᶜl al-Ghayr fī al-Fiqh al-Islāmī al-Muqāran written by Sayyid Amīn Muḥammad (Unpublished Phd. Thesis, The University of Cairo, 1384H/1964M)- most parts of this thesis have been translated into English by Abdul Qadir Zubair which was published by the Islamic International Contact Lagos, Nigeria in 1411H/1990M. In addition, in 1975 an excellent thesis was produced, that was Ḍamān al-Mutlifāt fī al-Fiqh al-Islāmī written by Sulaymān Muḥammad Aḥmad (Phd. Thesis, The University of al-Azhar, 1395H/1975M) and this thesis has been published by Maṭbaᶜat al-Saᶜādah, Cairo in 1405H/1985M. Apart from these theses, the researcher has also referred to a particular thesis on *ghaṣb* (usurpation) written by Yaḥyā Muḥammad ᶜAbd Allāh on the title: al-Ghaṣb wa Āthāruh fī al-Sharīᶜah al-Islāmiyyah wa al-Qānūn al-Madanī al-Yamanī, Dirāsah Muqāranah bi al-Qānūn al-Madanī al-Miṣrī, (Unpublished Phd. Thesis, The University of ᶜAyn Shams, 1416H/1995M). However, this thesis is very short in its discussion of the Islamic usurpation and it also does not comprehensively examine that topic. The researcher has also referred to a particular thesis on *ṭabīb* (doctor) written by Muḥammad Usāmah ᶜAbd Allāh on the title: al-Mas'ūliyyah

al-Jinā'iyyah li al-Aṭibbā': Dirāsah Muqāranah, (Unpublished Phd. Thesis, The University of Cairo, 1404H/1983M).

One PhD. thesis which is written in English language on the title of "Islamic Law of Tort" has been found. It was done in 1409H/1988M by Liaquat Ali Khan Niazi in pursuing a doctoral degree to the University of Punjab, Lahore, Pakistan. However, this thesis does not adequately cover the various opinions of the *fuqahā'* of the *madhāhib*. The references are very limited. The author prefers to use the precepts of the Majallah for the opinion of the Ḥanafī school without any real regard for commentaries on it either that of Salīm Rustam or of ᶜAlī Ḥaydar, etc. Another Ḥanafī school's work he prefers to use is "The Hedaya" translated by Charles Hamilton. In other *madhāhib*'s books, he has used Muwaṭṭa', translated by Muhammad Rahimuddin and Minhaj-et-Talibin: A Manual of Muhammadan Law, translated by E.C. Howard.

In view of the fact that cases of tort are scattered over various subjects in the classical and contemporary books of *fiqh*, references to works on *uṣūl*, *al-qawā'id al-fiqhiyyah*, *fatāwā* and history are also made.

CHAPTER ONE

BACKGROUND TO THE ISLAMIC LAW OF TORT

WESTERN DEFINITION OF TORT.

The term `tort' and `wrong' are originally synonymous. Tort is derived from the Latin word `tortum' while `wrong' is in its origin identical with `wrung', both the English and the Latin terms mean primarily conduct which is crooked or twisted, as opposed to that which is straight or right (rectum).[1]

Salmond defines tort as:

> "A civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation."[2]

According to Winfield:

> "Tortious liability arises from the breach of duty primarily fixed by the law, such duty is towards persons generally and its breach is redressible by an action for unliquidated damages."[3]

In the words of John G.Fleming:

> "Tort is derived from the Latin `tortus', meaning twisted or crooked, and early found its way into the English language as a general synonym for `wrong'. Later, the word disappeared from common usage, but retained its

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[1] Salmond and Heuston, p.14.

[2] Salmond and Heuston, pp.14-15.

[3] Winfield, The Law of Tort, p.11.

hold on the law and ultimately acquired its current technical meaning. In very general terms, a tort is an injury other than a breach of contract, which the law will redress with damages."[4]

Arthur Underhill described `tort' as:

"An act or omission which is unauthorised by law, and independently of contract;
(i) infringes either:
a- some absolute right of another; or
b- some qualified right of another causing damage; or
c- some public right resulting in some substantial and particular damage to some person beyond that which is suffered by the public generally; and
(ii) gives rise to an action for damages at the suit of the injured party".[5]

The definition given by Harry Street is:

"A tort is a wrong, the victim of which is entitled to redress."[6]

The first reported use of the word `tort' is in the case of *Boulston v. Hardy*.[7] Tort, however, has become specialised in its application, while wrong has remained generic.

Summing the matter up, we have seen that there are four classes of wrongs which stand outside the sphere of tort:

(1) Wrongs exclusively criminal;

(2) Civil wrongs which create no right of action for unliquidated damages, but give rise to some other form of civil remedy;

(3) Civil wrongs which are exclusively breaches of contract;

(4) Civil wrongs which are exclusively breaches of trust or of some other merely

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[4] John G. Fleming, The Law of Torts, p.1.

[5] Arthur Underhill, Summary of the Law of Torts, p.3.

[6] Harry Street, The Law of Tort, p.2.

[7] *Boulston v. Hardy*, (1597) Cro. Eliz. 547, 548; cited in Salmond and Heuston, p.14.

equitable obligation.[8]

To make an easy understanding of the definition of tort, it should be distinguished as follows:

i- Tort and crime.

ii- Tort and contract.

iii- Tort and trust.

iv- Tort and quasi-contractual obligation.

Tort and crime.

[a]- In tort, the wrongdoer has to compensate the injured party, in crime, he is punished by the state.[9]

[b]- In tort, the action is brought by the injured party himself, in crime, the proceedings are taken and conducted in the name of the state.[10]

[c]- Tort cases will be pursued in the civil courts (county court) and the criminal cases will be prosecuted in the criminal courts (crown court).[11]

[d]- The criminal law is designed to punish the defendant while the civil law aims only

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[8] Salmond and Heuston, p.14.

[9] Salmond and Heuston, p.9.

[10] Redmond and Stevens, General Principles of English Law, p.206.

[11] Mullis and Oliphant, Torts, p.1; Glanville Williams, Learning the Law, p.4.

to vindicate the plaintiff's rights.[12]

[e]- The criminal law is to protect the interest of the public at large (or of the state), whereas the primary aim of the law of tort is to protect the interests of individuals rather than to punish certain categories of wrongdoer.[13]

But it is often the case that the same wrong is both civil and criminal--capable of being made the subject of proceedings of both kinds. Assault, libel, theft and malicious injury to property, for example, are wrongs of this kind. Speaking generally, in all such cases the civil and criminal remedies are not alternative but concurrent, each being independent of the other. The wrongdoer may be punished by imprisonment or otherwise, and also compelled in a civil action to make compensation or restitution to the injured person.

The terms used are also different as between civil and criminal processes:[14]

In criminal cases.

The public prosecutor v.[15] an accused.

1) --->conviction--->punishment.

2) --->released on probation.

3) ---->discharged without punishment.

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[12] Mullis and Oliphant, Torts, p.1.

[13] Winfield, The Law of Tort, p.4.

[14] Glanville Williams, Learning the Law, pp.3-4.

[15] Prosecutes.

In civil cases.

The plaintiff v.[16] a defendant.

1) --->judgement--->to pay the money.

2) --->to transfer property.

3) --->injunction (to do or not to do something).

It is hardly necessary to point out that the terminology of the one type of proceedings should never be transferred to the other. "Criminal action", for example, is a misnomer; so is "civil offence" (the proper expression is "civil wrong"). One does not speak of a plaintiff prosecuting or of the criminal accused being sued. Again, the word "guilty" is used primarily of the criminal. The corresponding word in civil cases is "liable"; but this word is also used in criminal contexts.[17]

Tort and contract.[18]

[a]- The parties to a contract in effect make law for themselves when composing their contract, though the obligation to perform the contract is imposed by the law itself. Tortious rights and obligations on the other hand are imposed by law.

[b]- The rights created by the law of tort are against all persons but contractual rights are available only against particular persons.

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[16] Sues.

[17] Glanville Williams, Learning the Law, p.4.

[18] C.D. Baker, Tort, p.4.

[c]- The tortious right is one of exclusion of freedom from interference with a particular interest, while the contractual right is a right to performance.

Tort and trust.

[a]- The duty in the case of a trust is *in personam*[19] and the law of tort is *in rem*.[20]

[b]- Tort cases were handled by the common law courts and trusts by the court of Chancery.[21]

[c]- Compensation of tort is unliquidated damages but compensation of breach of trust is measured by the loss which the trust property has suffered.[22]

Tort and quasi-contract.

Another of the ideas of the primary duty to mark off from the law of tort is quasi-contract. This signifies liability imposed upon a particular person to pay money to another person on the grounds of unjust enrichment. A good example is the liability to repay money which has been paid under a mistake of fact. Suppose that I pay you $5.00 mistakenly thinking that I owe it to you; I can generally recover it in quasi-contract. You

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[19] A right available against a definite person or persons.

[20] A right available against the world at large. Clerk and Lindsell on Torts, p.7.

[21] Clerk and Lindsell on Torts, p.7; Salmond and Heuston, p.14.

[22] Harry Street, The Law of Tort, p.11.

have not agreed to pay it back, and so are not liable in contract to me; but in justice you ought to pay it back and so the law treats you as if (quasi) you had contracted to repay it.[23] In quasi-contract, the measure of the defendant's liability is (almost) the extent to which he has been unjustly enriched, not the extent to which the plaintiff has suffered loss.[24]

With the appearance of the differences between the law of tort, criminal act, contract, trust and quasi-contract, tort can be understood clearly and substantially. It can also be conceived that the law of tort has its own distinctive attributes.

ISLAMIC DEFINITION OF TORT.

The root meaning of the word corresponding to "tort" literally is *maḍarrah*, *ḍarar*, *adhiyyah* and *khasārah*. Tortious is *multawin*, tortiously is *bi al-tiwā'* and tortiousness is *iltiwā'*.[25] According to al-Mughnī al-Akhbār dictionary, "tort" is *fi'l ḍarar*.[26] The law dictionaries lay down that the meaning of tort is *fi'l al-ḍārr*.[27]

From these dictionaries, the proper meaning of tort in Arabic is literally *ḍarar* or *fi'l al-ḍārr*.

In *Sharī'ah*, the Arabic word for tort generally is *jināyah* and it is mostly applied

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[23] Glanville Williams, Learning the Law, p.10-11.

[24] W. V. H. Rogers, Winfield and Jolowicz on Tort, pp.8 and 11.

[25] George Percy Badger, An English-Arabic Lexicon, p.1111.

[26] Hasan Karmi, al-Mughnī al-Akhbār, p.1487.

[27] Ḥarith Suleiman Faruqi, Faruqi's Law Dictionary, p.259; Ibrahim I. al-Wahhab, Law Dictionary, , p.256.

in the parlance of the *fuqahā'* or of lawyers to injuries illegally inflicted on the human body whether such injuries have caused death, grievous hurt or merely simple hurt[28] and give rise to liability for *qiṣāṣ* or *diyah* (compensation).[29] However, some *fuqahā'* prefer to use the word *al-jirāḥ* instead of *al-jināyah*.[30] Some of them used both these terms in their writing as a title of a topic.[31]

According to the writings of the *fuqahā'*, the meaning of the word "*jināyah*" can be divided into two: general and specific meanings. In general meaning, it means "prohibited actions according to *shar*^{c} which are committed against the human body *(nafs)* or property *(māl)*, etc,". However, there are some *fuqahā'* use the word "*jarīmah*" for this meaning. Al-Māwardī defines: "*Al-Jarā'im* (pl. of *jarīmah*) are prohibited actions (*maḥẓūrāt*) which prohibited by *Shar*^{c}*iyyah* and Allāh punishes (the man who has committed it) with a *ḥadd* or *ta*^{c}*zīr* (discretionary punishment)".[32] Muḥammad Abū Zahrah explains that the word "*ḥadd*" in this context is prescribed punishment (*al-*^{c}*uqūbāt*

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[28] Abdur Rahim, The Principles of Muhammadan Jurisprudence, p.352. The usage of the word "*al-jināyah*" as a title for a chapter may be seen in Badā'i^{c} al-Ṣanā'i^{c}, vol.7, p.233; al-Hidāyah, vol.4, p.158; Minhaj al-Ṭullāb printed with Minhāj al-Ṭālibīn wa ^{c}Umdat al-Muftīn, p.269; Fatḥ al-Wahhāb, vol.2, p.154; Kifāyat al-Akhyār, p.602; al-Mīzān al-Kubrā, vol.2, p.124; al-Muhadhdhab, vol.3, p.170; al-Shīrāzī, Kitāb al-Tanbīh, p.123; al-Iqnā^{c}, vol.2, p.197; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.373; ^{c}Umdat al-Sālik wa ^{c}Uddat al-Nāsik, p.349; Tabyīn al-Ḥaqā'iq, vol.6, p.97; Aḥmad Ruslān, Matn al-Zubad, p.61; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.393; al-Ghamrāwī, Anwār al-Masālik, p.247; Manār al-Sabīl, vol.2, p.481; ^{c}Umdat al-Fiqh, p.114; al-Rawḍ al-Murbi^{c}, p.481; Bidāyat al-Mujtahid, vol.2, p.296; al-Ṣāwī, Bulghat al-Sālik, vol.2, p.179; Quṭlūbughā, Kitāb Mūjabāt al-Aḥkām wa Wāqi^{c}āt al-Ayyām, p.380 and p.387.

[29] Ajijola, Introduction to Islamic Law, p.125.

[30] See al-Umm, vol.6, p.3; Minhāj al-Ṭālibīn wa ^{c}Umdat al-Muftīn, p.269; Mughnī al-Muḥtāj, vol.4, p.2; al-Sirāj al-Wahhāj, p.477; al-Nīsābūrī, al-Iqnā^{c}, p.183.

[31] Bidāyat al-Mujtahid, vol.2, p.296 and p.303; al-Kāfī, p.587 and p.605.

[32] Al-Māwardī, al-Aḥkām al-Sulṭāniyyah, p.219.

al-muqaddarah) which includes *qiṣāṣ* and *diyāt*.[33] Prohibited actions means commission of forbidden act or omission of commanding act. The *Sharīᶜah* implies that the *jarīmah* is wrongful act which constitutes an act forbidden by the *Sharīᶜah*.[34] In specific meaning, the word of *jināyah* means aggression against the human person or his limbs such as murder, bodily injury, beating and wilful abortion.[35] This term is also used for wrongful acts punishable by *ḥudūd* or *qiṣāṣ*.[36] In other words, the *fuqahā'* usually denote by *jināyah* those actions which are committed against the human person and body as murder or wounding a bodily organ, the recovery of whose injurious results are to be made by *qiṣāṣ* or *diyah* (blood-money) or *arsh* (compensation).[37] With regard to the legal terms of Islamic jurisprudence "*jināyah*" and "*jarīmah*", it can be generally and safely asserted that "*jināyah*" is synonymous with "*jarīmah*" and occasionally the word "*jarīmah*" is wider in its meaning than the word "*jināyah*".

Briefly speaking, *jināyah* relates to violation of rights concerning person, honour and property. Violation of these rights may be civil or criminal in nature.

Some jurists like Ibn Juzayy used the term *al-taᶜaddī* conveying the meaning of tort in general. *Al-Taᶜaddī* connotes "transgression" or "trespass" which leads to any

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[33] Muḥammad Abū Zahrah, al-Jarīmah, p.22.

[34] ᶜAbd al-Qādir Awdah, al-Tashrīᶜ al-Jinā'ī, vol.1, p.66. See also Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.6, p.215.

[35] See ᶜAbd al-Qādir ᶜAwdah, al-Tashrīᶜ al-Jinā'ī, vol.1, p.67; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.6, p.215. See also al-Jurjānī, Kitāb al-Taᶜrīfāt, p.89.

[36] ᶜAbd al-Qādir ᶜAwdah, al-Tashrīᶜ al-Jinā'ī, vol.1, p.67.

[37] Ibn Taymiyyah, al-Siyāsah al-Sharᶜiyyah fī Iṣlāḥ al-Rāᶜī wa al-Raᶜiyyah, pp.87 and 195; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, pp.233-327; al-Hidāyah, vol.2, p.94; al-Fatāwā al-Hindiyyah, vol.2, pp.142-167 and vol.6, pp.2-90; Abdur Rahim, The Principles of Muhammadan Jurisprudence, p.351; Anwar Ahmad Qadrī, Islamic Jurisprudence, p.286.

injury to property, life, body and so on.[38] Some jurists used the term *al-ṣiyāl* in a particular chapter which may be related to the term "tort". *Al-Ṣiyāl* denotes "attack" or "assail" or "assault" to body, property and so forth.[39]

ᶜAbd al-Qādir ᶜAwdah states:

> "*The fuqahā'* do have knowledge of the civil wrong or delict but they did not give a name to it. We have come to employ the term civil wrong under the influence of the French law. In the *Sharīᶜah*, property and life are inviolable. Hence, any wrongful act of a person to another person's life and property, means he is responsible unless his act is justified in law. If his wrongful act does not entail criminal punishment *(ᶜuqūbah jinā'iyyah)* then he is liable to pay compensation *(taᶜwīḍ mālī)*. If the wrongful act entails criminal punishment, it is a criminal offence *(jarīmah)*, and if it is not, it does not warrant the application of criminal, and in this case it is not given any name (term) to be called unless *fiᶜl ḍārr*. It is not difficult to understand how to combine *jarīmah* and *al-fiᶜl al-ḍārr* unless both of them are liable for compensation and liable for punishment to wrongdoer.There are offences where civil wrongs as well as crimes exist. For example, if a person consumes wine belonging to a non-Muslim *(dhimmī)*, this is of course a crime as well as a *fiᶜl ḍārr* (tort of conversion). Drinking of wine is a crime for which the offender will be liable to *ḥadd* punishment. He will also be liable to pay compensation for having consumed the drink of another. In this case, the liability is concurrent in *fiᶜl ḍārr* as well as *jarīmah*".[40]

The fact is that the line which divides the two kinds of wrongs, tort and crime, is sometimes very subtle in Islamic jurisprudence. Borrowing words from Anwar Ahmad Qadri:

> "The consensus of the Muslim jurists has laid down the principle that by the commission of the prohibited actions and by not doing the sanctioned

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[38] Al-Qawānīn al-Fiqhiyyah, p.218; Muṣṭafā Aḥmad al-Zarqā', al-Fiᶜl al-Ḍārr, p.78; Schacht, An Introduction to Islamic Law, p.148.

[39] Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.305; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.463; Aḥmad b. Ruslān, Matn al-Zubad, p.66; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.421; al-Sirāj al-Wahhāj, p.536; ᶜUmdat al-Sālik wa ᶜUddat al-Nāsik, p.358; al-Ghamrāwī, Anwār al-Masālik, p.254.

[40] ᶜAbd al-Qādir ᶜAwdah, al-Tashrīᶜ al-Jinā'ī, vol.1, pp.76-77.

> actions there arise situations of injury to others. This particular action when exercised otherwise than in accordance with the legal methods is implied with a comprehensive meaning in the name of *jināyah*. The word originally meant that which is injurious or wrongful by later developments, it came to denote that which is prohibited or unlawful (tort)."[41]

Every wrongful act which results in causing damage immediately or soon after the commission is called *jināyah*.[42] According to Ibn Rushd, torts or wrongs are called *jināyah*, viz:[43]

i- Tort against human body, person and organs, e.g. murder, maiming and causing wound.

ii- Tort involving women, e.g. adultery and fornication.

iii- Trespass to property, e.g. robbery, theft and usurpation.

iv- Tort against human honour, e.g. defamation.

v- Tort through *taᶜaddī* against eatables (*ma'kūl*) and beverages (*mashrūb*).

According to al-Kāsānī, there are two categories of *jināyah*:

i- Tort committed against animals (*al-bahā'im*) and inanimate beings (*al-jamādāt*). These are either *ghaṣb* or *itlāf*.

ii- Tort committed against human beings, either it is committed against human person or organs, etc.[44]

To quote Joseph Schacht:

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[41] Anwar Ahmad Qadri, Islamic Jurisprudence, pp.285-286.

[42] Muhammad Mian Siddiqui, Qiṣāṣ wa Diyah, Islamic Research Institute, Islamabad, 1982, pp.74-75. Cited in Liquat, Islamic Law of Tort, p.6.

[43] Bidāyat al-Mujtahīd, vol.2, p.296.

[44] Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.233.

> "The approach of Islamic law to the *jināyāt*, i.e. homicide, bodily harm, and damage to property, is thoroughly different. Whatever liability is incurred through them, be it retaliation or blood-money or damages, is the subject of a private claim *(ḥakk ādamī)*; there is no prosecution or execution *ex officio*, not even for homicide, only a guarantee of the right of private vengeance, coupled with safeguards against its exceeding the legal limits; pardon *(ʿafw)* and amicable settlement are possible, but repentance has no effect. There is no tendency to restrict liability here, and the whole attitude of Islamic law is the same as in its law of property. The concept of bona fides plays no prominent part, but there is a highly developed theory of culpability which distinguishes, not quite logically, deliberate intent, quasi-deliberate intent, mistake, and indirect causation."[45]

In the words of Abdur 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 the 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 crime."[46]

Generally speaking, from the several opinions of Islamic jurists regarding the `tort', we can say that tort is a legal term for all prohibited acts committed either upon the person or property. It is an infringement of a private right belonging to an individual. Thus, it is a kind of civil wrong, that is, it relates to the individual's person, safety, reputation and property.

But, briefly speaking, the violation of rights which relate to person, honour and property are called *jināyah* in the *Sharīʿah* irrespective of their being civil or criminal in nature.

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[45] Schacht, An Introduction to Islamic Law, pp.177-178.

[46] Abdur Rahim, The Principles of Muhammadan Jurisprudence, p.351.

TORT IN THE QUR'ĀN AND ḤADĪTH.

The *Sharīʿah* insists that no person should interfere with the personal liberty of another (without any legal right) or deal with an other's properties without his permission, and thus a person should neither take another's property without legal cause, nor wrongfully destroy or appropriate another's properties.

The Qur'ān says:

> "And in no wise covet those things in which God hath bestowed His gifts more freely on some of you."[47]

A good explanation of the above verse is put forward by al-Mawdūdī when he states:

> "Man is naturally inclined to feel uneasy whenever he sees someone else ahead of him. This is the root of jealousy and envy, of cut-throat competition and animosity, of mutual strife and conflict. When anyone attempts to obliterate all differences between human beings, he in fact engages in a war against nature and inflicts wrong of another kind".[48]

Islām acknowledges the rights of human beings from the following verses of Qur'ān:

> "The recompense for an injury is an injury equal thereto."[49]

> "And if ye do catch them out, catch them out no worse than they catch you out."[50]

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[47] Al-Qur'ān, 4:32.

[48] Al-Mawdūdī, Tafhīm al-Qur'ān, vol.2, p.34.

[49] Al-Qur'ān, 42:40.

[50] Al-Qur'ān, 16:126.

"Eat not up your property among yourselves in vanities."[51]

In the Ḥadīth, the Prophet remarked in his last sermon about the sacredness of the body, property and honour of others:

> "Your blood, your properties and your honour are as sacred as the sacredness on this day of yours, in this city of yours and in this month of yours."[52]

In another Ḥadīth, the Prophet said:

"There should be neither harming nor reciprocating harm."[53]

Again, the Prophet said:

1- "Nobody among you should take a chattel of his partner with or without serious intention. If anyone takes even the stick of his partner he should return it to him."[54]

2- "It is incumbent upon a person who takes a thing from another to return the thing to the rightful possessor".[55]

3- "It is not allowed for a man to take his brother's staff except with his goodwill".[56]

From the Quranic verses and the Ḥadīths, we can say that Islām preserves and protects the property and honour of people, and lays down justice in society as a whole.

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[51] Al-Qur'ān, 4:29.

[52] Sunan Ibn. Mājah, vol.2, p.1015; Sunan al-Tirmidhī, vol.4, p.461; Ibn Hishām, al-Sīrah al-Nabawiyyah, vol.4, p.250-252.

[53] Al-Musnad, vol.1, p.313; al-Muwaṭṭa', p.529; Ibn Rajab, Jāmiᶜ al-ᶜUlūm wa al-Ḥukm, vol.2, p.207; Bulūgh al-Marām, p.396; Ashbāh.S, p.83; Ashbāh.N, p.94; Sunan Ibn. Mājah, vol.2, p.784; Mūjabāt, vol.1, pp.166-168; Majallah, article 19.

[54] Sunan al-Tirmidhī, vol.4, p.462. See also this Ḥadīth in al-Hidāyah, vol.4, p.12; Manār al-Sabīl, vol.1, p.433; al-Mabsūṭ, vol.11, p.49.

[55] See in al-Hidāyah, vol.4, p.12; al-Mabsūṭ, vol.11, p.49; Mughnī al-Muḥtāj, vol.2, p.277.

[56] Bulūgh al-Marām, p.376.

SOME SIMILAR CONCEPTS BETWEEN WESTERN AND ISLAMIC LAW OF TORT.

1)- One of the basic principles of the law of tort is that nobody should hurt another by word or deed. It exists for the purpose of preventing men from hurting one another, whether in respect of their property, their persons, their reputations, or anything else which is theirs.[57]

This principle is enunciated by the Prophet of Islām: "That a Muslim is one who refrains from hurting by word or deed another Muslim".[58]

2)- According to the English law of tort, the rights which are violated in an action for pecuniary compensation, will be remedied against the wrongdoer.

This principle is one which is applied by Islamic law. The *fuqahā'* have stated that the payment of money (*diyah*) is the legal remedy for a tort action as well as the punishment of *qiṣāṣ*.[59]

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[57] Salmond and Heuston, p.15.

[58] Ṣaḥīḥ al-Bukhārī, vol.1, p.18.

[59] In the Ḥanafī, Shāfiᶜī and Ḥanbalī schools, the topics of *diyah* and *qiṣāṣ* have been discussed in sections of *Kitāb al-Jināyāt* and *Kitāb al-Diyāt*. See al-Hidāyah, vol.4; al-Durr al-Mukhtār, vol.2; Radd al-Muḥtār, vol.6; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.5; Majmaᶜ al-Anhur, vol.2; al-Muhadhdhab, vol.3; Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn; Fatḥ al-Wahhāb, vol.2; al-Mīzān al-Kubrā, vol.2; Sulaymān al-Jamal, Ḥāshiyat al-Jamal ᶜalā Sharḥ al-Minhaj, vol.5; Manār al-Sabīl, vol.2; Sharḥ Muntahā al-Irādāt, vol.3; al-Rawḍ al-Murbiᶜ; ᶜUmdat al-Fiqh; al-ᶜUddah Sharḥ al-ᶜUmdah; al-Muqniᶜ; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vols.5 and 6. Al-Shīrāzī in his other book: Kitāb al-Tanbīh, puts the discussion of *diyāt* as one topic of *Kitāb al-Jināyāt*. This is similar

3)- Referring to the Western definition, there are certain actions of injury and wrong of which the law takes no account. The guiding principle in this connection is the Latin maxim: "*Damnum sine injuria*",[60] that is, harm is caused in actual fact, but it gives no right of action to the person who suffers damage. It is explained by Salmond as follows: Although all wrongs are, in fact or in legal theory, mischievous acts, the converse is not true. All damage done is not wrongful. There are cases in which the law will suffer a man knowingly and wilfully to inflict harm upon another, and will not hold him accountable for it. Harm of this description- mischief- which is not wrongful because it does not fulfil even the material conditions of responsibility- is called *damnum sine injuria.* The term *injuria* being here used in its true sense of an act contrary to law *(in jus)*, not in its modern and corrupt sense of harm.[61] There are cases of *damnum sine injuria*, in which the harm done may be caused by some person who is merely exercising his own rights, some of which are enumerated below:

a- In the case of the loss inflicted on individual traders by competition in trade.

b- In the case of the damage done by a man acting under necessity to prevent a greater evil.

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to Muḥammad al-Sharbīnī al-Khaṭīb in his book al-Iqnāᶜ, vol.2 and al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2. However, Muḥammad al-Sharbīnī al-Khaṭīb has divided these two topics into *Kitāb al-Jirāḥ* and *Kitāb al-Diyāt* in his other book Mughnī al-Muḥtāj, vol.4. This is similar to the writing style of the Mālikī jurists. See Bidāyat al-Mujtahid, vol.2. This style is also followed by the author of Ḥāshiyatān: Qalyūbī wa ᶜUmayrah, vol.4; and al-Sirāj al-Wahhāj. Ibn al-Mundhir also divides these discussions into two divisions: *Kitāb al-Jirāḥāt* and *Kitāb al-Diyāt*. See Ibn al-Mundhir, al-Iqnāᶜ. Further, in al-Kāfī fī al-Fiqh Ahl al-Madīnah, the discussion of *qiṣāṣ*, *diyāt* and *jirāḥah* are in one section. Similarly, Ibn Abī Zayd al-Qayrawānī discusses those topics in one section which is named as *Bāb fī Aḥkām al-Dimā' wa al-Ḥudūd.*

[60] Redmond and Stevens, General Principles of English Law, p.208-209.

[61] Salmond on Jurisprudence, p.357.

c- In the case of the exercise of statutory authority.[62]

Thus, cases of *damnum sine injuria* fall under two heads:

i- Those cases in which the harm done to the individual is nevertheless a gain to society at large.

ii- Although real harm is done to the community, yet, owing to its triviality or to the difficulty of proof, it is considered inexpedient to attempt its prevention by the law.[63]

This is a principle which has been discussed by the Islamic jurists also. Al-Sarakhsī has stated a general principle, that it is not wrongful if a person creates something in his own property.[64] This rule is derived from a more general rule, that legal validity negates payment of damages.[65] This means that if an act is lawful under Islamic law, damages cannot be claimed in respect of it. For example, if a person digs a trench or a well or a drain on a piece of land owned by him, and another person or some animal belonging to another person happens to fall into it and is killed, the owner of the land will incur no liability.[66] Another example is a trustee who returns a deposit in his custody to the owner through an agent. Before the trust reaches the person who was to receive it, it is destroyed on the way without any fault or wrongful act on the part of the agent. No

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[62] Salmond and Heuston, p.15.

[63] Salmond on Jurisprudence, pp.357-358.

[64] Al-Mabsūṭ, vol.27, p.22. See also al-Hidāyah, vol.4, p.193; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.460.

[65] Majallah, article 91. *Al-Jawāz al-sharʿī yunāfī al-ḍamān.*

[66] Majallah, article 91; al-Hidāyah, vol.4, p.193; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.460; al-Fatāwā al-Hindiyyah, vol.6, p.45; al-Shaybānī, Kitāb al-Aṣl, vol.4, p.526; al-Shaybānī, al-Amālī, p.53; Tabyīn al-Ḥaqā'iq, vol.5, p.145. See also al-Mudawwanah, vol.4, p.665.

liability will be incurred by the trustee.[67] In a further case, the borrower may deposit the thing borrowed for safe keeping with another person. If it is destroyed without any fault or negligence while in the possession of the latter, no liability would be incurred by him. For example, a person borrowed an animal for the purpose of going to and returning from a certain place. When he reached his destination, the animal is found to be tired and unable to do the return journey. Therefore, he left it in the safe keeping of another person. While in the latter's safe keeping, the animal died a natural death. In this case, no liability would be incurred.[68]

4)- The harm done to an individual may be more than counterbalanced by the benefit accruing to the public at large, as in the case of loss inflicted on individual traders by competition in trade. The individual loss is not taken into consideration on account of the public good.[69]

The Muslim jurists have also taken an interest in that and laid down in Islamic law, that it is sometimes necessary to cause loss or destruction to the individual for the good of society as a whole. ᶜIzz al-Dīn b. ᶜAbd al-Salām has specified two kinds of such loss:

a- Loss or destruction for the protection of life or the improvement of physical condition.

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[67] Majallah, article 795.

[68] Majallah, article 824.

[69] Salmond and Heuston, p.15.

b- Loss or destruction for the purpose of avoiding a public mischief.[70]

The principle observed in this connection is that a particular loss must be suffered in order to avoid a general harm.[71] In the words of al-Hidāyah: "Sometimes a harm to a particular person may be permitted to avoid loss to the community in general."[72]

This is based on the more fundamental principle, that is, "a private injury is tolerated in order to ward off a public injury".[73]

A few illustrations are stated below to elucidate these general rules:

(a) Anything which causes injury to passers-by on the public highway must be removed, even though it has been there for a long time.[74]

(b) It is for this reason that quacks are not allowed to practise.[75]

(c) The prohibition of hoarding of food to control the price in time of need. The government can force a hoarder *(muḥtakir)* to sell his stock at the ordinary price.[76] Abū Yūsuf theorizes: "Anything, by detaining it, may produce injury (bad consequences)to the

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[70] ʿIzz al-Dīn b. ʿAbd al-Salām, Qawāʿid al-Aḥkām fī Maṣāliḥ al-Anām, vol.2, p.87.

[71] Majallah, article 26; al-Hidāyah, vol.3, p.281 and vol.4. p.195.

[72] Al-Hidāyah, vol.3, p.281; Ashbāh.N, p.87.

[73] Majallah, article 26; Ashbāh.N, p.87; al-Zarqā', Sharḥ al-Qawāʿid al-Fiqhiyyah, p.197; ʿAlī al-Nadwī, al-Qawāʿid al-Fiqhiyyah, p.422. *Yutaḥammal al-ḍarar al-khāṣṣ li daf i al-ḍarar al-ʿāmm.*

[74] Majallah, article 1214; al-Hidāyah, vol.4, p.195; Ashbāh.N, p.87; al-Zarqā', Sharḥ al-Qawāʿid al-Fiqhiyyah, p.197.

[75] Majallah, article 26 and article 964; al-Hidāyah, vol.3, p.281; Iʿlām al-Muwaqqiʿīn, vol.4, p.487; Ashbāh.N, p.87; al-Durr al-Mukhtār, vol.2, p.323; al-Zarqā', Sharḥ al-Qawāʿid al-Fiqhiyyah, p.198.

[76] Ibn Qayyim, al-Ṭuruq al-Ḥukmiyyah, p.243; Ashbāh.N, p.87; Sharḥ al-Qawāʿid al-Fiqhiyyah, p.198; Subḥī Maḥmaṣṣānī, Falsafat al-Tashrīʿ fī al-Islām, p.157.

public is considered as hoarding, although such a thing is gold, silver or cloth".[77] Ibn Ḥajar al-Haythamī in his writings has classified that the action of hoarding as one of the grave sins (*al-kabā'ir*).[78]

It is clear that in all such cases some person or other suffers damage in his individual capacity. As a result for the good of the whole society, it becomes necessary to allow the individual to suffer. The majority of jurists thus permit the state or the persons in authority to interfere in the life of individuals if such interference is required by the public interest.[79]

5)- Salmond explains, "So the natural right to support of a landowner is subordinate to the natural right of his neighbour to exploit his property."[80] This means that a person may be suffering damages, because his neighbour chooses to exercise his rights of ownership in his property.

This principle is also generally applied by the Muslim jurists. It has been stated by Abū Muḥammad b. Ghānim al-Baghdādī and Ibn Nujaym that if a person exercises any right in respect of anything owned by him, no other person has the right to interfere with him, even though he may have to suffer damage by such exercise of the right of

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[77] Al-Hidāyah, vol.4, p.92; Sharḥ Fatḥ al-Qadīr, vol.10, p.58. See also ᶜAlī al-Nadwī, al-Qawāᶜid al-Fiqhiyyah, p.59. *Kullumā aḍarr bi al-ᶜāmmah ḥabasah fahuwa iḥtikār, wa in kānā dhahaban aw fiḍḍatan aw thawban.*

[78] Ibn Ḥajar, al-Zawājir ᶜan Iqtirāf al-Kabā'ir translated by Nuh Ha Min Keller and printed with his translation of ᶜUmdat al-Sālik wa ᶜUddat al-Nāsik, p.977.

[79] Subḥī Maḥmaṣṣānī, Falsafat al-Tashrīᶜ fī al-Islām, p.157.

[80] Salmond and Heuston, p.16.

ownership.[81] For example:

i)- If a person digs a well (or builds a building) on land owned by him, and it causes the wall of his neighbour's house to be weak, or suddenly to collapse, the person who dug the well (or built the building) is not liable.[82]

ii)- If a person pulls down his own house, and this action results in his neighbour's house collapsing. When the neighbour takes action for damages, the person who pulled down his own house is not ascribed any liability.[83]

These examples above mentioned that the harm done by the person who digs a well, builds a building or pulls down his house thereby damaging his neighbour's house is exercising his own rights, thus no liability accrues to him and no other person has the right of interference.[84]

6)- The Western principle of tort lays down that, "Damage may be done by a person to another under necessity to prevent a greater evil."[85]

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[81] Majmaᶜ al-Ḍamānāt, p.152; Ashbāh.N, p.281. This is the opinion of Abū Ḥanīfah who bases his opinion in accordance with *qiyās*. However, his opinion always comes a different conclusion of his disciple Abū Yūsuf who prefers to apply the rule of *istiḥsān*. See the division of groups according to their position whether prefer to apply *qiyās* or *istiḥsān* in the discussion of "The Concept of *Ḍamān* in the Islamic Law of Tort", pp.38-47.

[82] Majmaᶜ al-Ḍamānāt, p.152; Ashbāh.N, p.281. However, the decision in this case contradicts the decision made by the *fuqahā'* who apply the rule of *istiḥsān*. It also contradicts article 1200 of the Majallah and the decision made by other *madhāhib*. See the topic of "Structural Weakness" in the section of "Nuisance" to compare with the case mentioned above, pp.262-263.

[83] Majmaᶜ al-Ḍamānāt, p.152.

[84] Ashbāh.N, p.281. There are, however, other opinions of the *fuqahā'* which are contrary to the opinion mentioned above. For detail, see the discussion of "The Concept of *Ḍamān* in the Islamic Law of Tort" pp.44-46.

[85] Salmond and Heuston, p.15.

This principle is also applied by Islamic jurisprudence. Thus, it is a general rule that, "A greater injury may be prevented by a lesser injury."[86] And, "In the presence of two evils the one whose injury is greater may be avoided by the commission of the lesser."[87] The following illustrations will make the rule clear:

a- If a ship with passengers on board were in danger of capsizing, it would be legitimate to throw overboard all goods or animals with a view to saving human life, because the evil resulting from the loss of property is less than the evil resulting from the loss of human lives.[88]

b- The imprisonment of the father if he refuses to support his son. The injury resulting from imprisonment is less than the injury of unwillingness to support his son.[89]

c- If a hen swallows a pearl, attention will be paid as to which is more valuable, and the owner of the more valuable will pay the value of the less.[90]

d- A usurper of land has cultivated trees on it, then he returns it to its owner. The deeds of the owner to take out the trees from the land by the usurper will cause greater injury to the land, so the owner should pay the value of the trees.[91]

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[86] Majallah, article 27; ʿAlī al-Nadwī, al-Qawāʿid al-Fiqhiyyah, p.388. *Al-ḍarar al-ashadd yuzāl bi al-ḍarar al-akhaff.*

[87] Majallah, article 28; ʿAlī al-Nadwī, al-Qawā id al-Fiqhiyyah, p.388. *Idhā taʿāraḍa mafsadatān ruʿiya aʿẓamuhumā ḍararan bi irtikāb akhaffuhumā.*

[88] Al-Qawānīn al-Fiqhiyyah, p.218; al-Umm, vol.6, p.239; Ṣubḥī Maḥmaṣṣānī, Falsafat al-Tashrīʿ fī al-Islām, p.158; ʿAlī al-Nadwī, al-Qawāʿid al-Fiqhiyyah, p.389.

[89] Ashbāh.N, p.88; Salīm Rustam, Sharḥ al-Majallah, vol.1, p.31.

[90] Ashbāh.N, p.88; Salīm Rustam, Sharḥ al-Majallah, vol.1, p.32; ʿAlī Ḥaidar, Durar al-Ḥukkām, vol.1, p.37; al-Fatāwā al-Hindiyyah, vol.5, p.125; Majallah, article 27.

[91] Ashbāh.N, p.88; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.236; al-Fatāwā al-Hindiyyah, vol.5, p.125.

e- The *Sharī'ah* has sanctioned the usurpation of a thread to stitch up the wound of a human being. The usurpation of the thread is not permissible if it is for the purpose of sewing clothes.[92] The wound of a human being is a greater injury than the sewing of clothes.

7)- Sir John Salmond has stated that, "The harm complained of may be too trivial, too indefinite, or too difficult of proof, legal suppression of it will not be expedient or effective."[93]

In connection with the stand-point of Islamic jurisprudence, we may refer to the general principle enunciated by al-Karkhī that it is more rightful to exercise care in regard to public rights than to private rights. An instance of this principle is the question of the imposition of damages where the legal validity of such an imposition of damages is doubtful. In such a case it is desirable not to award damages, because the principle is that in doubtful cases damages cannot be imposed.[94]

8)- One of the principles of the English law of tort is *volenti non fit injuria*. It means "there is no act contrary to law done to one who consents". No act is actionable as a tort at the suit of any person who has explicitly or implicitly assented to it. The maxim applies to intentional acts which would otherwise be tortious:

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[92] Al-Wajīz, vol.1, p.213.

[93] Salmond and Heuston, p.16.

[94] Al-Karkhī, Uṣūl al-Karkhī, p.82.

i- Consent to an entry on land or goods which would otherwise be a trespass.

ii- Consent to physical harm which would otherwise be a battery.

So, the maxim affords a defence to a physician or surgeon for an act done in the course of medical or surgical treatment, accepted as proper by a responsible body of professional opinion. If the practice of the medical profession is disputed, then the court must decide on the standard of care. The defendant must establish that the plaintiff's consent was fully and freely given.[95]

Consent here means the agreement of the plaintiff, explicitly or implicitly, to exempt the defendant from the duty of care which he would otherwise have owed.[96] The act which is done may be rightfully done or the danger rightfully caused.[97]

This principle has been accepted even by Islamic jurists. Al-Shāfiᶜī has explained that if one person, fearing the incidence of disease, permitted a physician to bleed him or operate on him and the physician accordingly carried out the operation or the bleeding and this caused the death of the person, the effect of that is that the physician will not be liable either for the retaliatory death punishment or for the price of blood. The reason for this is that the work was done with the permission of the deceased, as if the latter himself did the work.[98]

Al-Sarakhsī has also stated a few illustrations of this kind, namely:

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[95] Salmond and Heuston, p.485.

[96] Salmond and Heuston, p.486.

[97] Salmond and Heuston, p.489.

[98] Al-Umm, vol.6, p.240. For detail about *volenti non fit injuria* in the case of medical treatment, see the discussion of "Necessity of Consent in Medical Treatment" in the section of "Liability of Medical Practitioners", pp.335-338.

i- A person dug a well outside his premises on a public street. Another person wilfully threw himself into it. No liability would be incurred by the first person on this account.[99]

ii- A person constructed a bridge, and another person wilfully tried to walk on it, causing harm to himself. The person who constructed the bridge will not be liable for his action, because the injured person was guilty of an intentional act.[100]

9)- As a general rule, it is for the plaintiff to prove the defendant's negligence. It is not for the defendant to disprove it. In some cases, however, the plaintiff can prove the accident but he cannot prove how it happened so as to show the defendant's negligence. This hardship is avoided by the rule of *res ipsa loquitur*.[101]

Res ipsa loquitur literally means "the thing speaks for itself"[102] or "the accident tells its own story".[103] In legal terms, it means that the fact of the accident by itself is sufficient (in the absence of an explanation by the defendant) to justify the conclusion that most probably the defendant was negligent and that his negligence caused the

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[99] Al-Mabsūṭ, vol.27, p.16; Tabyīn al-Ḥaqā'iq, vol.5, p.145; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.461; al-Fatāwā al-Hindiyyah, vol.6, p.45; al-Shaybānī, Kitāb al-Aṣl, vol.4, p.517; al-Durr al-Mukhtār, vol.2, p.464; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.597; Radd al-Muḥtār, vol.6, p.597.

[100] Al-Mabsūṭ, vol.27, p.22; al-Hidāyah, vol.4, p.194; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.460; al-Fatāwā al-Hindiyyah, vol.6, p.44; al-Jāmiᶜ al-Ṣaghīr, p.515; al-Shaybānī, Kitāb al-Aṣl, vol.4, p.527; al-Durr al-Mukhtār, vol.2, p.464; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.597; Tabyīn al-Ḥaqā'iq, vol.5, p.145.

[101] Salleh Buang, Law of Negligence in Malaysia, p.69; Salmond and Heuston, p.247.

[102] Salleh Buang, Law of Negligence in Malaysia, p.69; Keenan and Crabtree, Essentials of Industrial Law, p.131; C. D. Baker, Tort, p.201.

[103] Mullis and Oliphant, Torts, p.75.

plaintiff's injury. In short, the fact of the accident raises an inference of negligence.[104]

It can be clearly explained by referring to the case of *Scott v. London & St. Katherine Docks Co.*,:[105]

> "the plaintiff was passing by the defendant's warehouse when six bags of sugar, which were being hoisted up by the defendant's crane, fell on him. The only thing which the plaintiff could prove was that the bags of sugar fell on him, causing his injury. He could not show how the accident happened. The court held that the facts were sufficient to give rise to an inference of negligence on the part of the defendant. The maxim *res ipsa loquitur* therefore was applicable".

The rule was laid down succinctly by Sir William Erle C.J. as follows:

> ".....where the thing is shown to be under the management of the defendant or his servant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose from want of care".

In connection with the Islamic law of tort, the maxim *res ipsa loquitur* is the same in meaning as the maxim *inna li al-ḥālah min al-dalālah kamā li al-maqālah*[106] which means :"A particular circumstance which leads to a fact being inferred, is considered as good as a spoken statement". As a fact can be inferred from a statement, so a particular circumstance may also lead to a fact being inferred from it. An example of such a case is that if a person collects tools to pull down his house and another person comes and pulls it down without the permission of the owner, no liability would be imposed on him.

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[104] See, *Yap Kim Chye & Anor. v. Seow Seng Choon* (1952) MLJ 168 and *Keng Wah v. Lim Tew Hong* (1957) MLJ 137, cited in Salleh Buang, Law of Negligence in Malaysia, p.69.

[105] (1865) 3 H&C 596, cited in Salmond and Heuston, p.248; Mullis and Oliphant, Torts, p.75; Salleh Buang, Law of Negligence in Malaysia, p.69.

[106] Al-Karkhī, Uṣūl al-Karkhī, p.81.

In such matters, the principle is that if there is no difference in the action of one man and of another in performing work, it is lawful for any person to help another. But, if in performing a task there is a difference in one man's action and another's, it will not be right for any person to render help to another.[107]

Mālik b. Anas also refers to this point and states that a labourer was passing through a street with a camel loaded with two sacks. In the middle of the street the rope suddenly broke and one of the sacks fell down on a woman who died as a result of injuries received. Liability would be incurred by the labourer.[108] The proof in this case may be inferred from the occurrence.

Al-Sarakhsī states that if some load fell down on a person from a camel's back and he died on account of that occurrence, the leader of the camel will incur liability, and if there is a driver, he will also incur the same. The reason for this is the fact that in this case it is possible to avoid injury.[109] This case stipulated:

(i)- That the accident is such as in the ordinary course of things does not happen if those who have the management use proper care.[110]

(ii)- That the accident was due to the negligence of the defendant.[111]

On the other hand, the defendant is entitled to show:

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[107] Al-Fatāwā al-Hindiyyah, vol.5, p.129.

[108] Al-Mudawwanah, vol.4, p.666. See also Majallah, article 926.

[109] Al-Mabsūṭ, vol.27, p.4.

[110] *Hādhā mimmā yumkin al-taḥarruz ʿanh.*

[111] Al-Mabsūṭ, vol.27, p.4. *Wa innamā yasquṭu li taqṣīr.*

(i)- That he exercised all reasonable care.[112]

(ii)- That the accident did not arise out of negligence.[113]

The above examples mentioned that the attendant circumstances may show to what extent the accident had happened and who can be held liable for that. Both Islamic and English law of tort agree upon this point.

To sum up, the above are several principles and rules formulated by Western law of tort and by Islamic jurists. They have undergone development and progress in modern times.

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[112] *Bi an yashudda al-ḥaml ʿalā al-baʿīr ʿalā al-wajh lā yasquṭ.*

[113] Al-Mabsūṭ, vol.27, p.4.

THE CONCEPT OF *ḌAMĀN* (LIABILITY) IN THE ISLAMIC LAW OF TORT.

The term *ḍamān* literally means responsibility, answerability, accountability, amenability, suretyship, guaranteeship, security, warranty and the like. It is synonymous with *kafālah*, but it is more common and wider (in signification) than *kafālah*. Sometimes, it signifies what is not *kafālah* (suretyship), namely, indemnification or restoration of the like, or the value, of a thing that has perished. *Ḍamān māl* or *ghurm* signifies responsibility for property or for a debt, owed by another person.[1]

Ḍamān also means *iltizām* (obligation).[2] *Iltizām* is used in a wider sense, that is as a synonym for *al-ḥaqq al-shakhṣī*, i.e. private right, for *al-taghrīm*, i.e. mulct, for *al-mūjib*, i.e. obligating, for *al-dayn*, i.e. debt, for *al-ḍamān*, i.e. damages, etc.[3]

The application of the term *ḍamān* by the *fuqahā'* in their books could be divided into two aspects:

i- Suretyship *(kafālah)*.

ii- Compensation *(gharāmah)*.[4]

However, there are significations of *ḍamān* given by the *fuqahā'* which could be

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[1] Lane, An Arabic-English Lexicon, vol.1, p.1805; Harith Suleiman Faruqi, Faruqi's Law Dictionary, p.217; Ibrahim I. al-Wahhab, Law Dictionary, p.136.

[2] Mughnī al-Muḥtāj, vol.2, p.198; Wahbah, Naẓariyyat al-Ḍamān, p.14.

[3] Amīn, al-Mas'ūliyyah al-Taqṣīriyyah, p.16.

[4] Ḍamān al-Mutlifāt, pp.29-30.

related to tort:

1- *Ḍamān* is an obligation to replace destroyed property, if it is similar or fungible *(mithliyyāt)*, or to pay the value thereof, if it is a thing which could be grouped in dissimilar or infungible *(qīmiyyāt)*.[5]

2- A duty to pay a pecuniary reward against an injury incurred upon tortfeasor.[6]

3- Giving compensation of similar thing by a tortfeasor, if it is in a similar group, or giving the value if it comes from a dissimilar group.[7]

4- *Ḍamān* is compensation for destruction.[8]

5- *Ḍamān* is an obligation to return a thing to its owner or to give compensation of a similar thing or its value.[9]

6- *Ḍamān* is liability *(iltizām)* to pay compensation *(taᶜwīḍ)* due to injury *(ḍarar)* to another.[10]

7- *Ḍamān* is liability *(iltizām)* to pay compensation to another due to destruction of property or loss of benefits *(manāfiᶜ)*.[11]

From the above definitions of *ḍamān*, we understand that any injury committed

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[5] Majallah, article 416.

[6] Amīn, al-Mas'ūliyyah al-Taqṣīriyyah, p.69.

[7] Al-Ḥamawī, Ghamz al-ᶜUyūn al-Baṣā'ir, vol.2, p.210.

[8] Nayl al-Awṭār, vol.5, p.299.

[9] Al-Wajīz, vol.1, p.208.

[10] Muṣṭafā b. Aḥmad al-Zarqā', al-Madkhal al-Fiqhī, vol.2, p.1032, no.648; Wahbah, Naẓariyyat al-Ḍamān, p.15; Muṣṭafā b. Aḥmad al-Zarqā', al-Fiᶜl al-Ḍārr, p.62.

[11] Wahbah, Naẓariyyat al-Ḍamān, p.15.

by a person on another person is prohibited by law and the tortfeasor will be held liable for what he has done. He has to pay compensation (give the similar thing or its value) as a return to the claimant (plaintiff) for any injury which the latter has sustained. However, the exercising of an action following the legal right which is not considered as an infringement of another person's right negates any tortious liability. If it so happened as a result of failure to exercise a legal right within the limit of the law, and it accidentally happened that another person sustained injury to his life, or his land, or his chattels, the *fuqahā'* negate tortious liability of a person who exercised his legal right. For this reason, they propounded that if a person dug a well on his land or on the public road under the command of the authorities, and an animal of another person fell into it accidentally and died, the digger would not be held responsible,[12] because the digger acted within his legal right. They, therefore, theorized that "legal permission negates tortious liability".[13]

This theory would necessarily warrant that "legal permission" is unrestricted. It is then assumed that a person would be free within his legal rights. But, where this legal permission is subject to some restraints and limitations the owner of this legal permission is not immune from liability. An example will elucidate this. If, for instance, a person in severe need found another's food to eat in order to prevent himself from starving to death, would he be liable to make good the loss?

Eating of another's food under severe need is not only permissible but

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[12] Jāmiᶜ al-Fuṣūlayn, vol.2, p.115; Majallah, article 91; al-Zarqā', Sharḥ al-Qawāᶜid al-Fiqhiyyah, p.449; Salīm Rustam, Sharḥ al-Majallah, vol.1, p.59; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.1, p.81.

[13] Majallah, article 91. *Al-Jawāz al-shar'ī yunāfī al-ḍamān.* For detailed discussion of this legal maxim, see Muṣṭafā b. Aḥmad al-Zarqā', al-Madkhal al-Fiqhī, vol.2, pp.1032-1033, no.648; al-Zarqā', Sharḥ al-Qawāᶜid al-Fiqhiyyah, pp.449-452.

compulsory. It is based on a Quranic verse:

> "But if one is forced by necessity, without wilful disobedience, nor transgressing due limits, then is he guiltless, for God is Oft-Forgiving, Most Merciful".[14]

It is also endorsed by al-Ghazālī who said: "All prohibited things become permissible by necessity".[15] In the same sense, the Majallah states: "Necessity renders prohibited things permissible".[16] One of the Latin legal maxims gives the same meaning: "*Necessitas non habet legem*".[17]

According to the Ḥanafī and the Shāfiᶜī schools, the person consuming the food should be liable and must make good the loss to the owner of the food. The Majallah says: "Necessity does not invalidate the right of another". Consequently, if a hungry person eats bread belonging to another, such a person will later be liable to the value thereof.[18] Indeed, necessity *(iḍṭirār)* gives the legal permission to trespass upon another person's rights, but it does not dissolve the compensation *(ḍamān)* and does not void the other's rights.[19] ᶜIzz al-Dīn ᶜAbd al-Salām said: "A person who in necessity eats another's food, must be liable for its value, he and the owner of that food are regarded as debtor

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[14] Al-Qur'ān, 2:173.

[15] Al-Wajīz, vol.2, p.216. *Jamīᶜ al-muḥarramāt tubāḥ bi al-ḍarūrah.*

[16] Majallah, article 21. *Al-Ḍarūrāt tabīḥ al-maḥẓūrāt.* For detailed discussion of this maxim, see Muṣṭafā b. Aḥmad al-Zarqā', al-Madkhal al-Fiqhī, vol.2, pp.995-996, no.600; al-Zarqā', Sharḥ al-Qawāᶜid al-Fiqhiyyah, p.185; al-Nadwī, al-Qawāᶜid al-Fiqhiyyah, p.308.

[17] See Subḥī Maḥmaṣṣānī, Falsafāt al-Tashrīᶜ fī al-Islām, p.154.

[18] Majallah, article 33. *Al-Iḍṭirār lā yubṭil ḥaqq al-ghayr.* For detailed discussion of this maxim, see al-Zarqā', Sharḥ al-Qawāᶜid al-Fiqhiyyah, pp.213-214.

[19] Al-Zarqā', Sharḥ al-Qawāᶜid al-Fiqhiyyah, p.213.

(muqriḍ) and debtee *(muqtariḍ)* at that time".[20]

However, the Mālikī and the Ḥanbalī schools are reported to have ruled otherwise on this question. They rejected the liability to compensation of the person who eats other people's food to ward off hunger on grounds of equality (*musāwāh*) and the duty of preserving life.[21]

With regard to the Ḥanafī and the Shāfiᶜī opinions, it could be said that the cause of this liability is that the legal permission at this juncture is restrained with a condition of non-trespass on another's right whether:

i- The necessity comes naturally *(samāwī)*, e.g. hunger or self-defence from an unruly animal, or

ii- The necessity comes unnaturally *(ghayr samāwī)*, e.g. the coercion of *ghayr mulji'* (imperfect coercion) and the coercion of *mulji'* (perfect coercion).[22]

Furthermore, the application of maxim: "Legal permission negates tortious liability", should provide the reasonable duty of care to preserve *(salāmah)* another person from injury in using public property *(amwāl ᶜāmmah)*. If a dangerous action emerges, even though in the exercise of a legal right, the liability must be upheld. For instance, a

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[20] ᶜIzz al-Dīn ᶜAbd al-Salām, Qawāᶜid al-Aḥkām fī Maṣāliḥ al-Anām, vol.2, p.176; al-Nawawī, al-Majmūᶜ, vol.9, p.43. There is, however, a weak opinion which considers that the person would not be liable. See also, ᶜAbd al-Karīm Zaidān, Majmūᶜah Buḥūth Fiqhiyyah, p.198.

[21] Ibn Qayyim, Iᶜlām al-Muwaqqiᶜīn, vol.3, p.8; al-Qarāfī, al-Furūq, vol.4, p.9; Ṣubḥī Maḥmaṣṣānī, Falsafat al-Tashrīᶜ fī al-Islām, p.156; Mūjabāt, vol.1, p.178. However, al-Dusūqī maintains that the person is released from liability if he has no property for paying compensation on that time, otherwise, he should be liable. See al-Dusūqī, Ḥāshiyah, vol.2, p.126. Also in the Ḥanbalī school where Ibn Taymiyyah opines in concurrence with al-Dusūqī. See Ikhtiyārāt Ibn Taymiyyah, vol.4, p.191, cited in ᶜAbd al-Karīm Zaidān, Majmūᶜah Buḥūth Fiqhiyyah, p.199.

[22] Al-Zarqā', Sharḥ al-Qawāᶜid al-Fiqhiyyah, p.213.

passer-by or a rider of an animal on a public highway should be held liable if he inflicts any injury on persons or chattels on the highway because his right to the public highway is limited to proper and reasonable care to safeguard the right of other users.[23]

That, in addition to the discussion of the exercise of legal right *(istiᶜmāl al-ḥaqq)* in his property, and as a result that exercise may sustain injury to another person, land or chattels, a person who exercises it will not be held liable or restrained from its exercise, has been agreed by Abū Ḥanīfah in the popular opinion of his school, as well as al-Shāfiᶜī and the Ẓāhirīs.

Abū Ḥanīfah stated: "A person is free to exercise his legal right in his property and no one can prevent him from it in spite of the possibility that his neighbour (another person) may suffer injury. He is not liable because legal permission negates tortious liability. But, according to him, religiously *(diyānah)* it will not be valid to damage another's property because it is prohibited by a Ḥadīth:

"There should be neither harming, nor reciprocating harm".

The implementation of this Ḥadīth is to all human beings without differentiating neighbour or not".[24]

Al-Shāfiᶜī asserted: "A person has a legal right in exercise of his property to do whatever he wishes even though it inflicts injury upon another or himself. If he commits injury by himself and causes damage to his neighbour (another person), his action in his

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[23] Al-Mabsūṭ, vol.27, p.23; al-Hidāyah, vol.4, p.194; al-Ajwibah al-Khafīfah, p.388; al-Zarqā', Sharḥ al-Qawāᶜid al-Fiqhiyyah, p.450; Wahbah, Naẓariyyat al-Ḍamān, p.212.

[24] Al-Fatāwā al-Hindiyyah, vol.2, p.256; Tabyīn al-Ḥaqā'iq, vol.4, p.196; al-Mabsūṭ, vol.27, p.23; Sharḥ Fatḥ al-Qadīr, vol.5, p.506; Fatāwā Qaḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.2, p.284. For examples, see Majmaᶜ al-Ḍamānāt, p.152; Wahbah, Naẓariyyat al-Ḍamān, p.21.

property is a legal right and no liability should arise".[25]

Ibn Ḥazm cited: "No one can be prevented from exercising his legal right in his property even though his neighbour (another person) may sustain an injury".[26]

However, there are opinions on this case which stipulate that tortious liability would be imposed on tortfeasor even in the course of exercising a legal right. This view is based on *maṣlaḥah* (public interest) and *istiḥsān* (juristic preference). Among those who held this are Abū Yūsuf (one of the Ḥanafī jurists),[27] al-Ghazālī,[28] a group of the Mālikī jurists[29] and the Majallah.[30] They remarked that if a person in the course of exercising his legal property inflicts an obvious and grave *(fāḥish)* injury on his neighbour, the neighbour has the right to ask the person to stop the injury. This is because they follow the maxims: "there should be neither harming, nor reciprocating harm"; "injury is removed"; "repelling an evil is preferable to securing a benefit"; and "any person may exercise his property so long as it does not incur injury to another". The

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[25] Al-Umm, vol.3, p.222. Al-Māwardī said: "If the owner of a house builds an oven in it and its smoke molests the neighbour, then the *muḥtasib* may not oppose him in this and may not prevent him from doing so; likewise, if someone installs a mill or a forge or fuller's machinery, then the *muḥtasib* may not stop them, as people may deal with what they own as they wish, and people cannot prevent them from doing so". See al-Māwardī, al-Aḥkām al-Sulṭāniyyah, p.255.

[26] Al-Muḥallā, vol.8, pp.241-242, issues no.1355-1357.

[27] Tabyīn al-Ḥaqā'iq, vol.4, p.196; Badā'iᶜ al-Ṣanā'iᶜ, vol.6, p.258; Radd al-Muḥtār, vol.4, p.461; al-Mabsūṭ, vol.27, p.23; Sharḥ Fatḥ al-Qadīr, vol.5, p.506; Jāmiᶜ al-Fuṣūlain, vol.2, p.281; al-Ajwabah al-Khafīfah, p.385. Al-Ḥaṣkafī also mentioned: "Someone is not prevented from exercising his legal right in his own property unless his neighbours sustain injury". See al-Durr al-Mukhtār, vol.2, p.154.

[28] Al-Ghazālī, Iḥyā' ᶜUlūm al-Dīn, vol.2, p.189.

[29] Al-Qawānīn al-Fiqhiyyah, p.370; al-Bājī, al-Muntaqā Sharḥ Muwaṭṭa', vol.6, p.40; Ibn Farḥūn, Tabṣirat al-Ḥukkām, vol.2, p.254; al-Tasūlī, al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.335.

[30] See articles 1192-1197.

Majallah has explained what grave injury *(al-ḍarar al-fāḥish)* is, in article 1199:

> "Grave injury consists of anything that makes it impossible to put an object to the use for which it was originally intended *(al-ḥawā'ij al-aṣliyyah),* for instance, a dwelling house or anything which causes damage to a building which weakens it and causes it to collapse".

They substantiated their stand with the verse:

> "And do good to parents, kinsfolk, orphans, those in need, neighbours who are near, neighbours who are strangers, the companion by your side, the way-farer (ye meet), and what your right hands possess".[31]

And the Prophet said:

> "None amongst you believes (truly) until he likes for his brother or for his neighbour that which he loves for himself".[32]

They concluded that the verse and the Ḥadīth ordain kindness to some group of people including the neighbour. It can be perceived that the ordinance of an act means the interdiction of its opposite. The opposite here is an offence and it is prohibited. Every person is forbidden from doing anything which may be a source of trouble to his neighbour. He is encouraged not only to lead a peaceful life himself, but also to create a social atmosphere where every man feels secure from the injury of the wrongdoer. Whoever, consequently, transgresses the legal prohibition will be liable before the law. When a person injures his neighbour by any act, with or without intent, he has infringed the rule of law and thus becomes liable.[33] This approach focuses upon the result rather than upon the intention of the person exercising the right. If the result is fraught with

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[31] Al-Qur'ān, 4:36.

[32] Ṣaḥīḥ Muslim, vol.1, p.31.

[33] Ṣaḥīḥ Muslim, vol.1, p.31.

grave danger, the exercise of the right is prohibited regardless of the intention.[34]

According to the MālikĪ and the Ḥanbalī schools, a person can exercise use of his property in the course of exercising his legal right so long as he does not intend to injure his neighbour or his exercise may sustain injury to another. If the element of intention of injury to neighbour (*animus nocendi*) could be proved in exercising the legal right, he could be restrained from exercising his legal right and will be liable to make compensation. In effect, they carry out a ḤadĪth :

"There should be neither harming, nor reciprocating harm".[35]

Their opinions are based on intention *(qaṣd)* as a measure. So, the liability for any injury which arises from exercising use of property within his legal right will be upon its owner, such as to block up the window in his house which overlooks the women of an adjoining neighbour,[36] to close down a well if it causes great injury to the well belonging to his neighbour, to refrain from constructing a baking oven *(furn)* or a bath-house *(ḥammām)* or a forge, etc, so that it becomes impossible for the neighbour to dwell therein by reason of the great quantity of smoke, to remove a threshing floor because the dust coming therefrom makes it impossible for the neighbour to dwell in his house, to pull down any interference intended to prevent the neighbour from the entire amount of

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[34] Ṣubḥī Maḥmaṣṣānī, Transactions In The SharĪ'ah, Law In The Middle East, p.186.

[35] Al-Shāṭibī, al-Muwāfaqāt fī Uṣūl al-SharĪ'ah, vol.2, p.348; al-Qawānīn al-Fiqhiyyah, p.341; Ibn Rajab, Jāmi' al-'Ulūm wa al-Ḥukm, p.267; al-Tasūlī, al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.336; Tabṣirat al-Ḥukkām, vol.2, p.260; Mūjabāt, vol.1, pp.39-55; Ḍamān al-Mutlifāt, p.328.

[36] Al-KāsānĪ said: "Indeed, to remove any injury which incurs harm to the neighbour is compulsory. It is based on a ḤadĪth: "Verily, all actions of human beings are according to their intentions". Badā'i' al-Sanā'i', vol.6, p.264.

benefits of air, sunlight or light.[37] The topic of obstructions of air, sunlight and light will be particularly discussed in the chapter on Nuisance.

The yardstick to measure the tortious liability is an infringement or transgression of the rule of right. The rule of right which is related to *ḍamān* will be discussed as follows:[38]

1- The right of God. Means the right of the public and is linked with no specific person. It involves benefit to the community at large and not merely to a particular individual. It is understood that this right is not any benefit to God because he is above everything. This right is referred to God because of the magnitude of the risks involved in its violation and of the comprehensive benefit which would result from its fulfilment. In cases of public right which affect some particular individuals, they will not be entitled to condone the acts of the offender. For instance, on the infliction of the punishment of *ḥadd* (a fixed punishment) for theft, the person from whom the property is stolen is not entitled to condone the act. This right accommodates no remission. Even emendation or reconciliation is not permitted and the law has to take its course.

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[37] Ibn Qayyim, al-Ṭuruq al-Ḥukmiyyah, pp.260-264; al-Qawānīn al-Fiqhiyyah, p.224. See also Ibn Qudāmah, Kitāb al-Kharāj, p.60; Tabṣirat al-Ḥukkām, vol.2, p.255 and vol.2, p.257, al-Mudawwanah, vol.15, p.196; al-Muqniᶜ, vol.2, p.129; Majallat al-Aḥkām al-Sharᶜiyyah, article 1675, p.507; al-Bahūtī, Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.3, pp.339-340; Majallah, article 1201; Wahbah, Naẓariyyat al-Ḍamān, pp.22-23.

[38] Ibn Taymiyyah, al-Siyāsah al-Sharᶜiyyah, p.87 and pp.195-211; Ibn Qayyim, Iᶜlām al-Muwaqqiᶜīn, vol.1, pp.108-109; ᶜAbd al-Wahhāb Khallāf, ᶜIlm Uṣūl al-Fiqh, p.128; Taftāzānī, al-Talwīḥ ᶜalā al-Tawḍīḥ, vol.2, p.151; Abū Zahrah, Uṣūl al-Fiqh, pp.323-326; al-Taqrīr wa al-Taḥbīr, vol.2, pp.104-111, Kashf al-Asrār, vol.2, p.136, Ḥāshiyat Nasamāt al-Asḥār, p.259, cited in Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.4, pp.13-15; Abū Sinnah, Naẓariyyat al-Ḥaqq, p.179, Abū ᶜĪd, Mabāḥīth, pp.141-145, cited in Hashim Kamali, Principles of Islamic Jurisprudence, pp.348-350; ᶜAbd al-Qādir ᶜAwdah, al-Tashrīᶜ al-Jināʾī al-Islāmī, vol.1, pp.204-205; Abdur Rahim, The Principles of Muhammadan Jurisprudence, pp.201-203.

2- The right of mankind is a right of individual interest and is called "private right", such as a right to the enforcement of contracts, protection of property and the like. Enforcement of such a right is entirely at the option of the individual whose right is infringed. This right, conversely to the right of God, accommodates emendation and remission. The injured person affected by the infringement of a private right, may either sue for compensation or pardon the tortfeasor.

3- When the rights of two natures are combined, of God and of mankind, the former is preponderant. An example of this right is *qadhf* (defamation) in the Ḥanafī school. The right of the public is infringed by reason of depreciation of the honour of one of its members, and the right of the individual defamed is violated by the defamation which tends to destroy one's prestige. According to the Ḥanafī school, the right of God preponderates in this matter by reason of the attack made on the honour of one of the public and the person defamed is not entitled to compound the offence. The Shāfiᶜī school, the Ḥanbalī school and the popular opinion in the Mālikī school (according to Ibn Rushd) however, holds a contrary view. They opine that the person defamed is entitled to exonerate the defamer.

4- When the rights of two natures are combined, of God and of mankind, the latter is preponderant. An example of this right is *qiṣāṣ* (retaliation) which is the punishment for murder. The right of the public here consists in putting a stop to disturbances and breaches of the peace on this earth. The private right in a case of murder arises from the

fact of the offence having caused loss and sorrow to the heirs of the person murdered. The private right preponderates in this case because the heirs of a murdered person may pardon the murderer or accept blood-money *(diyah)* or enforce punishment, there being a specific text. The right of the individual is here subsumed into the right of God by reason of the text.

From the classification of the rights above, we can classify the liability in them are of two kinds:

1- Specific punishment.

2- Unspecific punishment.

When the punishment is unspecific, the judge is empowered to adjudicate in such cases. These cases could be put in the class of "civil wrong". The liability in this kind warrants that the tortfeasor is liable to indemnify his wrongful act against another's person, land or chattels as regulated in the rule of right. However, there are cases of "civil wrong" which their punishments have been specified like in the case of *qiṣāṣ* and *diyah.*

Generally, the civil wrong is divided into two types, namely:

1- Contract.

2- Tort.

Contractual liability emerges when there is a breach of one of the conditions of the contract. It will not feature as a subject in this discussion. In this discussion, the topic of tort or tortious wrong will be the focus. It is of various types. In general, they

are :[39]

1- Usurpation of another person's property *(ghaṣb)*.

2- Destruction or damage *(talaf; nuqṣān)*.

3- Infringement of a man's right, etc.

STRICT LIABILITY

The *Sharīᶜah* has confirmed that the rule of Strict Liability (*al-mas'ūliyyah al-shakhṣiyyah*)[40] exists in the Islamic law of tort. It therefore mentioned the notion of individual liability where every person is liable for his own action or omission and not that of another person. It can be elucidated by referring to the verses of the Holy Qur'ān, the Traditions of the Prophet and Muslim jurists' opinions.

The Qur'ān propounds the strict liability of tortfeasor in committing wrong by emphasizing:

"No bearer of burden can bear the burden of another."[41]

From the above verse, al-Mawdūdī says: "Every person is responsible for whatever he does, and no one is responsible for the deeds of others."[42] So, the man cannot deny his

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[39] Abdur Rahim, The Principles of Muhammadan Jurisprudence, p.352.

[40] The term emerges in the modern books of *fiqh* as in ᶜAbd al-Qādir ᶜAwdah, al-Tashrīᶜ al-Jinā'ī, vol.1, p.394, Wahbah, Naẓariyyat al-Ḍamān, p.251, and Fawzī Fayḍ Allāh, Naẓariyyat al-Ḍamān, p.158. The term does not appear in the classical books of *fiqh*, but, the emergence of the rule in those books may be construed from the explanations and examples in them. There is another term usually used in the modern books of *fiqh*, *ḍamān al-fiᶜl al-shakhṣī* which renders the same meaning.

[41] Al-Qur'ān, 6:164; 35:18.

[42] Al-Mawdūdī, Tafhīm al-Qur'ān, vol.2, p.299.

liability after his intention is established. The Qur'ān says:

> "The blame is only against those who oppress men with wrong-doing and insolently transgress beyond bounds through the land."[43]

The Qur'ān says again:

> "If anyone does a righteous deed, it redounds to the benefit of his own soul, if he does evil, it works against his own soul."[44]

Again, the Qur'ān certifies this rule:

> "It (soul) gets every good that it earns, and it suffers every ill that it earns."[45]

> "Every soul will be (held) in pledge for its deeds."[46]

> "Then shall anyone, who has done an atom's weight of good, see it! And anyone who has done an atom's weight of evil, shall see it."[47]

> "Whoever works evil, will be requited accordingly."[48]

These verses above denote that a person will not be liable except for his own torts and mistakes. He cannot be accountable for the torts or mistakes of other people.

Traditions of the Prophet specifically substantiate the above principle. He said:

> "You will not do him wrong and he will not do you wrong."[49]

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[43] Al-Qur'ān, 42:42.

[44] Al-Qur'ān, 45:15.

[45] Al-Qur'ān, 2:286.

[46] Al-Qur'ān, 74:38.

[47] Al-Qur'ān, 99:7-8.

[48] Al-Qur'ān, 4:123.

[49] Sunan Ibn Mājah, vol.2, p.890. It means that in tort action what is committed by a person, he who acts is liable for what he has done, not another.

He said again:

"Indeed, your son does not commit any offence against you, nor do you commit any offence against him."[50]

In another Ḥadīth, he said:

"No person should be apprehended for an offence committed by his father or brother."[51]

As in English law, the liability of a defendant in the Islamic law of tort is established on the principle of "fault" or "wrong". In other words, the defendant is liable because he has acted intentionally or negligently, as a result of which he has caused harm to the plaintiff's interest. In such an event, the element of fault or wrong is one of intention or negligence, respectively.

All Muslim jurists agree that a person is not liable for what is lost or destroyed unless there has been negligence (*tafrīṭ*) or transgression (*al-taᶜaddī*)[52] on his part.[53] Basically, the element of intention (*niyyah*) is an important matter. It is based on the Ḥadīth:

"Deeds are judged by intentions and every person is judged according to

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[50] Sunan Ibn Mājah, vol.2, p.890; Sunan Abī Dāwud, vol.4, p.168; Sunan al-Dārimī, vol.2, p.199. See also al-Kawtharī, Tartīb Musnad al-Imām al-Shāfiᶜī, vol.2, p.98.

[51] Nayl al-Awṭār, vol.7, p.88; ᶜAbd al-Qādir ᶜAwdah, al-Tashrīᶜ al-Jinā'ī, vol.1, p.395.

[52] The element of intention (*niyyah*) can be connected to the element of transgression (*taᶜaddī*) which is most commonly used by Islamic jurists in their written books as one element for liability. Majallah, article 92 and 93. But sometimes the *fuqahā'* do not consider the *niyyah* as an element of liability either in mistake (*khaṭā'*) or intention (*al-ᶜamd*) actions. Al-Muwaṭṭa', p.614; Muṣṭafā b. Aḥmad al-Zarqā', al-Fiᶜl al-Ḍārr, p.78-79; Majmaᶜ al-Ḍamānāt, p.146; Ashbāh.N, p.171. For detail see Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.5, pp.748-749.

[53] Al-Mughnī, vol.5, p.487; al-Bahūtī, Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.35; al-Futūḥī, Muntahā al-Irādāt, vol.1, p.493.

his intention."[54]

There is an exception to the general rule, however. There are cases where a defendant is held strictly liable for accidental harm, independently of the existence of either wrongful intention or negligence.[55]

This statement can be related to the Islamic maxim:

"Injury is to be removed."[56]

This means that grave (*fāḥish*) injury, however caused, must be removed. For example, a forge or a mill is erected adjacent to a house. The house is weakened by the hammering from the forge, or the turning of the mill wheel, or it becomes impossible for the owner of such a house to dwell in it by reason of the great quantity of smoke or bad smell from that forge or mill. These acts amount to grave injury which must be removed.[57]

Moreover, there are many maxims which can be connected to the rule. The maxims are:

1- Injury should be avoided as much as possible.[58]

For example: If any person constructs a cesspit or a sewer near a well belonging to some other person, and it contaminates its water, he must be made to remove the injury. If it is impossible to remove the injury, he

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[54] Ṣaḥīḥ al-Bukhārī, vol.1, p.3-4.

[55] For detail, see examples in Majallah, article 912, 913 and 914.

[56] Ashbāh.S, p.92; Ashbāh.N, p.85; Majallah, article 20. *Al-Ḍarār yuzal.* For detail discussion of this maxim, see al-Zarqā', Sharḥ al-Qawā'id al-Fiqhiyyah, pp.179-183; al-Nadwī, al-Qawā'id al-Fiqhiyyah, pp.287-293.

[57] Majallah, article 1200; al-Qawānīn al-Fiqhiyyah, p.224.

[58] Majallah, article 31; Muṣṭafā b. Aḥmad al-Zarqā', al-Madkhal al-Fiqhī, vol.2, pp.981-982, no.587. *Al-Ḍarar yudfa' bi qadr al-imkān.*

should be made to close up the cesspit or sewer.[59]

2- Private injury should be borne to avoid public injury.[60]

For example: Unskilled doctors are restrained from practice, because their practice can cause injury to the public.[61]

3- Repelling evils is preferable to acquisition of interests.[62]

For example: In a building, the upper storey is owned by A and the lower storey is owned by B. A has a right to dwell over B (lower storey) and B has a right to covering from sun and rain from A (upper storey). Neither may do any act which will damage the other without obtaining permission, and neither may pull down his part of the building.[63]

From the above examples, the persons (constructor of a cesspit or sewer, unskilled doctor and the owners of upper and lower storeys) must not cause any injury or harm to the others or each other. They are held strictly liable for any harm done. So, those maxims are in conformity with the celebrated Ḥadīth:

"There should be neither harming, nor reciprocating harm."[64]

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[59] Majallah, article 1212.

[60] Majallah, article 26; al-Zarqā', Sharḥ al-Qawā'id al-Fiqhiyyah, pp.197-198; Muṣṭafā b. Aḥmad al-Zarqā', al-Madkhal al-Fiqhī, vol.2, pp.984-985, no.593. *Yutaḥammal al-ḍarar al-khāṣṣ li daf'i al-ḍarar al-'āmm.*

[61] Al-Hidāyah, vol.3, p.281; Mukhtaṣar, p.348; 'Alī Ḥaydar, Durar al-Ḥukkām, vol.1, p.36; al-Sayyid Sābiq, Fiqh al-Sunnah, vol.2, p.580; al-Kaḥlānī, Subul al-Salām Sharḥ Bulūgh al-Marām, vol.3, p.250; Sunan Abī Dāwud, vol.4, p.195; Bulūgh al-Marām, p.266.

[62] Majallah, article 30. *Dar'u al-mafāsid ūlā min jalb al-maṣāliḥ.*

[63] Majallah, article 1192; al-Hidāyah, vol.3, p.109; al-Qawānīn al-Fiqhiyyah, p.223.

[64] Sunan Ibn Mājah, vol.2, p.784.

In addition, the Majallah gives two more maxims which could be related to the rule of Strict Liability. One of them is :

> "The responsibility for an act falls upon the person who does it, it does not fall upon the person who gives the order, as long as he does not compel the commission of the act."[65]

And, another maxim mentioned:

> "A person who does an act, even though not intentionally, is liable."[66]

A few more examples from the Majallah and the opinions of *fuqahā'* will make this rule clear.

1- If a person, in the exercise of his right, does an act which involves risk to the person or property of others, he will be held liable for the damage if damage occurs. He should be held to ensure the 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 or property, the carrier (*ḥāmil*) will be held responsible (*ḍāmin*) for the damage caused.[67]

2- The act in itself was dangerous, the person doing it will be held liable for injury acting at his own risk. For example, a public road is meant for traffic and any other use of it amounts to trespass. Hence, if a man makes a projection on a public road (as construction

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[65] Majallah, article 89. *Yuḍāf al-fi'l ilā al-fā'il lā al-āmir mā lam yakun mujbiran.*

[66] Majallah, article 92. *Al-Mubāshir ḍāmin wa in lam yata'ammad.*

[67] Al-Hidāyah, vol.4, p.194; Mughnī al-Muḥtāj, vol.4, p.205; Tabyīn al-Ḥaqā'iq, vol.5, p.146; al-Fatāwā al-Hindiyyah, vol.6, p.43; al-Ajwibah al-Khafīfah, p.387; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.251 and p.458; al-Jāmi' al-Ṣaghīr in the margin of Kitāb al-Kharāj, p.119; al-Jāmi' al-Ṣaghīr, pp.514-515; Minhāj al-Ṭālibīn wa 'Umdat al-Muftīn, p.306; Jāmi' al-Fuṣūlayn, vol.2, p.88; Radd al-Muḥtār, vol.5, p.523; al-Kanawī, al-Nāfi' al-Kabīr printed with al-Jāmi' al-Ṣaghīr, p.514; Majallah, article 926; Fatāwā Ḥammādiyyah, vol.2, p.752.

of a bath or water-spout, or erects a wall, or sets up a shop, etc.) and the projection falls on a passerby and injures him or damages his property, the owner of the projection will be responsible. Likewise, if a man ties up his animal on a public road and it damages something (person or property), he will be liable for damage.[68]

3- 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.[69]

4- 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.[70]

5- If a person slips and falls upon and destroys any property of another, he is liable for the loss.[71]

6- 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.[72]

7- If a person lawfully brings on his land something such as stones or water or digs a hole which will naturally do mischief to his neighbour if it remains there or escapes from his land, he will be liable for any loss.[73]

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[68] Manār al-Sabīl, vol.1, p.439; al-Fatāwā al-Hindiyyah, vol.6, p.40 and p.50; Majallah, article 934.

[69] Majallah, article 912.

[70] Al-Muḥallā, vol.2, p.19-31.

[71] Majallah, article 913.

[72] Majallah, article 914.

[73] Al-Fatāwā al-Hindiyyah, vol.6, pp.45-47; al-Ajwibah al-Khafīfah, p.390; Mughnī al-Muḥtāj, vol.4, p.83. According to the Ḥanafī jurists, the decision of the case above is made in accordance with the rule of *istiḥsān*.

8- Furthermore, Ibn Qudāmah records:

> "The *ajīr mushtarak* (independent contractor) is liable for damage caused by his act, the porter is liable for the load that falls from his head. The camel driver is liable for loss caused by the way he leads or drives the camel or by the breaking of the ropes which secure the load.[74]

With regard to the discussion of Strict Liability, the rule of *mubāsharah* (direct cause) and the rule of *tasabbub* (indirect cause) cannot be forgotten. Even, the element of *al-taᶜaddī* (trespass or transgression) is an important matter.

Mubāsharah means to create the cause of destruction by oneself; such as murdering some person, eating something or burning something. *Tasabbub* means to create conditions leading to the destruction of something. That is to say, to do an act which in the normal course of events causes the destruction of another thing. An example of *mubāsharah* is if a person digs a well at a certain place where it is not lawful to do so and an animal belonging to some other person happens to fall into the well and die. Liability would be imposed upon the person who dug the well. However, if a person other than he causes the animal to move towards the well and as a result, the animal falls into it and injures itself or dies, liability would be imposed upon the person who causes the animal to move towards the well. This is *tasabbub*.[75]

The word *al-taᶜaddī* (trespass/transgression) connotes "action against another person's right or against his ownership which is inviolable."[76] It also means "an

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[74] Al-Mughnī, vol.5, p.479.

[75] Al-Wajīz, vol.1, pp.205-206; Mughnī al-Muḥtāj, vol.4, p.83; Majallah, article 887 and 888; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.5, p.741; ᶜIzz al-Dīn b. ᶜAbd al-Salām, Qawā id al-Aḥkām fī Maṣāliḥ al-Anām, vol.2, pp.154-155; al-Furūq, vol.4, p.27; Ibn Rajab, al-Qawāᶜid fī al-Fiqh al-Islāmī, p.218.

[76] Muṣṭafā b. Aḥmad al-Zarqā', al-Fiᶜl al-Ḍārr, p.78. *Al-Mujāwazah al-fᶜliyyah ilā ḥaqq al-ghayr aw milkihi al-maᶜṣūm.*

infringment of the rule of right and transgression against another person's right."[77]

For the tort action by *mubāshir* (tortfeasor by direct cause), the element of *al-taʿaddī* is not considered[78]. The *mubāshir* will be held liable in all tort actions whether the element of *al-taʿaddī* existed or not. This is understood from the statement of al-Baghdādī:

> "A *mubāshir* (direct tortfeasor) is liable even though he does not trespass (*yataʿadd/al-taʿaddī*)."[79]

Similarly, the Majallah states: "A *mubāshir* who does an act, even though not intentionally (*yataʿammad*) is liable."[80] The words "even though not intentionally (*wa in lam yataʿammad*)" can be replaced by the words "even though he does not trespass (*wa in lam yataʿadd*)".[81] So, if a *mubāshir* damages or injures the person or the property or the limbs of another, either in the case of accident or by mistake, whether he is a major or a minor, asleep or awake, whether the property is in his possession or in the possession of others (*fī milkihi am fī ghayr milkihi*), the liability is upon him.[82] In short, the elements of *al-taʿaddī* and *taʿammud* are not considered as a condition in the *mubāsharah* tort actions. For example:

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[77] Al-Tasūlī, al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.344; Mūjabāt, p.173. In Mukhtaṣār, p.220, where the author notes that the verb *taʿaddā*, in fact, signifies exactly *transgredi* "to go beyond". The word is applicable to any act directed against another's property in such a manner as to exceed the lawful limits.

[78] Tabyīn al-Ḥaqā'iq, vol.5, p.149.

[79] Majmaʿ al-Ḍamānāt, p.146 and p.165. *Al-Mubāshir ḍāmin wa in lam yataʿadd.*

[80] Majallah, article 92. *Al-Mubāshir ḍāmin wa in lam yataʿammad.*

[81] Wahbah, Naẓariyyat al-Ḍamān, p.196.

[82] Al-Muwaṭṭa', p.614; Wahbah, Naẓariyyat al-Ḍamān, p.196; al-Zarqā', Shaḥ al-Qawāʿid al-Fiqhiyyah, p.454; Majallah, article 912-916.

1- If a sleeper as a *mubāshir* falls upon any property of another or any person causing destruction or death, the liability is upon him.[83] His tort actions are like the tort actions of someone who is awake.[84]

2- If a minor as a *mubāshir* urinates on the floor, and it causes damage to the clothes of another, he is liable.[85]

3- If a person as a *mubāshir* drags the clothes of another causing a tear, he is liable for it.[86]

Briefly speaking, the element of *al-taᶜaddī* is not an important condition in the actions of the *mubāshir*. So the rule of Strict Liability would be applied to him when the *mubāsharah* tort action is brought.

In cases of tort action by *mutasabbib* (tortfeasor by indirect cause), the element of *al-taᶜaddī* (trespass) is considered as a condition for liability. The Majallah records:

> "A *mutasabbib* is not liable to any loss caused unless intentionally (*taᶜammud*)."[87]

The words "unless intentionally (*illā bi al-taᶜammud*)" could be replaced by the words "unless with trespass (*illā bi al-taᶜaddī*)". *Al-Taᶜaddī* is a condition for liability

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[83] Al-Zarqā', Sharḥ al-Qawāᶜid al-Fiqhiyyah, p.454; Wahbah, Naẓariyyat al-Ḍamān, p.197; Majmaᶜ al-Ḍamānāt, p.165.

[84] Majmaᶜ al-Ḍamānāt, p.146 and p.182.

[85] Wahbah, Naẓariyyat al-Ḍamān, p.197. For detailed discussion on damages by a minor see, Majallah, article 916.

[86] Majallah, article 915. It is similar to the example of a person siting down on the garment of another person and suddenly the another person stands up and causes a tear to his cloth, the person who sat down on it is liable. Majmaᶜ al-Ḍamānāt, p.152.

[87] Majallah, article 93. *Al-Mutasabbib lā yaḍmanu illā bi al-taᶜammud.*

in tortfeasor by indirect cause[88] whether the element of intention (*qaṣd*) existed or not.[89] But, there are opinions which consider that the conditions of liability for the *mutasabbib* are:

i- *Al-Mutaᶜammid* (*al-taᶜammud*).

ii- *Al-Muᶜtadī* (*al-taᶜaddī*).[90]

Most of *the fuqahā'* prefer to use *al-mutaᶜaddī* (*al-taᶜaddī*) as the condition, because the element of *al-mutaᶜammid* (*al-taᶜammud*) is included in *al-mutaᶜaddī* (*al-taᶜaddī*). Indeed, if the element of *al-taᶜaddī* does not exist as an element of tort action by the *mutasabbib*, the liability (*ḍamān*) is not adjudged upon him.[91] So, the word *al-taᶜammud* in the maxim above is construed as *al-taᶜaddī*. It is in conformity with a few statements by the *fuqahā'*. Al-Sarakhsī stated:

> "The liability is not upon a *mutasabbib* when the element of *mutaᶜaddin* (*al-taᶜaddī*) did not exist in his tort action."[92]

Al-Zaylaᶜī mentioned:

> "*Tasbīb* requires the existence of the element of *al-taᶜaddī* in it. Otherwise, in *al-mubāsharah*, is not required *al-taᶜaddī*."[93]

Al-Baghdādī recorded:

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[88] Majallah, article 924. *Yushtaraṭu al-taᶜaddī li yakūna al-tasabbub mūjiban li al-ḍamān.....*

[89] Wahbah, Naẓariyyat al-Ḍamān, p.198.

[90] ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.1, p.83; Salīm Rustam, Sharḥ al-Majallah, vol.1, p.60; al-Zarqā', Sharḥ al-Qawāᶜid al-Fiqhiyyah, p.455.

[91] Wahbah, Naẓariyyat al-Ḍamān, pp.198-99; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.5, p.749; al-Qawānīn al-Fiqhiyyah, p.218.

[92] Al-Mabsūṭ, vol.27, p.22. *Al-Mutasabbib idhā lam yakun mutaᶜaddiyan lā yakūn ḍāminan.*

[93] Tabyīn al-Ḥaqā'iq, vol.5, p.149. *Tasbīb wa fīh yushtaraṭ al-taᶜaddī....wa fī al-mubāsharah lā yushtaraṭ.*

"*Mutasabbib* is not liable unless he is *al-mutaᶜaddī*."[94]

Ibn ᶜĀbidīn indicated:

"*Al-Mutasabbib* is liable when he is *mutaᶜaddin*".[95]

Examples which illustrate the discussion are:

1- If a person is laying a fire in his land while the wind is blowing, and it blows the fire to another place, and something is burnt in consequence, he, having committed *al-taᶜaddī* (trespass), is responsible for the damage. But, he is not responsible if after the fire has been laid, the wind blows it and causes the fire to burn property of another,[96] because, there is not the element of *al-taᶜaddī*.

2- If a *mutasabbib* collects and pours water on his land in some manner which is not normal (*khilāf al-ᶜādah*), and the water escapes (*taᶜaddā*) onto another person's land and damages something there, he is liable, because, the element of *al-taᶜaddī* existed. But, if he pours it in the normal manner (*ḥasb al-ᶜādah*) and knows that the water is unlikely to escape, but unfortunately the water does escape onto another person's land, he is not liable. Here, there is not the element of *al-taᶜaddī*.[97]

3- If a *mutasabbib* digs a well in the public highway, and an animal belonging to another person falls therein and is destroyed, he is liable. But, if he digs a well in his own land,

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[94] Majmaᶜ al-Ḍamānāt, p.146 and p.165. *Al-Mutasabbib lā illā idhā kāna mutaᶜaddiyan.*

[95] Radd al-Muḥtār, vol.6, p.596. *Al-Mutasabbib yaḍman idhā kāna mutaᶜaddiyan.*

[96] Al-Hidāyah, vol.4, p.192; Tabyīn al-Ḥaqā'iq, vol.5, p.144; Mughnī al-Muḥtāj, vol.2, p.278 and vol.4, p.83; al-Mabsūṭ, vol.27, p.23; Mukhtaṣar, p.348; al-Fatāwā al-Hindiyyah, vol.6, p.42; al-Qawānīn al-Fiqhiyyah, p.218; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.1, p.83.

[97] Mughnī al-Muḥtāj, vol.4, p.83; al-Mabsūṭ, vol.27, p.23; al-Ajwibah al-Khafīfah, p.390; al-Fatāwā al-Hindiyyah, vol.6, p.47; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.1, p.83; Majmaᶜ al-Ḍamānāt, p.164.

and an animal of another falls therein and is destroyed, he is not liable, because, the element of *al-taʿaddī* is not in the latter, while in the former there is.[98]

In short, in cases of tort for action by the *mutasabbib*, the rule of Strict Liability will be applied to him when the element of *al-taʿaddī* exists, but, if that element does not exist, that rule cannot be applied. To sum up, the above discussions clearly demonstrate that the notion of Strict Liability is not entirely alien to Islamic law.

VICARIOUS LIABILITY

In the practice of tort law, the doctrine of individual tort liability is one of the foundations of individual security. The tortfeasor himself is the only person who can be sued for a particular tort action and no one else can be held liable for the same. Thus, no person bears any portion of another's burden. This rule is called "the rule of Strict Liability" which has been discussed in the previous section. The previous section serves as a fundamental principle and as a bedrock of judicial acts under the Islamic law of tort although many exceptions to that rule had been allowed in multifarious circumstances. These exceptions are permitted in order to give space for justice and equity when strict following of that rule might have deterred the justice and equity.[99]

In the Islamic law of tort, the term "Vicarious Liability" specifically did not

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[98] Al-Hidāyah, vol.4, p.193; Mughnī al-Muḥtāj, vol.4, pp.82-83; Tabyīn al-Ḥaqā'iq, vol.5, p.145; al-Qawānīn al-Fiqhiyyah, p.218; al-Fatāwā al-Hindiyyah, vol.6, p.45 and p.47; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, pp.460-461; Salīm Rustam, Sharḥ al-Majallah, vol.1, p.515; ʿAlī Ḥaydar, Durar al-Ḥukkām, vol.1, p.83; Majmaʿ al-Ḍamānāt, p.146; Wahbah, Naẓariyyat al-Ḍamān, p.199; Majallah, article 924.

[99] ʿAbd al-Qādir ʿAwdah, al-Tashrīʿ al-Jinā'ī, vol.1, p.395 and p.674. In his discussions, ʿAbd al-Qādir ʿAwdah gives six grounds why the exception in this question is warranted. For detail see pp.674-677.

appear in these exact terms in the classical books of *fiqh*. Also, the *fuqahā'* did not mention clearly this term in their writings. It merely could be understood, however, from the exegesis of Ḥadīths and the cases which are cited in their writings, especially the use of the term *ʿāqilah*[100] which could be related to the discussion of vicarious liability.

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[100] There is a difference of opinion among the *fuqahā'* as to the signification of *ʿāqilah* according to their *madhhab*.

In the Shāfiʿī school, *ʿāqilah* means a group of men who are *mukallaf* and who have a right to inherit from the murderer by means of relation (*nasab*) or *walā'* (emancipation from slavery). Thus, the *ʿāqilah* of the murderer are his agnates (*ʿaṣabah*). Al-Shāfiʿī himself said: "I do not know if there is a disparity (of opinion among the *fuqahā'*) that *al-ʿāqilah* is *al-ʿaṣabah*". *ʿAṣabah* includes all the kinsmen and relations on the father's side (*al-qarābah min qibal al-ab*). See Mughnī al-Muḥtāj, vol.4, p.95, Nihāyat al-Muḥtāj, vol.7, p.370. Therefore, the *ʿāqilah* are:

1- Full brothers (consanguine and uterine) of the murderer including their sons.
2- Consanguine brothers of the murderer including their sons.
3- Full uncles of the murderer including their sons.
4- Consanguine uncles of the murderer including their sons.
5- Grandfather's brothers of the murderer including their sons.

See Khālid Rāshid al-Jumaylī, al-Diyāt wa Aḥkāmuhā fī al-Sharīʿah al-Islāmiyyah wa al-Qānūn, p.469.

They are liable for the *diyah* to the relatives of victim by reason that they have the right of inheritance of the murderer's property. However, it is not to be a condition that they have inherited such property. What is needed here is that they have the right, and such a right is not hindered (*ḥijāb*). See ʿAbd al-Qādir ʿAwdah, al-Tashrīʿ al-Jinā'ī, vol.1, p.673.

The ancestors (father, grandfather and to a higher position) and the descendants (son, grandson and to a lower position) of the murderer are excluded from the *ʿāqilah* because the Prophet did not impose the liability of *diyah* for husband and son of a woman who is the guilty party from the *qabīlah* Hudhayl. In this case, she murdered her victim by throwing a stone and causing a woman and her the child in her womb death. The Prophet adjudged that the *diyah* for the victim is upon the *ʿāqilah* (not upon her husband and son). This is also an opinion in the Ḥanbalī school. If the son is excluded from the *diyah*, it is certain that his father also is excluded from it because both of them have the same right in the rules governing inheritance of the murderer's property. This Ḥadīth indicates that the husband also is excluded from bearing the payment of *diyah*. See Mughnī al-Muḥtāj, vol.4, p.95; Nihāyat al-Muḥtāj, vol.7, pp.369-370; al-Muhadhdhab, vol.2, p.228; al-Mughnī, vol.7, p.784; Nayl al-Awṭār, vol.7, p.81; ʿAbd al-Qādir ʿAwdah, al-Tashrīʿ al-Jinā'ī, vol.2, p.195.

No such responsibility ever attaches to a poor man (*faqīr*), a slave (*raqīq*) even though he is *mukātab* (i.e. buying his freedom on the basis of a written contract), a minor (*ṣabī*), and an insane person (*majnūn*). They are excluded from the *ʿāqilah*, as are women. A Muslim *ʿāqilah* is not responsible for a *kāfir* offender, nor a *kāfir ʿāqilah* for a Muslim offender; but a Jew may be responsible for a Christian offender, and *vice versa*. *Dhimmī* is not responsible for *ḥarbī*, and *vice versa* because there is no right of inheritance between both sides. See Minhāj al-Ṭālibīn in the margin of Mughnī Muḥtāj, vol.4, p.99; ʿAbd al-Qādir ʿAwdah, al-Tashrīʿ al-Jinā'ī, vol.1, p.673 and vol.2, p.195; Muḥammad al-Khaḍrawī, al-Mas'ūliyyah al-Jinā'iyyah, p.140; The Encyclopaedia of Islām, vol.1, p.338; Brunschvig, "Considerations Sociologiques Sur Le Droit Musulman Ancien," Studia Islamica, vol.3, p.69.

ʿAbd al-Qādir ʿAwdah said: "The *ʿāqilah* of the murderer are his *ʿaṣabāt*. The term excludes maternal relations (*al-ikhwah li umm*), husband (*al-zawj*) and uterine relations (*dhawī al-arḥām*)". al-Tashrīʿ al-Jinā'ī, vol.1, p.673 and vol.2, p.195.

They are not responsible for *diyah* because they are regarded as ineligible people to give help and to bear the burden of *diyah*. See Mughnī al-Muḥtāj, vol.4, p.99; Muḥammad al-Khaḍrawī, al-Mas'ūliyyah al-Jinā'iyyah, p.140.

The Ḥanafī and the Mālikī schools basically agree with the Shāfiʿī school in respect of the signification of *ʿāqilah*, but they stipulate that ancestors and descendants can be a member of *ʿāqilah* because they are also

The *fuqahā'* of the *madhāhib* just mentioned the features and criteria regarding vicarious liability through the examples in their writings which could be understood explicitly or implicitly. However, the term for "vicarious liability" is quite clear when it is used by the contemporary *fuqahā'* in their books, whether in the discussions of tort or criminal law. Usually, they use the term "*mas'ūliyyah ᶜan fiᶜl al-ghayr*", "*ḍamān fiᶜl al-ghayr*", "*ḍamān fiᶜl al-ākharīn*", *ḍamān al-shakhṣ fiᶜl al-tābiᶜīn*", and "*ḍamān al-shakhṣ fiᶜl al-khāḍiᶜīn liriqābatihim*".[101] All the terms, generally, give the same signification as "vicarious liability".

The technical term of *fiqh* "*al-ᶜāqilah*" applies to those people who can bear the responsibility of *diyah* (blood-money) on behalf of others. The *diyah* is imposed on the *ᶜāqilah* for no fault of their own and as a help and compassion for the tortfeasor. The word *diyah* is a term exchangeable for *ᶜaql* (blood-money) in this context meaning prevention (*manᶜ*). It is used in the case of homicide by misadventure (*qatl al-khatā'*) and manslaughter (*qatl shibh al-ᶜamd*).[102]

The rule of vicarious liability will also occur in cases involving animals, buildings and so on . When an animal destroys something or injures somebody the liability will be imposed on its owner or lessee (*musta'jir*), or depositor (*mūdiᶜ*), or usurper (*ghāṣib*). This

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regarded as eligible people to be requested for help, equal to the others, *ᶜāqilah*. This opinion is also one opinion in the Ḥanbalī school. See al-Mughnī, vol.7, p.784; Mawāhib al-Jalīl, vol.6, p.266; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.256; ᶜAbd al-Qādir ᶜAwdah, al-Tashrīᶜ al-Jinā'ī, vol.2, p.195.

[101] Fawzī Fayḍ Allāh, Naẓariyyat al-Ḍamān, pp.170-173; Wahbah, Naẓariyyat al-Ḍamān, p.253; Bahnasī, al-Mas'ūliyyah al-Jinā'iyyah, p.59.

[102] Nihāyat al-Muḥtāj, vol.7, p.369, ᶜAbd al-Qādir ᶜAwdah, al-Tashrīᶜ al-Jinā'ī, vol.1, p.673.

is because the animal is in their ownership or possession.[103]

In brief, Islamic vicarious liability may be defined as the liability imposed on one person for the tortious act or omission of another which causes loss to a third person.[104]

The major evidence for allowing exception to the notion of individual responsibility (*mas'ūliyyah shakhṣiyyah*) is the Ḥadīth of the Prophet which runs as follows:

> "Everyone of you is a guardian and is responsible for his charge, the *imām* (ruler) is a guardian and is responsible for his subjects, the man is a guardian in the affairs for his family and responsible for his charges, a woman is guardian of her husband's house and responsible for her charges, and the servant is a guardian of his master's property and is responsible for his charge."[105]

Another Ḥadīth can be related to the rule:

1- "He who stationed an animal on one of the roads of the Muslims or in one of their markets and the animal injured somebody with its fore-leg or hind-leg, is liable".[106]

2- It was also reported that the Prophet adjudged that:

> "It is the duty of owners of the property to keep and protect their property in the day time, while it is duty of the owner of animals to keep their animals (from trespassing) at night. If any injury is committed by animals

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[103] Mughnī al-Muḥtāj, vol.4, p.86 and p.204.

[104] With this appearance, it could be related to the Latin legal maxim: *qui facit per alium facit per se*, which means "he who does a thing by an action of another effectively does it himself" or "he who acts through another is deemed to act in person" which means "a principal is liable for the acts of his agents". Garvine Mc Farlane, The Layman's Dictionary of English Law, p.233; John Burke, Jowitts Dictionary of English Law, p.1862; Roger Bird, Osborn's Concise Law Dictionary, p.275.

[105] Ṣaḥīḥ al-Bukhārī, vol.3, p.439.

[106] Nayl al-Awṭār, vol.5, p.324.

at night, its liability shall be borne by their owners".[107]

The Ḥadīths above have served as an exception in the limitation of the rule of Strict Liability. This tendency has been supported by the *fuqahā'* of all schools of law. The following quotations are from some of the texts from the classical books of the *fuqahā'*:

1- A woman who is affected by epilepsy (*taṣarra'a*) needs to take care of herself and if she is unable to take care of herself, then her husband should take care of her in order to avoid the occurrence of falling into the water or fire when she is struck by epilepsy. If it happens without any care that the woman falls into the fire, her husband is liable (vicarious liability) for what had happened.[108]

2- If a father handed his small son to a skilful swimmer to teach the child how to swim and the child drown, the tortious liability (vicarious liability) will be upon the teacher (skilful swimmer). This is because the father gave his son to the teacher to be under his guard. And when the child drowned in the process of learning, the negligence is attributed to the teacher *prima facie* except if he can prove otherwise.[109]

3- If a father or guardian commanded a small child to kill a person and the child complied, the father or the guardian would be killed (vicarious liability) in retaliation (*qiṣāṣ*) and not the child.[110]

4- If an *āmir* commanded a minor (*ṣabī ghayr mumayyiz*) to kill a person and he did, the

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[107] Al-Muwaṭṭa', p.531; Sunān Abī Dāwud, vol.3, p.298; Nayl al-Awṭār, vol.5, p.324.

[108] Majma' al-Ḍamānāt, p.458.

[109] Al-Mughnī, vol.2, p.831; Manār al-Sabīl, vol.2, p.336; Minhāj al-Ṭālibīn in the margin of Mughnī al-Muḥtāj, vol.4, p.82.

[110] Al-Khirshī, Fatḥ al-Jalīl 'alā Mukhtaṣar Khalīl, vol.8, p.10.

*āmir*would be the object of retaliation (vicarious liability), not the minor because he is regarded as an appliance used for a purpose by the *āmir*.[111]

5- A three year old minor is under the care of his/her mother. If the mother went out and left the minor without any care and the minor fell into the fire, the mother is tortiously (vicariously) liable.[112]

In the Islamic law of tort, vicarious liability arises in the following acts:

1- Liability of guardian (*walī*) for the act of his ward.

Basically, the guardian is not liable for a tort committed by his ward. The Majallah notes: "If a minor (*ṣabī*) destroys the property of another, compensation (*ḍamān*) must be made from his own property. If he has no property, payment may be postponed until he is in a position to pay. Compensation cannot be recovered from his guardian (*walī*)." And, the obligation is on the person who holds his guardianship (*wilāyah*) in administration (*adā'*) of his property for compensation in this circumstance. This decision (*ḥukm*) has been agreed upon by the *jumhūr*.[113]

In another article, the Majallah says: "When a minor (*ṣabī*) has destroyed someone's property, although he has not reached the age of discretion (*ghayr mumayyiz*),

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[111] Al-Muhadhdhab, vol.3, p.179; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.6, p.242.

[112] Majmaᶜ al-Ḍamānāt, p.458.

[113] Al-Dardīr, al-Sharḥ al-Kabīr, vol.3, p.296 and p.443; Tabṣirat al-Ḥukkām, vol.2, p.249; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.171; Radd al-Muḥtār, vol.5, pp.125-126; Majallah, article 916.

he is liable".[114]

ᶜAbd al-Qādir ᶜAwdah states: "If a minor under seven (*ghayr mumayyiz*) commits an offence, he will neither be punished on criminal grounds (*jinā'iyyan*) nor as a disciplinary or reformatory measure (*ta'dībiyyan*). Thus, if he commits a *ḥadd* offence, he will not be subjected to the *ḥadd*, and if he kills or wounds any person, he will neither be subjected to the *qiṣāṣ* nor will he be liable to *taᶜzīr*. Neverthless, the exemption of the child from criminal responsibility (*al-mas'ūliyyah al-jinā'iyyah*) does not warrant his exemption from civil responsibility (*al-mas'ūliyyah al-madaniyyah*). He will have to compensate for the loss in life or property caused by him out of his possessions. The reason for this is that the *Sharīᶜah* guarantees the security of life and property and nobody is allowed to infringe them. The *ḍamān* is neither negated nor invalidated by any excuse admissible under the *Sharīᶜah*, although punishment may be nullified".[115]

According to *the uṣūliyyūn*: "In the rights of men (*al-ᶜibād*) pertaining to damages and compensation, the obligation is also upon a minor. The objective concerned is property and its duty is borne by deputyship".[116]

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[114] Majallah, article 960, Tabṣirat al-Ḥukkām, vol.2, p.249; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.171. It is because of the fact that the liability here is covered under *al-aḥkām al-waḍᶜiyyah* (declatory laws) in which the elements of *'aql* (intellect) and *bulūgh* (the age of majority) are not stipulated. The liability for paying compensation is taken from his property. In case his property is put under his guardian's authority, the compensation can be claimed from his guardian, otherwise, it should be waited for until the minor reaches *bāligh*. In addition, in the matters relating to the right of God, these elements are taken into account, but if it be related to the rights of human beings, both of them are unconditional. See Muḥammad Jawād Maghniyyah, al-Fiqh ᶜalā al-Madhāhib al-Khamsah, pp.630-631.

[115] ᶜAbd al-Qādir ᶜAwdah, al-Tashrīᶜ al-Jinā'ī, vol.1, p.601. *Anna al-dimā' wa al-amwāl maᶜṣūmah, ghayr mubāḥah, anna al-ᶜdhār al-sharīᶜah lā tunāfī hādhihī al-ᶜiṣmah, ay anna al-ᶜdhār lā tahdir al-ḍamān wa lā tasquṭuhu wa law asqaṭat al-ᶜuqūbah.*

[116] Ibn Kamāl Bāshā, Taghyīr al-Tanqīh, p.257 cited in Fawzī Fayḍ Allāh, Naẓariyyat al-Ḍamān, p.171; Fawzī Fayḍ Allāh, al-Mas'ūliyyah al-Taqṣīriyyah, p.377. *Fa ḥuqūq al-ᶜibād mā kāna minhā ghurman wa ᶜiwaḍan, yajibu ᶜalā al-mawlūd al-ṣabī, li anna al-maqṣud huwa al-māl, wa adāuhu yaḥtamil al-niyābah.*

The *fuqahā'* mentioned: "If people under interdiction as minors and lunatics destroy something, whether property or life, they are liable".[117]

However, some of the MālikĪ jurists opined that a minor (*ṣabī*), if he has not reached the age of discretion (*ghayr mumayyiz*), is not liable if he destroyed or caused damage to another person's property or body because that the damage caused by the *ṣabī* is compared to the damage caused by animals of their own accord.[118]

Ibn Nujaym stated: "A minor is responsible for his acts, and is liable from his property for what he has destroyed".[119]

Briefly speaking, *the jumhūr* have mentioned that all people are liable in their capacity of destruction (*ahliyyat al-itlāf*). The condition of *ᶜaql* (intellect) is not considered in this case. Therefore, for any action committed by a minor who has not reached the age of discretion, which destroys or damages another's property, he is liable for compensation (*multaziman bi al-ḍamān*) because he is regarded as having the capacity to receive or inhere rights and obligations (*ahliyyat al-wujūb*) and to bear any obligation towards others pertaining to property (*māliyah*). This type of legal capacity is acquired by every human being at the moment of birth. Liability for loss (*ḍamān*) or establishment of capacity of destruction (*ahliyyat al-itlāf*) is upon every person whether he has reached the age of discretion or not, whether he is a man or a woman, whether he is a major or a

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[117] Al-Durr al-Mukhtār, vol.2, p.323; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.146; Radd al-Muḥtār, vol.6, p.146; Tabyīn al-Ḥaqā'iq, vol.5, p.192; al-Hidāyah, vol.3, p.280; Majmaᶜ al-Anhur, vol.2, p.438; Badr al-Muttaqā in the margin of Majmaᶜ al-Anhur, vol.2, p.438; FawzĪ Fayḍ Allāh, Naẓariyyat al-Ḍamān, p.171; Muḥammad Jawād Maghniyyah, al-Fiqh ᶜalā al-Madhāhib al-Khamsah, p.630; Fatāwā al-NawawĪ, p.79.

[118] Al-Qawānīn al-Fiqhiyyah, p.218; Ḍamān al-Mutlifāt, p.234; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.168; Mūjabāt, vol.1, p.223.

[119] Ashbāh.N, p.332; Wahbah, Naẓariyyat al-Ḍamān, p.254.

minor, whether he is a free man or a slave. However, a minor is not liable to be subjected to bodily punishment (*ʿuqūbah badaniyyah*). This is the opinion of the Ḥanafīs, the Shāfiʿīs, the Ḥanbalīs and the *jumhūr* of the Mālikīs.[120]

Otherwise, the tort of other people who lack legal fitness, such as an insane person, a foetus in the womb and a foolish person (*safīh*), whether in good health or in illness, all of whom possess legal capacity by virtue of their dignity as human beings and are treated the same,[121] all those persons who have been cited may be described as "having the legal capacity (*ahliyyat al-wujūb*)" which is in every human being.[122]

Although, the *fuqahā'* opine that a minor himself (*ṣabī or ṣaghīr*) is liable for his tort action against another's property, not his guardian (*walī*), there are a few exceptions permitted:

1- If a minor destroys another's property by virtue of the negligence (*taqṣīr*) of his guardian in taking care of him.[123]

For example: If a person (father) gives a knife to a minor and the minor kills another person, his *ʿāqilah* will be vicariously liable. Similarly if a minor rides an animal and the animal injures a person and the person dies, the liability of *diyah* is vicariously on his

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[120] Tabyīn al-Ḥaqā'iq, vol.5, p.192; Badā'iʿ al-Ṣanā'iʿ, vol.7, p.171; Nihāyat al-Muḥtāj, vol.5, p.150 and vol.8, p.26; al-Futūḥī, Muntahā al-Irādāt, vol.1, p.435; al-Dardīr, al-Sharḥ al-Kabīr, vol.3, p.296 and p.443; al-Qawānīn al-Fiqhiyyah, p.218; Abū Zahrah, Uṣūl al-Fiqh, p.328 and p.330.

[121] ʿAbd al-Wahāb Khallāf,ʿ Ilm Uṣūl al-Fiqh, p.136; Mohammad Hashim Kamali, Principles of Islamic Jurisprudence, p.351.

[122] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence, p.351; Abdur Rahim, The Principles of Muhammadan Jurisprudence, p.217. Abū Zahrah, Uṣūl al-Fiqh, p.330, notes that the capacity to receive rights and obligations (*ahliyyat al-wujūb*) for a foetus in the womb (*janīn*) are recognized as incomplete capacity to receive rights and obligations (*ahliyyat al-wujūb al-nāqiṣah*), otherwise, they are recognized as complete capacity to receive rights and obligations (*ahliyyat al-wujūb al-kāmilah*).

[123] Fawzī Fayḍ Allāh, Naẓariyyat al-Ḍamān, p.172; Wahbah, Naẓariyyat al-Ḍamān, p.254.

ʿāqilah.[124]

For example: If a knife is given to a minor to hold and the knife falls down upon him or another person or (another's property), the person who gave the knife to the minor is to be held tortiously (vicariously) responsible.[125]

For example: When a child of nine years old fell down from the top of a high building or drowned in water (or caused damage to another's property), the jurists are of the opinion that his parents are free from liability for he is supposed to have taken care of himself. But, in case of one lacking discretion or younger to the extent that he cannot take care of himself, the jurists opined that the parents are liable for their negligence.[126]

In the case of the absence of the father of the minor, the responsibility for taking care will be shifted to another male relative close to the father, like the uncle. A father has the right to delegate this responsibility to any other person he wishes even in the presence of the uncles. Similarly, if the father hands his minor to a teacher, the teacher will be the minor's guardian.

2- If a minor destroys another's property at the instigation (*ighrā'*) or command (*amr*) of his parents.[127]

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[124] Ashbāh.N, p.163 and pp.309-310; al-Mabsūṭ, vol.26, p.185 and p.187; al-Mudawwanah, vol.4, p.664; Majmaʿ al-Ḍamānāt, p.172.

[125] Al-Mabsūṭ, vol.26, p.185; Jāmiʿ al-Fuṣūlayn, vol.2, p.78; Majmaʿ al-Ḍamānāt, p.166 and p.172; Wahbah, Naẓariyyat al-Ḍamān, p.42; Fawzī Fayḍ Allāh, Naẓariyyat al-Ḍamān, p.172; Amīn, al-Mas'ūliyyah al-Taqṣīriyyah, p.142.

[126] Amīn, al-Mas'ūliyyah al-Taqṣīriyyah, p.134; al-Fatāwā al-Hindiyyah, vol.6, p.33; Ashbāh.N, p.310.

[127] Fawzī Fayḍ Allāh, Naẓariyyat al-Ḍamān, p.172; Wahbah, Naẓariyyat al-Ḍamān, p.254.

For example: If a minor is commanded to destroy another's property and he did so, the person who commanded him is vicariously held liable for the tort.[128]

For example: If a father commanded his child (a major) to light a fire on his land and he did, and the fire trespasses (*taᶜaddat*) to the neighbour's land and destroys something, the father is vicariously liable because his command is valid and the action of his child is as his action by himself.[129]

In cases of a command by someone to a minor (*ṣabī*) to destroy another's property or to kill a person, a minor is liable, however that liability is returned (*yurjaᶜ*) to the commander (*āmir*).[130]

The Islamic law stipulates that the command from any commander must produce an effect direct to the result of destruction. If the result of destruction is outside of any command, the commander is not vicariously liable for what had happened. In other words, the command should have relation with destruction. 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 *ᶜāqilah* of the minor, not upon the commander because the accident is separate (*munfaṣil*) from the command.[131]

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[128] Jāmiᶜ al-Fuṣūlayn, vol.2, p.78; Fawzī Fayḍ Allāh, Naẓariyyat al-Ḍamān, p.172.

[129] Radd al-Muḥtār, vol.5, p.186; Majmaᶜ al-Ḍamānāt, p.162; Mūjabāt, vol.1, p.227; Salīm Rustam, Sharḥ al-Majallah, vol.1, p.58.

[130] For detailed discussions and examples, see Tabyīn al-Ḥaqā'iq, vol.6, p.159; Ashbāh.N, p.113; Majmaᶜ al-Ḍamānāt, p.162; Mūjabāt, p.228; al-Fatāwā al-Hindiyyah, vol.6, p.30.

[131] Majmaᶜ al-Anhur, vol.2, p.664; Mūjabāt, vol.1, p.228.

3- If a minor destroys another's property by authority given to him with regard to property without the consent of the guardian.[132]

For example: If a minor is given a trust by a person without getting permission from his guardian, and the trust is destroyed, the minor is not liable. The liability is upon the owner of property himself.[133]

In relating to *mubāsharah* (direct cause) and *tasabbub* (indirect cause), a minor is not excused in any *mubāsharah* tort actions whether he attained *tamyīz* or not. Whereas, in cases of *tasabbub* tort actions, only the minor who has attained *tamyīz* is liable, *ghayr mumayyiz* is free from any liability.[134] In this situation, he lacks the intention, and in turn, has intended no trespass. The Islamic law of tort, however, does not debar the plaintiff from claiming damages from the guardian of the minor if it could be proved that the guardian was negligent in his duty of taking care of his ward who could not take care of himself.[135]

Al-Sarakhsī noted:

> "*Musabbib* (a minor), if he transgressed (*mutaᶜaddian*) causing injury to another person, is liable and *diyah* (blood-money) is upon his *ᶜāqilah*. For instance, if a minor is a digger of a well or puts (*wāḍiᶜ*) a stone on the road. The subject matter here is the minor who is left without anyone to take care of him where he needs it and he cannot take care of himself

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[132] Fawzī Fayḍ Allāh, Naẓariyyat al-Ḍamān, p.172; Wahbah, Naẓariyyat al-Ḍamān, p.254. *Kāna bi sababi taslīṭihim ᶜalā al-māl.*

[133] Majmaᶜ al-Ḍamānāt, p.423; Fawzī Fayḍ Allāh, Naẓariyyat al-Ḍamān, p.173.

[134] Mūjabāt, vol.1, p.223; Majallah, articles 916 and 960; Amīn, al-Mas'ūliyyah al-Taqṣīriyyah, pp.141-142; Fawzī Fayḍ Allāh, al-Mas'ūliyyah al-Taqṣīriyyah, pp.381-382.

[135] Amīn, al-Mas'ūliyyah al-Taqṣīriyyah, pp.141-144.

properly".[136]

So, the element of *al-mutaʿaddī* existed here on account of the negligence of his guardian in taking care of him.

In another example, al-Sarakhsī stated:

> "If a minor rode an animal and the animal injured a person and the person died, the minor would be liable if he is known to be riding regularly and the *diyah* of the killed person is on the *ʿāqilah* of the minor. But, if the minor did not know how to ride properly owing to his young age (*li ṣigharihi*) and inability to control the animal, the blood-money of the deceased would be overlooked (*hadar*)".[137]

The blood-money is overlooked in the second instance because the minor did not know how to ride an animal before and because he lacked intelligence and understanding. Consequently, he did not have the intention which is made a prerequisite for liability of any indirect injury as in the above mentioned principle.

2- Liability of employer (principal) for the act of his employee (*ajīr*).

According to Islamic civil law, the *fuqahā'* have divided *ajīr* (servant or employee) into two categories:

i- *Ajīr khāṣṣ* (private agent or exclusive employee)[138].

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[136] Al-Mabsūṭ, vol.26, p.186.

[137] Al-Mabsūṭ, vol.26, p.187. See also al-Fatāwā al-Hindiyyah, vol.6, p.33; Mūjabāt, vol.1, p.224; Ashbāh.N, p.310.

[138] It is also called *ajīr waḥda*, see Tabyīn al-Ḥaqā'iq, vol.5, pp.133-134; al-Fiqh ʿalā al-Madhāhib al-Arbaʿah, vol.3, p.127; al-Durr al-Mukhtār, vol.2, p.297; al-Hidāyah, vol.3, p.245; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.4, p.766, or *ajīr al-munfarid*, see Mughnī al-Muḥtāj, vol.2, p.352, or *ajīr muʿayyan*, see al-Wajīz, vol.1, p.237.

ii- *Ajīr mushtarak* (independent contractor or general agent).[139]

Ajīr khāṣṣ means a person working for another for a definite time and for specific work,[140] or a person taken on hire to work for the hirer alone, not for another.[141] His wages are due if he is ready to work during the period for which his services were hired.[142]

Ajīr mushtarak means a person who is hired, and is not restricted by the condition that he is not to work for anyone other than the hirer,[143] and his wages are paid when the work is done.[144]

For example: Porters (*ḥammāl*), brokers (*dallāl*), tailors (*khayyāṭ*), clockmakers (*sāʿātī*), jewellers (*ṣāʾigh*), cab drivers (*aṣḥāb ʿajalāt al-kirāʾ*), harbour boatmen (*aṣḥāb al-zawāriq*) and village shepherds (*rāʿī al-qaryah*) are all general employees (*ajīr mushtarak*), that is, persons who are not employed especially by one particular individual, but work for anyone. But, a porter or a cab driver (*ṣāḥib al-ʿarabah*) or a boatman (*ṣāḥib zauraq*) who gives his services on hire to one employer only for a specific period,

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[139] Al-Mughnī, vol.5, p.388 and p.479; al-Fiqh ʿalā al-Madhāhib al-Arbaʿah, vol.3, p.146; al-Durr al-Mukhtār, vol.2, p.295; Manār al-Sabīl, vol.1, p.421; Tabyīn al-Ḥaqāʾiq, vol.5, pp.133-134; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.4, p.766.

[140] Al-Durr al-Mukhtār, vol.2, p.297; al-Mughnī, vol.5, p.481; al-ʿUddah Sharḥ al-ʿUmdah, p.228; Manār al-Sabīl, vol.1, p.421; Fawzī Fayḍ Allāh, Naẓariyyat al-Ḍamān, p.173.

[141] Al-Hidāyah, vol.3, p.245; Mughnī al-Muḥtāj, vol.2, p.352; Majmaʿ al-Ḍamānāt, pp.27-28; al-Fiqh ʿalā al-Madhāhib al-Arbaʿah, vol.3, p.146; Majallah, article 422; Ḍamān al-Mutlifāt, p.647.

[142] Majallah, article 425; al-Durr al-Mukhtār, vol.2, p.297; Tabyīn al-Ḥaqāʾiq, vol.5, p.134.

[143] Al-Durr al-Mukhtār vol.2, p.295; Tabyīn al-Ḥaqāʾiq, vol.5, p.133; al-Hidāyah, vol.3, p.244; Mughnī al-Muḥtāj, vol.2, p.352; al-Fiqh ʿalā al-Madhāhib al-Arbaʿah, vol.3, p.146; Majallah, article 422.

[144] Al-Durr al-Mukhtār, vol.2, 295; Tabyīn al-Ḥaqāʾiq, vol.5, p.134; Majallah, article 424; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.4, p.768.

becomes during that period an exclusive employee (*ajīr khāṣṣ*).[145]

Ajīr Khāṣṣ

Ajīr khāṣṣ is entitled to his wages by attending for work during the period for which his services were hired even though he might not perform it. However, he cannot decline to do the work. If he does so, he is not entitled to his wages.[146] The fact that he has submitted himself and made himself available for the job which was for the benefit of his employer means that he would not be held liable for any damage which occurred without his own fault in the course of his duty because he is *amīn* (trustee), and working with the permission (*ma'dhūn*) of the owner of the property.[147]

Indeed, the action of *ajīr khāṣṣ* or *tilmīdh* (worker) is attributed (*yuḍāf*) to his *ustādh* (master/principal/employer). If the *ajīr khāṣṣ* or *tilmīdh* does his work and it causes any destruction, the *ustādh* is vicariously liable when:

1- The contract warrants the employee to give out his service for the benefit (*manfaᶜah*) of the employer. It is also necessary that the job to which the employee gives his service is lawful and is unambiguous (*ṣarāḥah*). However, if the commanded act concerns another person's property, the command will be null and void because the *sharᶜ* permits

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[145] Majallah, article 422; al-Durr al-Mukhtār, vol.2, pp.295-297; Manār al-Sabīl, vol.1, p.421; Tabyīn al-Ḥaqā'iq, vol.5, p.134; al-Mughnī, vol.5, p.479.

[146] Majallah, article 425; al-Durr al-Mukhtār, vol.2, p.297.

[147] Tabyīn al-Ḥaqā'iq, vol.5, p.138; al-Hidāyah, vol.3, p.246; al-Fiqh ᶜalā al-Madhāhib al-Arbaᶜah, vol.3, p.147; Fawzī Fayḍ Allāh, Naẓariyyat al-Ḍamān, p.174.

no one to exercise any action on another's property without his consent. And in any situation where the command is void, the commander shall not be responsible, as the *fuqahā'* have theorized that: "Anything forbidden to be done, is also forbidden to have the performance of it requested".[148] So the request is regarded as invalid. Consequently, if a person commands another person to get hold of another's property illegally, the person who gets hold of the other's property is liable by virtue of the fact that the command from the first person is invalid.[149]

2- The occurrence of an injury (*ḍarar*) to a third party while acting in the course of his employment in an *intra vires* activity.

If the conditions above do not emerge as *prima facie* evidence of an *ajīr khāṣṣ* or a *tilmīdh*, the *ustādh* is not vicariously liable for any liability.[150]

For example: If an *ajīr khāṣṣ* lighted a fire in a lamp (*sirāj*) complying with the command of his employer, and the lamp dropped and singed or oiled the cloth in the fuller's work (*thiyāb al-qiṣārah*), the liability is not upon the *ajīr khāṣṣ*, but is vicariously upon his *ustādh* (master) because lighting the lamp is an authorised work (*bi idhnihi*) for a fuller,[151] but, if the lamp dropped and it singed the cloth other than the cloth in the fuller's work, the liability is upon the *ajīr khāṣṣ* because he engages in an *ultra vires* activity without

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[148] Amīn, al-Mas'ūliyyah al-Taqṣīriyyah, p.156; Majallah, article 35; ʿAlī Ḥaydar, Durar al-Ḥukkām, vol.1, p.39; Salīm Rustam, Sharḥ al-Majallah, vol.1, p.34. *Mā ḥarrama fiʿlih ḥarrama ṭalabih.*

[149] Majmaʿ al-Ḍamānāt, p.158.

[150] Jāmiʿ al-Fuṣūlayn, vol.2, p.122; Majmaʿ al-Ḍamānāt, p.28 and p.45; Fawzī Fayḍ Allāh, al-Mas'ūliyyah al-Taqṣīriyyah, p.390; Shaltūt, al-Mas'ūliyyah al-Madaniyyah wa al-Jinā'iyyah, p.28; Ḍamān al-Mutlifāt, p.648; Mūjabāt, vol.1, pp.230-231.

[151] Majmaʿ al-Ḍamānāt, pp.42-43; Jāmi' al-Fuṣūlayn, vol.2, p.122; Ḍamān al-Mutlifāt, p.648; Wahbah, Naẓariyyat al-Ḍamān, p.256.

express authority.[152]

Similarly, when the *ajīr* or *tilmīdh* in the fullerwork makes a pounding and causes the cloth to drop and damage, the employer (*ustādh*) is vicariously liable because pounding is part of the work of a fuller, and thus liability is ascribed to him. On the other hand, where the pounding of the fuller causes cloth other than the cloth which is commanded by the employer, the liability is upon the *tilmīdh*, because the act upon the other cloth is not authorised or is an *ultra vires* activity.[153]

The reason for the liability of the employer (*ustādh*) concerned with the injury which is done by his *ajīr khāṣṣ* or *tilmīdh* is that his employee is his authorised representative (*nā'ib/niyābah*), so, his tort action is as if the employer caused the loss or damage himself. At the same time, the benefits (*manāfiᶜ*) gained by the *ajīr* are owned by the *musta'jir* (lessee/master) alone. Therefore, the fault of the *ajīr* is the fault of the employer because he (the employer) is the guarantor (*ḍāmin*) or surety (*kafīl*) for the employee.[154]

The benefit (*manfaᶜah*) of the service of *ajīr khāṣṣ* belonging exclusively to the employer,[155] and the liability belonging to him on behalf of his *ajīr khāṣṣ* could be summarised from the maxim: "Liability is an obligation accompanying gain".[156] That is

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[152] Majmaᶜ al-Ḍamānāt, p.43; Jāmiᶜ al-Fuṣūlayn, vol.2, p.130; Ḍamān al-Mutlifāt, p.648.

[153] Majmaᶜ al-Ḍamānāt, p.43; Wahbah, Naẓariyyat al-Ḍamān, pp.256-257; Ḍamān al-Mutlifāt, p.649.

[154] Tabyīn al-Ḥaqā'iq, vol.5, p.138; Jāmiᶜ al-Fuṣūlayn, vol.2, p.130; Mūjabāt, vol.1, p.231; al-Hidāyah, vol.3, pp.245-246; Wahbah, Naẓariyyat al-Ḍamān, p.256; Ḍamān al-Mutlifāt, p.649.

[155] Mughnī al-Muḥtāj, vol.2, p.352; al-Hidāyah, vol.3, pp.245-246; Nihāyat al-Muḥtāj, vol.5, p.311; Mūjabāt, vol.1, p.230; Fawzī Fayḍ Allāh, Naẓariyyat al-Ḍamān, p.174.

[156] Majallah, article 87. *Al-ghurm bi al-ghunm.*

to say, a person who enjoys the benefits of a thing must submit to the disadvantage attaching thereto. There is another maxim to this effect derived from the Majallah: "Benefit follows responsibility".[157] That is to say, the enjoyment of a thing is the compensation factor for any liability attaching thereto.

This example could be related to the discussion above:

> "One of the traders in the bazaars, compounds and other places orders a worker (*ajīr*) to sprinkle water in a place which is situated in the courtyard of a Muslim, and a man (or an animal) slips. Then the man who ordered would be responsible. But if he has ordered him to make ablution on the part (and he causes an accident there), then the man who performed the ablution would be held liable, for the one who performs ablution will derive benefit for himself and the benefit of sprinkling water goes to the person who ordered it".[158]

Wahbah al-Zuḥaylī briefly mentions the views of the Ḥanafī jurists on the subject of vicarious liability:

> "When the *matbūʿ* (employer) asks his *tābiʿ* (employee) for any work, and between them there existed a contract of employment (*ʿaqd ijārah*), and injury (*ḍarar*) occurs on account of the employee in the course of his work; and the equipment, the place and the method of the work is in accordance with normal practice, or the employer ordered it explicitly or implicitly: if these two stipulations are not confirmed, the employer is not liable".[159]

Al-Marghīnānī also states the doctrine of vicarious liability:

> "*Ajīr khāṣṣ* is not responsible for anything he loses which in his possession or destroys in the course of the employment. If an article be lost whilst in the hands of a particular hireling (*ajīr khāṣṣ*), without his

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[157] Majallah, article 85. *Al-Kharāj bi al-ḍamān.* The maxims from Majallah, articles 85 and 87 are derived from Ḥadīth of the Prophet: "*Al-Kharāj bi al-ḍamān aw al-ghurm bi al-ghunm*", both phrases meaning that whosoever gets the benefit also has to shoulder the liability. See, Sunan Ibn Mājah, vol.2, p.754; Ibn Qayyim, Iʿlām al-Muwaqqiʿīn, vol.2, p.20; Ashbāh.S, p.136; Ashbāh.N, p.151.

[158] Abū Yūsuf, Kitāb al-Kharāj, p.322; Majmāʿ al-Ḍamānāt, p.159; Mūjabāt, vol.1, p.230.

[159] Wahbah, Naẓariyyat al-Ḍamān, p.257.

act; by a thief stealing it (*saraqa*)(for instance), or, a usurper carrying it away (*ghaṣaba*),- or, if it be lost by his act (*ghāba*), he is not responsible for it. He is not responsible in the former instance because the article is a deposit in his hand, since he took possession of it with the owner's consent. He is also not responsible in the second instance, because, as the advantage of this hireling's service is the property of the hirer, it follows that, where he directs him to act with his property, such direction is valid: consequently the hireling is his deputy; his acts, therefore, are the same as the acts of his principal, the hirer, and of course he is not responsible".[160]

Although, in some cases, the *ajīr khāṣṣ* would be held liable if he inflicted damage upon the property of a third party through the command of his employer, he will be entitled to compensation from his employer if he did not know that the act is unlawful. For example, if the employer ordered him to dig a well on a piece of land which belongs to another person, and the employee thought that the land belonged to his employer, the employer definitely is responsible for his employee's act; likewise the case of the employer commanding his employee to slaughter a lamb of another man, whereas the employee thought that the lamb belonged to the employer.[161] In these cases, the employer is in the position of vicarious liability.

The *fuqahā'* of the Ḥanafī school,[162] the Mālikī school,[163] the Shāfiᶜī school,[164]

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[160] Al-Hidāyah, vol.3, p.246; Sharḥ Fatḥ al-Qadīr, vol.9, p.129.

[161] Majmaᶜ al-Ḍamānāt, p.178; Jāmiᶜ al-Fuṣūlayn, vol.2, p.108; al-Mughnī, vol.9, p.570; Mūjabāt, vol.1, p.230.

[162] Badā'iᶜ al-Ṣanā'iᶜ, vol.4, p.210; Tabyīn al-Ḥaqā'iq, vol.5, p.138; al-Durr al-Mukhtār, vol.2, p.299; Radd al-Muḥtār, vol.6, p.67; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.1, p.598 and pp.604-605.

[163] Al-Khirshī, Fatḥ al-Jalīl ᶜalā Mukhtaṣar Khalīl, vol.7, p.28; al-Mudawwanah, vol.3, p.439; al-Dusūqī, Ḥāshiyat al-Dusūqī, vol.4, p.26.

[164] Al-Muhadhdhab, vol.1, p.415; Minhāj al-Ṭālibīn, in the margin of Mughnī al-Muḥtāj, vol.2, p.351; al-Sirāj al-Wahhāj, pp.293-294; Mughnī al-Muḥtāj, vol.2, p.352; Nihāyat al-Muḥtāj, vol.5, p.311.

the Ḥanbalī school[165] and Ibn Ḥazm[166] unanimously agreed that the *ajīr khāṣṣ* is *amīn* and his hand is called "the hand of *amanah*" (*yad amānah*). He does not bear any liability unless in case of transgression (*al-taᶜaddī*) and intention (*tā ammud*), or in case of carelessness (*ihmāl*) and negligence (*tafrīṭ*). In short, he will be held liable in cases in which he transgresses (*taᶜaddā*) or he is negligent (*farraṭa*).

The *ajīr mushtarak* will not be discussed here, because that cannot be related to the rule of vicarious liability.

From the discussion, it is clear that the rule of vicarious liability existed in Islamic law. It is not alien or foreign.

Actually, there are still many topics in the books of *fiqh* which could be related to that rule, namely:

i- Liability of a coercer (*mukrih*) for his coercion of another person (the coercion of *mulji'*).

ii- Liability of a commander (*āmir*) for his command to another person.

iii- The liability of the state for any injury done by its workers.

iv- The liability of a master for his slave.

v- The liability of an owner for his animal.[167]

vi- The liability of an owner for his building,[168] etc.

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[165] Manār al-Sabīl, vol.1, p.421; al-Bahūtī, al-Rawḍ al-Murbiᶜ, vol.2, p.324.

[166] Al-Muḥallā, vol.8, p.201.

[167] This topic will be discussed under the title of "Liability for Animals".

[168] This topic will be discussed under the title of "Liability for Premises".

CHAPTER TWO

THE TYPES OF TORTS AGAINST THE PERSON

ASSAULT AND BATTERY

Assault and battery in Arabic means *iʿtidāʾ maʿa al-īdhāʾ al-badanī wa al-ḍarb* (transgression which occurs together with bodily harm and beating).[1] In the *Sharīʿah*, there is no specific word for both. However, any action which could be linked to assault and battery is prohibited.

The prohibition of these actions are based on the idea of the dignity of mankind. The Islamic law of tort goes to great length to protect every citizen from interference in his personal liberty and dignity. The Qur'ān states:

"We have honoured the sons of Ādam".[2]

This verse depicts the unique distinction of man and makes him superior in this respect to all other animate beings.[3]

The Qur'ān says again:

"We have indeed created man in the best of moulds".[4]

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[1] Ibrahim I. al-Wahhab, Law Dictionary, p.14; Hasan S. Karmi, al-Mughnī al-Akhbār, p.79; The Oxford English-Arabic Dictionary of Current Usage, p.69.

[2] Al-Qur'ān, 17:70.

[3] Muhammad Asad, The Message of the Qur'ān, p.430.

[4] Al-Qur'ān, 95:4.

The Prophet also depicted the concept of dignity of man in his Ḥadīth:

"God created Ādam in His image".[5]

The meaning of the Quranic verses and Ḥadīth above is that torture, beating and assault on the sons of Ādam are unlawful and prohibited.

Assault has been expressly condemned by the Prophet in his Ḥadīth:

> "The angels invoke a curse upon him who pointed a weapon towards his brother, even if he is his real brother, so long as he does not abandon pointing it".[6]

In another Ḥadīth:

> "When any one of you happens to go to a meeting or the bazaar with an arrow in his hand, he must grasp its pointed head". Then (he again said): "He must grasp its pointed head".[7]

The Prophet said again:

> "The angels invoke a curse upon him who pointed a piece of iron towards his brother".[8]

In Islām, it is actionable to point a gun at a man in a threatening manner, even though it is unloaded. The aim of the condemnation of assault by the Prophet in his Ḥadīths is to protect the lives and honour of people. The word weapon or arrow or piece of iron here include all the points and edges of weapons which can do harm, e.g.,

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[5] Ṣaḥīḥ al-Bukhārī, vol.8, p.43; Ṣaḥīḥ Muslim, vol.4, p.1378.

[6] Ṣaḥīḥ Muslim, vol.4, p.1380.

[7] Ṣaḥīḥ Muslim, vol.4, p.1379.

[8] Sunan al-Tirmidhī, vol.9, p.7. There is another Ḥadīth reported by Ibn Mājah that the Prophet said: "He who pointed at us with a weapon is not from us". See Sunan Ibn Mājah, vol.2, p.860; Bulūgh al-Marām, p.528.

spearhead, blade of a knife, sword, the barrel of the gun, fist, etc.[9]

The Prophet also condemned battery. It was reported as follows:

> "A person bit the arm of another, he pulled [his mouth away from the arm] and his foretooth fell out. This matter (i.e. his appeal for compensation for his tooth) was taken to the Prophet, and he turned it down saying: "Did you want to eat his flesh? ".[10]

In another Ḥadīth, it was reported that:

> "A person bit the arm of the servant of Yaʿlā b. Munyah. He pulled [his mouth away from the arm] and his foretooth fell out. The matter was referred to the Prophet and he turned it down and said: "Did you intend to bite his hand, as the camel bites? ".[11]

Additionally, Abū Yūsuf mentioned that when ʿUmar Ibn al-Khaṭṭāb despatched his governors, he would say to them:

> "I have not despatched you to be oppressors but as leaders. So, don't beat the Muslims to humiliate them; do not praise them lest you should put them into a trial, do not usurp their rights or oppress them.....".[12]

Ibn Saʿd quoted:

> "ʿUmar wrote to his governors that they should meet him in the season of *ḥājj*. They met him. He stood up and said: "O people, I do not despatch to you my governors so that they may oppress you in regard to your lives and properties. I have despatched them to rule over you with justice. So, whoever has a complaint, should stand up. A person stood up and said: "O *Amīr* of the Muslims, your governor beat me with one hundred stripes". ʿUmar said: "Will you beat him with one hundred stripes? Then

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[9] Those Ḥadīths which prohibited "assault" could be compared to the Western cases as *Thomas* v. *N.U.M.* [1986] Ch. 20, 62 (to shake one's fist in a man's face) and *R.* v. *St. George* (1840) 9 C.& P. 483, 493, or *R. v. Hamilton* (1891) 12 L.R. (N.S.W.) 111 at 114 (to point a pistol at a man in threatening manner), cited in Salmond and Heuston, p.128; John G. Flemings, The Law of Torts, p.25.

[10] Ṣaḥīḥ Muslim, vol.3, p.897.

[11] Ṣaḥīḥ Muslim, vol.3, p.897.

[12] Abū Yūsuf, Kitāb al-Kharāj, p.230.

stand up and retaliate against him.....".[13]

The above quotations mentioned that battery is an unlawful action. It is prohibited by Islām and actionable by the defendant.

Islām prohibits the action of pulling away a chair from under a person whereby he falls to the ground or of sprinkling water in the way and someone falls in consequence. In the case of sprinkling water in the way, either intentionally or by performing ablutions there, whereupon a person slips causing injury, the sprinkler will be liable for compensation.[14] Likewise, if a person drops a slippery substance, such as oil or water on the highway and an animal of another person (or a person) slips thereon and is injured, the first person is liable.[15] Elsewhere, it is mentioned that a person having placed a slippery substance on the path with the intention of causing hurt to some person, is liable to retaliation if the death of the person be caused thereby. But, if he had no intention of harming anyone, or if someone other than the person he intended to harm suffered damage, he is liable only to pay *diyah*.[16]

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[13] Ibn Sa'd, al-Ṭabaqāt al-Kubrā, vol.3, pp.293-294; Abū Yūsuf, Kitāb al-Kharāj, p.231.

[14] Al-Mabsūṭ, vol.27, p.7; al-Wajīz, vol.2, p.150; Mughnī al-Muḥtāj, vol.4, p.87; al-Hidāyah, vol.4, p.192; Abū Yūsuf, Kitāb al-Kharāj, p.97 (translated by Abid Ahmad Ali, p.323); al-Fatāwā al-Hindiyyah, vol.6, p.41; Majma' al-Ḍamānāt, p.164; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.598; al-Muhadhdhab, vol.2, p.210; Sulaymān al-Jamal, Ḥāshiyat al-Jamal 'alā Sharḥ al-Minhaj, vol.5, p.83; Kifāyat al-Akhyār, p.613; Badr al-Muttaqā in the margin of Majma' al-Anhur, vol.2, p.655; Majma' al-Anhur, vol.2, p.655; al-Shaybānī, Kitāb al-Aṣl, vol.4, p.506; al-Shīrāzī, Kitāb al-Tanbīh, p.127; al-Ajwibah al-Khafīfah, p.387; Jāmi' al-Fuṣūlayn, vol.2, p.90; al-Mughnī, vol.7, p.822; Tabyīn al-Ḥaqā'iq, vol.5, p.145; al-Durr al-Mukhtār, vol.2, p.464; al-Ikhtiyār li Ta'līl al-Mukhtār, vol.5, p.46; Zarrūq, Sharḥ Zarrūq 'alā Matn al-Risālah, vol.2, p.245; Ibn Rajab, al-Qawā'id fī al-Fiqh al-Islāmī, p.217.

[15] Majallah, article 927; al-Fatāwā al-Hindiyyah, vol.6, p.50; al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.6, p.408.

[16] Mukhtaṣar, p.273; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, p.384.

The *fuqahā'* maintained that if a person is riding his animal on the highway, and another person strikes or goads the animal without the consent of the rider so as to cause it to kill a man by kicking, or treading him down, or running over him, the responsibility rests upon the person who so struck or goaded it, not upon the rider. Moreover, if the animal throws his rider and kills him, the *diyah* for him is due from the *āqilah* of the striker or goader.[17]

The author of the Mukhtaṣar noticed that whoever aims at another an unsheathed weapon, without pursuit and without ill-will, will be liable to pay *diyah*, if such other shall have succumbed to fright.[18]

Examples of battery and assault: hitting somebody with the fist or a stick, throwing water or a stone at a person, pulling off a person's shoe, shining a powerful beam of heat, light, noise or vapour onto another person, pushing another person roughly etc., could be seen in the writings which are cited by the *fuqahā'* in their original texts as follows:

1)- Abū Ḥanīfah and Mālik b. Anas opine that if a person intentionally throws a stone at another who was indiscreetly looking at him through a window and hits the peeping-

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[17] Al-Mabsūṭ, vol.27, p.2; al-Hidāyah, vol.4, p.202; al-Fatāwā al-Hindiyyah, vol.6, p.51; al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.6, p.400-401; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.456; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.282; Lisān al-Ḥukkām, p.279; al-Shaybānī, Kitāb al-Aṣl, vol.4, p.501; al-Iqnāᶜ, vol.2, p.242; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.468; Kifāyat al-Akhyār, p.644; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.423; al-Durr al-Mukhtār, vol.2, p.469; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.608; Radd al-Muḥtār, vol.6, p.608.

[18] Mukhtaṣar, p.274. See also al-Ābī, Jawāhir al-Iklīl, vol.2, p.257; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.241; al-Ṣāwī, Bulghat al-Sālik, vol.2, p.385; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, p.385.

tom one in the face, the thrower is liable. This is because the thrower can prevent the other from looking at him without throwing the stone. Otherwise, if the thrower did it unintentionally, he is definitely not liable. On the other hand, al-Shāfiᶜī, al-Ghazālī and Ibn Qudāmah opine that the thrower is not liable.[19] This group uphold their view by quoting a Ḥadīth: "If any person were to look at you without permission and you were to throw a pebble at him and put out his eye, you would be guilty of no offence". In a wording by Aḥmad and al-Nasā'ī which Ibn Ḥibbān declared to be sound, "Neither *diyah* nor *qiṣāṣ* is fixed for him".[20]

2)- If a person be carrying a load (stone or wood) upon the highway, and the load falls upon any person (or he throws it upon another person), so as to kill him, the responsibility rests upon the carrier.[21]

3)- If a person roughly pushes another person, who falls down into a well, the pusher is

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[19] Al-Mughnī, vol.8, p.335; Minhāj al-Ṭālibīn printed with al-Sirāj al-Wahhāj, p.537; Mukhtaṣar, p.348; al-Wajīz, vol.2, p.185; Raḥmat al-Ummah, p.304. See also Mukhtaṣar al-Muzanī ᶜalā al-Umm, vol.9, p.283; al-Kāfī, p.607; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.322; al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, pp.322-323; al-Umm, vol.6, p.48; al-Ābī, Jawāhir al-Iklīl, vol.2, p.297; Tabṣirat al-Ḥukkām, vol.2, p.251; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.422; al-Mīzān al-Kubrā, vol.2, p.153.

[20] See Bulūgh al-Marām, p.533; Sunan al-Dārimī, vol.2, pp.197-198. See also al-Nīsābūrī, al-Iqnāᶜ, p.187; al-Umm, vol.6, pp.48-49.

[21] Al-Hidāyah, vol.4, p.194; al-Fatāwā al-Hindiyyah, vol.6, p.43; al-Ajwibah al-Khafīfah, p.387; Tabyīn al-Ḥaqā'iq, vol.5, p.146; Fatāwā Ḥammādiyyah, vol.2, p.752; al-Kanawī, al-Nāfiᶜ al-Kabīr printed with al-Jāmiᶜ al-Ṣaghīr, p.514; Mughnī al-Muḥtār, vol.4, p.205; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.251 and p.458; al-Jāmiᶜ al-Ṣaghīr in the margin of Kitāb al-Kharāj, p.119; al-Jāmiᶜ al-Ṣaghīr, pp.514-515; Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.306; Jāmiᶜ al-Fuṣūlayn, vol.2, p.88; Radd al-Muḥtār, vol.5, p.523; Majallah, article 926.

liable.[22]

4)- If a person digs a well or lays down a stone or a log of wood in the middle of the highway and a man perishes in consequence, the person who has done it will be held liable. This is because he is considered as *mutaᶜaddin* in his deed, and he is therefore responsible for any accident it may occasion. The throwing of earth or soil in the highway is the same as placing there a stone or a log of wood.[23]

5)- A person who by quickly pulling away his hand pulls out the teeth of another who was biting him is liable for what he has done in the opinion of Mālik and Ibn Abī Laylā.[24] This is because the person can pull away his hand without pulling out the teeth of the other person.[25] They also maintain that the Prophet said: "For an injury which results in the lost of a tooth, five camels are paid".[26] The person who pulled away his hand is considered as *al-mubāsharah* to the injury which had happened.[27] But, according to Abū

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[22] Mughnī al-Muḥtāj, vol.4, p.83; al-Fatāwā al-Hindiyyah, vol.6, p.45. See also al-Mabsūṭ, vol.27, pp.14-19.

[23] Al-Hidāyah, vol.4, pp.192-193. See also al-Shaybānī, al-Amālī, p.51; al-Shaybānī, Kitāb al-Aṣl, vol.4, pp.505-506; Muᶜīn al-Ḥukkām, p.208 and p.211; Tabyīn al-Ḥaqā'iq, vol.6, pp.143-144; Majmà al-Anhur, vol.2, pp.651-652; Badr al-Muttaqā in the margin of Majmaᶜ al-Anhur,vol.2, p.652; al-Muhadhdhab, vol.3, p.206; Mughnī al-Muḥtāj, vol.4, p.83 and p.87; al-Mughnī, vol.7, p.822; Ibn Rajab, al-Qawāᶜid fī al-Fiqh al-Islāmī, p.217; Majmaᶜ al-Ḍamānāt, p.176 and p.178.

[24] Al-Mughnī, vol.8, pp.333-334; Mukhtaṣar, p.291; Raḥmat al-Ummah, p.304; al-Ābī, Jawāhir al-Iklīl, vol.2, p.297; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.322; al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.322; Tabṣirat al-Ḥukkām, vol.2, p.251; al-Mīzān al-Kubrā, vol.2, p.153.

[25] Al-Kāfī, p.607; al-Ābī, Jawāhir al-Iklīl, vol.2, p.297; al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.322.

[26] Al-Mughnī, vol.8, p.334. See this Ḥadīth in al-Risālah, p.124; al-Muwaṭṭa', p.620; al-Umm, vol.6, p.163; Sunan al-Dārimī, vol.2, p.195.

[27] Tabṣirat al-Ḥukkām, vol.2, p.251.

Ḥanīfah, al-Shāfiᶜī, Aḥmad b. Ḥanbal and al-Ghazālī, the person who has pulled away his hand is not liable.[28] This is because, according to them, the Prophet invalidated the payment of *diyah* in this case. ᶜImrān b. Ḥuṣayn reported: "Yaᶜlā b. Munyah or Ibn Umayyah fought with a person, and the one bit the hand of the other and he tried to draw his hand from his mouth and thus his foreteeth were pulled out. Then they referred their dispute to the Prophet, whereupon he said: Does anyone of you bite as the camel bites?. So there is no *diyah* for it".[29] In another Ḥadīth, Ṣafwān b. Yaᶜlā b. Umayyah reported from his father: "I participated in the expedition of Tabūk with the Prophet.... . Ṣafwān said that Yaᶜlā had stated: I had a servant, he quarrelled with another person, and the one bit the hand of the other. So he whose hand was bitten drew it from the mouth of the one who had bitten it and (in this scuffle) one of his foreteeth was also drawn out. They both came to the Prophet and he declared that his claim for *diyah* for the tooth was invalid".[30] The liability would not be borne upon the person who had drawn his hand away because the incident was also caused (*tasabbub*) by the person whose tooth was drawn out.[31]

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[28] Al-Mughnī, vol.8, p.333; Minhāj al-Ṭālibīn printed with al-Sirāj al-Wahhāj, p.537; al-Wajīz, vol.2, p.185; Raḥmat al-Umᵐah, p.304; al-Umm, vol.7, p.231. See also Mukhtaṣar al-Muzanī ᶜalā al-Umm, vol.9, p.283; al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.322; Tabṣirat al-Ḥukkām, vol.2, p.251; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.234; Lisān al-Ḥukkām, p.281; al-Fatāwā al-Hindiyyah, vol.6, p.12; al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.6, p.385 and p.395; al-Umm, vol.7, p.231; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.422; al-Mīzān al-Kubrā, vol.2, p.153.

[29] Ṣaḥīḥ Muslim, vol.3, p.897; Sunan al-Dārimī, vol.2, p.195. See also al-Umm, vol.6, pp.43-44; al-Kāfī, p.607.

[30] Ṣaḥīḥ Muslim, vol.3, p.897. See also al-Umm, vol.6, pp.43-44.

[31] Tabṣirat al-Ḥukkām, vol.2, p.251.

6)- If a person injures (or threatens) another person with a knife, he is liable.[32]

7)- A person who has thrown some soap down after taking a bath or has spat phlegm in the way, is liable for any occurrence to another person who has slipped and is injured.[33] Similar is the case of throwing away rubbish or the peel of watermelon in the way.[34]

8)- If a person intentionally throws a stone at another person which hits him and he dies, the thrower will be held liable. The liability is the punishment of *qiṣāṣ*.[35] Likewise, if a person pours hot water upon another and he is injured in consequence, the one who poured the hot water will be held liable. The liability is *diyah*.[36]

9)- If a person pierces another with a needle and he is injured, the piercer is liable.[37]

10)- If a person pursues another person with his sword and the latter unintentionally falls into fire or water or a well in consequence, the pursuer is liable. On the other hand, if

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[32] Mughnī al-Muḥtāj, vol.4, p.88.

[33] Mughnī al-Muḥtāj, vol.4, p.87; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, p.384.

[34] Al-Wajīz, vol.2, p.150; al-Shīrāzī, Kitāb al-Tanbīh, p.127; al-Muhadhdhab, vol.3, p.206; Fatḥ al-Wahhāb, vol.2, p.175; Kifāyat al-Akhyār, p.613; Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.284; Minhaj al-Ṭullāb printed with Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.284; al-Maḥallī printed with Ḥāshiyatān Qalyūbī wa ᶜUmayrah, vol.4, p.150.

[35] Mughnī al-Muḥtāj, vol.4, p.84; Ḥāshiyatān Qalyūbī wa ᶜUmayrah, vol.4, p.148 and p.150.

[36] Majmaᶜ al-Ḍamānāt, p.165.

[37] Al-Wajīz, vol.2, p.121.

another person intentionally throws himself into such place, the pursuer is not held liable by reason that the another person has kills himself intentionally. The another person in this case is considered as *al-mubāshir*. There are legal maxims to uphold and clearify this case. One of them is: "In the presence of *al-mubāshir* and *al-mutasabbib*, the first alone is responsible (*idhā ijtamaᶜa al-mubāshir wa al-mutasabbib yuḍāf al-ḥukm ilā al-mubāshir*)". Another one is: "*Al-Mubāsharah* has priority over *al-sabab* (*al-mubāsharah muqaddimah ᶜalā al-sabab*)".[38]

The examples which are illustrated by the *fuqahā'* above include the actions of assault and battery. Any act which puts another person in reasonable fear or apprehension of an immediate battery amounts to an assault. Furthermore, cases of bringing of harmful objects into contact with another person is counted as battery.

Harry Street maintains:

> "..... that the least touching of another in anger is battery, but that if two or more meet in a narrow passage, and without any violence or design to harm, the one touches the other gently, it is no battery".[39]

Islām appears to recognise the same sense with the quotation of Harry Street by statement of al-Marghīnānī:

> "If a person be carrying a load upon the highway and the load falls upon any person so as to kill him, or falls in the road so as to cause a person to stumble and thereby occasion his death, the liability rests upon the

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[38] Al-Wajīz, vol.2, p.149; Kifāyat al-Akhyār, p.612; Mughnī al-Muḥtāj, vol.4, p.82; Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, pp.283-284; Minhaj al-Ṭullāb printed with Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.284; Majallah, article 90. In other words, the *fuqahā'* theorize: "*Al-Mubāshir ūlā min al-mutasabbib*". See al-Durr al-Mukhtār, vol.2, p.467; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.604. "*Al-Iḍāfah ilā al-mubāshir ūlā*". See al-Hidāyah, vol.4, p.199.

[39] Harry Street, The Law of Torts, p.19.

> carrier;- whereas, if a person be wearing a cloak upon the highway, and it falls upon any person, the wearer of the cloak is not liable. The difference between these two cases are that as a carrier, he has to take care of his load as a condition of safety to another person, whereas, the wearer has not to take care of his cloak, but the wearing of it is allowed to him generally. Restricting his liberty of use to the condition of safety would operate as a hardship".[40]

Al-Sarakhsī also stated:

> "Every person has a right of way with his animal over the public highway on condition of safety to another persons. However, he is not liable to make good any injury or loss which he could not have avoided. Since, were we to require him to avoid what cannot be avoided, it would be to impose a condition impossible of fulfilment".[41]

Analogously, the cases of the contact which were part of everyday life, for example, jostling in a street crowd, or touching another person in order to gain his attention or to ask something, are not considered as battery.

In the case of projecting heat, light, etc., intentionally to cause physical injury or personal discomfort to another person are considered as torts of battery. It could be linked to the Ḥadīths of the Prophet which have described the same sense of the case:

a)- Hishām b. Ḥakīm b. Ḥizām happened to pass by people, the farmers of Syria, who had been made to stand in the sun. He said: "What is the matter with them?". They said: "They have been detained for *jizyah*". Thereupon, Hishām said: "I bear testimony to the fact that I heard the Prophet saying: God would torment those who torment people in the

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[40] Al-Hidāyah, vol.4, p.194. See also al-Fatāwā al-Hindiyyah, vol.6, p.43; al-Jāmiᶜ al-Ṣaghīr, p.515; al-Shaybānī, al-Amālī, pp.51-52; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.595; al-Durr al-Mukhtār, vol.2, p.463; Radd al-Muḥtār, vol.6, p.595; al-Kanawī, al-Nāfiᶜ al-Kabīr printed with al-Jāmiᶜ al-Ṣaghīr, p.515; al-Jāmiᶜ al-Ṣaghīr in the margin of Kitāb al-Kharāj, p.119; Muᶜīn al-Ḥukkām, p.211.

[41] Al-Mabsūṭ, vol.26, p.188.

world".[42]

b)- Hishām b. Ḥakīm b. Ḥizām happened to pass by some people in Syria who had been made to stand in the sun and olive-oil was being poured upon their heads. He said: "What is this?". They answered (*qīl*): "They are being punished for (not paying) the *kharāj*". Thereupon he said: "God would punish those who torment people in this world (without any genuine reason)".[43]

Abū Yūsuf also ruled:

> "Most probably, the contractor charges something in excess over and above his contract and it is not possible for him except by being strict with the people, beating them harshly, making them stand in the sun and wear stones around their necks- and great torment is inflicted on the payers of *kharāj*, which is not permitted (for that is forbidden by God). God has ordered that only the surplus should be taken from them and that it is not permissible that they (should be borne a burden) beyond their capacity."[44]

These Ḥadīths and the above opinion of Abū Yūsuf encourage the people to be

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[42] Ṣaḥīḥ Muslim, vol.4, p.1378.

[43] Ṣaḥīḥ Muslim, vol.4, p.1378. Abū Yūsuf also describes in his writing as follows: Abū Yūsuf says; Hishām b. ʿUrwah related to us from his father from Saʿīd b. Zayd that (Saʿīd b. Zayd) passing somewhere in Syria saw people standing in the sun. He said: "What is the matter with them?". It was explained to him that they had not paid the *jizyah*. Thereupon he said that he disliked this and went to their Amīr and said:" I have heard the Prophet saying: He who tortures people will be tortured by God".
Abū Yūsuf says; some of our elders (*ashyākhunā*) related to us from ʿUrwah from Hishām b. Ḥakīm b. Ḥizām that he saw ʿIyāḍ b. Ghanam makes the *dhimmīs* stand in the sun for non-payment of *jizyah*. He said:" O ʿIyāḍ!, What is this? The Prophet said those who torture people in this world will be tortured in the Hereafter".
Abū Yūsuf says; Hishām b. ʿUrwah related to us from his father that ʿUmar b. al-Khaṭṭāb on his return from his march into Syria, once saw some people standing in the sun over whose heads oil was poured. He said:" What is the matter with these people?". It was explained that they had not paid *jizyah* and they will be punished till they paid it. ʿUmar asked, "What do they say and what is their excuse (*ʿudhur*) for non-payment of *jizyah*?". They say:" We have nothing to pay *jizyah*". He said:" Leave them and do not charge them with more than they can bear. I have heard the Prophet say that those who torture people in this world will be tortured by God in the Hereafter". He then ordered them to be set free. See Abū Yūsuf, Kitāb al-Kharāj, p.71, English version translated by A. Ben Shemesh, p.86, translated by Abid Aḥmad ʿAlī, pp.251-252.

[44] Abū Yūsuf, Kitāb al-Kharāj, p.210.

humane and discourage them not to cause injury or personal discomfort to any person in any manner.

FALSE IMPRISONMENT

In Islām, every man is guaranteed the freedom to move as he pleases. The following verse may be cited as the source of this principle:

> "It is He who has made the earth manageable for you, so traverse ye through its tracts and enjoy of the sustenance which He furnishes".[45]

The meaning of the above verse is that the false imprisonment of any person without reason is prohibited. This rule is also confirmed by the Prophet in his Ḥadīth. He was once delivering a lecture in the mosque, when a man rose and said:

> "O Prophet of God! for what crime have my neighbours been arrested?". The Prophet appeared not to hear the question and continued his lecture. The man rose again and repeated the question. The Prophet again did not answer and continued his lecture. The man rose for a third time and repeated the question. Then the Prophet ordered the man's neighbours to be released".[46]

The reason the Prophet had not answered when the question was asked twice earlier was that an authorized person who had carried out the arrest was present in the mosque, and if there had been valid reasons for the arrest, he would have got up to explain his position. Since he gave no reason for these arrests, the Prophet ordered that the arrested

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[45] Al-Qur'ān, 67:15.

[46] Sunan Abī Dāwud, vol.3, p.314.

persons should be released.[47]

No one can be imprisoned without judicial process of law in court. The Caliph ᶜUmar said:

"No one can be imprisoned in Islām without due course of justice".[48]

Islamic law of tort goes to a great extent to protect every citizen from interference with his personal liberty and from false imprisonment.

In the Ḥanafī school, Abū Yūsuf mentioned:

"Nobody can be imprisoned on false or unproved charges by another person".[49]

In the Shāfiᶜī school, al-Māwardī said:

"If a man accused of theft or adultery is brought before a judge, he would not be influenced by such accusation. He should not imprison the accused for investigation or for proving innocence prior to hearing the complaint of theft from one who has authority to make that complaint, and until he takes into account his confession or denial. ..... he added, ...a *qāḍī* could not imprison any person unless he is authorized by law".[50]

Al-Ghazālī also said:

".....the prisoners should be inspected and released if unjustly held. The prisoner who admits to his wrong remains in jail. When a prisoner claims unjust treatment, the plaintiff is recalled to renew litigation and reestablish that the judge had ruled justly in his favour. Should the prisoner express ignorance of the reasons for his imprisonment, the plaintiff is recalled. If the plaintiff fails to appear, the prisoner is released. If the plaintiff has since disappeared, the prisoner claiming to be wronged

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[47] Al-Mawdūdī, Human Rights in Islām, p.26.

[48] Al-Muwaṭṭa', p.510.

[49] Abū Yūsuf, Kitāb al-Kharāj, p.356.

[50] Al-Māwardī, al-Aḥkām al-Ṣulṭāniyyah, pp.219-220.

should also be released".[51]

In the Mālikī school, al-Qarāfī remarked:

> "Imprisonment could not be imposed upon any person without lawful permission, it being also an unlawful action (to impose imprisonment upon any person) in claiming any right which could be adjudged by a judge".[52]

In the Ḥanbalī school, it could implicitly be understood from the quotation of Ibn Qayyim:

> "Shaykh Ibn Taymiyyah has been asked: "Is the punishment by beating or by imprisoning tortfeasor in *shar^{c}ī* or not?. If it comes from *shar^{c}ī*, who is entitled to carry it out and who is not entitled to carry it out?,..... ". He replied: ".....when a judge adjudges between two persons, he should judge them justly".[53]

Underlining the notifications of Quranic verse, Ḥadīth and Islamic jurists above, imprisonment without justice or excuse is prohibited in Islām because no person is to take the life and liberty of another except under a law authorizing him to do so. The person whose life and liberty is threatened is therefore entitled to require the indication under which law he is imprisoned.

In the same sense, al-Mawdūdī stated:

> "Islām has laid down the principle that no citizen may be imprisoned unless his guilt has been proved in open court. To arrest a man only on the basis of suspicion and to throw him into prison without proper court proceedings and without providing him with a reasonable opportunity to produce his defence is not permissible in Islām".[54]

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[51] Al-Wajīz, vol.2, p.239.

[52] Al-Qarāfī, al-Furūq, vol.4, p.80; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.6, p.199.

[53] Ibn Qayyim, al-Ṭuruq al-Ḥukmiyyah, p.93.

[54] Al-Mawdūdī, Human Rights in Islām, p.25.

In brief, as long as a specific charge is not laid against a person, he cannot be detained or imprisoned. However, in any circumstances, if there is a specific reason to imprison a person, it could be implemented. It is based on the Ḥadīths of the Prophet:

"The Prophet detained a man accused of a crime, then he released him".[55]

"The Prophet imprisoned (one) who had been accused".[56]

"The Prophet imprisoned (one) who had been accused during the day".[57]

Al-Khaṭṭābī explained in his Maʿālim al-Sunan that in Islām there are only two kinds of imprisonment:

a)- Imprisonment under order of the court (*ḥabs ʿuqūbah*), namely, when a person is sentenced by the court and is kept in prison till the expiry of the term of his sentence; and

b)- Imprisonment for investigation (*ḥabs istiẓhār*).

He concludes that there can be no other ground for deprivation of a person's freedom.[58]

However, al-Qarāfī has laid down eight cases in which detention could be implemented:

1- The *jānī* (criminal) will be detained in the absence of the victim, as a protection for the location of *qiṣāṣ*.

2- The *ābiq* (fugitive) will be detained for a year, as a protection for property (*al-māliyah*) so that its owner is made to know, (like trust).

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[55] Sunan Abī Dāwud, vol.3, p.314. See also Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.6, p.198.

[56] Ibn Qayyim, al-Ṭuruq al-Ḥukmiyyah, p.102.

[57] Ibn Qayyim, al-Ṭuruq al-Ḥukmiyyah, p.102.

[58] Al-Khaṭṭābī, Maʿālim al-Sunan, vol.4, p.165. See also in al-Mawdūdī, The Islamic Law and Constitution, p.249.

3- The detention of the one who is unwilling to perform the right. By the detention, he could be enforced (by the authority) to perform it, (like debt).

4- One, whose case involves a question of establishing whether he is poor or rich, will be detained in order to investigate his condition, then when his condition becomes apparent, judgement will be made according to this.

5- The detention of the *jānī* is (to serve as) a *taᶜzīr* (discretionary punishment) and *radᶜ* (deterring) from disobeying God.

6- The detention of the one who is unwilling to bear the obligation which does not entertain substitution of another, like the detention of one who admits that he had married two sisters at the same time or ten women, or a woman and her daughter, while unwilling to specify one among them as his legal wife.

7- One who maintains that he does not know either the thing in question or of any responsibility (*dhimmah*) in the matter and he refuses to specify it, will be detained until he does specify it, by saying: "The thing is this cloth or this animal and the like, or the thing which I have admitted is the *dīnār* which is my responsibility.

8- The detention of a person who is unwilling to perform one of the religious duties required by God like fasting, according to the Shāfiᶜīs. However, according to the Mālikīs, such a man will be killed.[59]

With regard to the place of imprisonment, Ibn Qayyim states:

> "Legitimate imprisonment (*al-ḥabs al-sharᶜī*) is not confinement in a narrow place, but impeding the person and preventing him from his freedom of movement, whether he is placed in a house or a mosque, or

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[59] Al-Qarāfī, al-Furūq, vol.4, p.79; al-Shāṭibī, al-Iᶜtiṣām, vol.2, p.120. See also Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.6, p.199.

> charging the plaintiff or his representative with guarding him or appointing him a keeper ..... . This was confinement during the Prophet's era and that of his companion Abū Bakr. There were no specific prisons assigned to confine the opposing parties in a lawsuit. However, during the rule of ᶜUmar Ibn al-Khaṭṭāb, when the population increased, he bought the house of Ṣafwān Ibn Umayyah for four thousand *dirhams* and made it a prison".[60]

As to the period of imprisonment of a person accused in favour of investigation, al-Māwardī said that:

> "There are different opinions. ᶜAbd Allāh al-Zubayrī, one of al-Shāfiᶜī's companions says that the maximum period of imprisonment is one month for investigation (*al-kashf*) and for acquittal (*al-istibrā'*). Others say it is undetermined and should be left up to the *imām*'s view and his independent reasoning (*ijtihād*), the last is more likely".[61]

Basically, the imprisonment is a *taᶜzīr* punishment, which cannot be imposed for a crime until after the crime has been proved and a lawful sentence passed. However, the cases of false imprisonment could be put under tort law and any Muslim or non-Muslim citizen may move to the court for redress against unwarranted imprisonment.

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[60] Ibn Qayyim, al-Ṭuruq al-Ḥukmiyyah, pp.102-103.

[61] Al-Māwardī, al-Aḥkām al-Sulṭāniyyah, p.220. See also Ibn Qayyim, al-Ṭuruq al-Ḥukmiyyah, p.103. For detail see Ibn Farḥūn, Tabṣirat al-Ḥukkām, vol.2, p.225.

THE TYPES OF TORTS AGAINST PROPERTY

TRESPASS ON LAND

The tort of trespass on land (trespass *quare clausum fregit*) is committed by entry on the land of another without lawful authority. Trespass on land is actionable *per se* which means that an action may be brought against a trespasser even though he has not caused any actual damage to the land. In other words, it constitutes a tort without proof of actual damage.[1]

Trespass on the Surface and on the Subsoil of the Land

In general, one who owns or possesses the surface of land, also owns or possesses all the underlying *strata*.[2] Any entry beneath the surface, therefore, at whatever depth, is an actionable trespass. If a man tunnels horizontally from his land under the land of an adjoining coal mine to take coal, this will be trespass. However, surface and subsoil may be possessed by different persons. If A is in possession of the surface and B of the subsoil, and C walks upon the land, that is a trespass against A, but not against B. If C

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[1] Arthur Underhill, A Summary of the Law of Torts, p.74; R.S. Sim And D.M.M. Scott, "A" Level English Law, p.181.

[2] There is a Latin maxim which connotes this issue : "*Cujus est solum, ejus est usque ad coelum et usque ad inferos*", means the owner of the surface is presumed to own everything beneath it to the centre of the earth, and above it to the sky. See Salmond and Heuston, p.49; Arthur Underhill, A Summary of the Law of Torts, p.75.

digs holes vertically in the land, that is a trespass against both A and B. If C bores a tunnel from his land into B's subsoil, that is a trespass against B only.[3]

The discussion above could be related to views of the *fuqahā'* as follows:

In the Ḥanafī school, the Majallah states:

> "Whoever owns a piece of land is the owner of what is below it. That is to say, he is able to make what use of it he wishes; for instance, to build what buildings he wishes. He may also dig the ground and make a cellar, and sink a well as deep as he likes".[4]

Furthermore, in case of a man digging a well or a canal or a stream in the land of the other without his permission, it is permissible for him to prevent the digger from this and he can claim from him the expenses required to level the digging in his land. This is the opinion of Abū Yūsuf. He added in this case (trespass on land) the plaintiff is entitled to damages and pecuniary compensation for the damage sustained in his land by digging it (like causing a structure to be demolished over it and so on).[5]

According to the Shāfiᶜī jurist al-Māwardī:

> "There are two opinions about the minerals which are hidden in the land (*al-maᶜādin al-bāṭinah*),[6] whether they should be awarded to the owner of

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[3] Salmond and Heuston, p.49; R.S. Sim And D.M.M. Scott, "A" Level English Law, p.183; W.V.H. Rogers, Winfield and Jolowicz on Tort, p.365.

[4] Majallah, article 1194.

[5] Abū Yūsuf, Kitāb al-Kharāj, p.198.

[6] *Al-Maᶜādin al-bāṭinah* (minerals) means mines which are kept hidden in the land and cannot be taken out unless by spending a large amount or a great labour is required. Whereas, *al-maᶜādin al-ẓāhirah* connotes any valuable thing which is easily seen in the land and there is no need for much labour and expense to obtain them, like kohl, salt and so forth. See al-Māwardī, al-Aḥkām al-Sulṭāniyyah, p.197. Al-Nawawī also states on the same topic that *al-maᶜdin al-ẓāhirah* are visible mines, that is material which can be extracted without preliminary labour, as in the case of deposits of naphtha, sulphur, pitch, bitumen.... . They do not become private property by the way of *iḥyā'* (clearing uncultivated land), and no preferential right arises from first occupancy, nor even from a concession from the Sovereign. If the yield of the mine is not abundant, the first occupier can take from the mine what is enough for his needs; but if he wants to take more, it may be

the land or not..... . The second opinion is that the minerals (which are hidden in the land) should be awarded to the owner of the land because there is a Ḥadīth reported by several people[7] that the Prophet awarded to Bilāl b. al-Ḥārith al-Muzanī minerals at al-Qabliyyah, what is above it and what is below it; and also awarded a farm at Qadas, and the Prophet did not award (minerals and a farm) as belonging to all Muslims (public right)".[8]

Al-Shīrāzī elaborates this issue talking [(in the chapter of *zakāh* on *maᶜdin* (mine) and *rikāz* (buried treasure)]:

"If a person found (either a mine or buried treasure) in a land of another, it is owned by its owner and (if it has been dug out of that land) he should return it to the owner of the land".[9]

In the Mālikī school, Ibn Rushd notes:

"The *ᶜulamā'* have unanimously agreed that whoever cultivates trees of date palm or fruit trees or any plants on the land of another, is ordered to take them out".[10]

Ibn Abī Zayd al-Qayrawānī says:

"A usurper is ordered to demolish his building or up-root the plant and

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prohibited. Drawing lots must decide the priority, where two or more persons want to begin the exploitation at the same time. *Al-Maᶜdin al-bāṭinah* is hidden mines, that is which cannot be extracted without preliminary labour, as gold, silver, iron and copper. They do not become private property by the mere fact of digging and exploitation, any more than "visible" ones; but if a person clears uncultivated land (*iḥyā' al-mawāt*) and discovers in it a "hidden" mine, he obtains the ownership of it, as an accessory to the soil. Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.167. See also Minhaj al-Ṭullāb printed with Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.167; Mughnī al-Muḥtāj, vol.2, p.372.

[7] Reported by Kathīr b. ᶜAbd Allāh b. ᶜAmr b. ᶜAwf al-Muzanī who received it from his father who received it from his grand father. This Ḥadīth can also be seen in al-Muwaṭṭa', p.133.

[8] Al-Māwardī, al-Aḥkām al-Sulṭāniyyah, pp.197-198.

[9] Al-Muhadhdhab, vol.1, p.532 and p.535.

[10] Bidāyat al-Mujtahid, vol.2, pp.241-242. See also al-Mudawwanah, vol.4, p.189; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.287.

tree he has planted on the usurped land .... ."[11]

Khalīl b. Isḥaq indicates:

"The owner of the land usurped may either demand that the usurper shall remove any building he may have put up on it (or any tree he may have cultivated on it), or he may.."[12]

Ibn Juzayy states:

"Whoever usurps a land and builds a building on it, should demolish it ..... ".[13]

In the Ḥanbalī school, Ibn Rajab states:

"Everything which comes out of the land of an owner is owned by the owner".[14]

In general, Aḥmad b. ᶜAbd Allāh al-Qārī remarks:

"Performing any activity in another's ownership is not permissible unless with the authorization of its owner".[15]

Generally, the word " performing any activity in another's ownership" (*al-taṣarruf fī milk al-ghayr*) could be said to include land, house and so forth.

In the Ẓāhirī school, Ibn Ḥazm mentions:

"The mineral rights of any landlord who discovers deposits of precious materials on, or in his land, as iron, tin, gold, silver, aluminium, any other precious metal, rubies, crystal, or oil belong to him. The government may

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[11] Al-Risālah, p.134. See also al-Fawākih al-Dawānī, vol.2, p.234; al-Thamar al-Dānī, p.553; Zarrūq, Sharḥ Zarrūq ᶜalā Matn al-Risālah, vol.2, pp.296-297; Ibn Nājī, Sharḥ Ibn Nājīᶜ alā Matn al-Risālah printed with Sharḥ Zarrūq ᶜalā Matn al-Risālah, vol.2, p.296. See also al-Kāfī, p.455.

[12] Mukhtaṣar, p.227. See also al-Ābī, Jawāhir al-Iklīl, vol.2, p.151; al-Dardīr, Aqrab al-Masālik, p.151; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, p.198.

[13] Al-Qawānīn al-Fiqhiyyah, p.217.

[14] Ibn Rajab, al-Qawāᶜid fī al-Fiqh al-Islāmī, p.160.

[15] Majallat al-Aḥkām al-Sharᶜiyyah, article 1674, p.507.

not claim any ownership of such items discovered in a private property".[16]

Joseph Schacht also has expressed the same sense in the following words:

"Also, the owner of the ground has an exclusive right in trees that grow in it, and its alluvion. ..... The mine belongs to the owner of the ground, to the finder only if the ground has no owner..... .".[17]

Based on the Ḥadīth, the Ḥanafī, the Shāfiᶜī, the Mālikī, the Ḥanbalī, the Ẓāhirī schools and Joseph Schacht agreed on the general rule that persons other than the owner of the ground have no any right of usufruct and the like to the ground of another without lawful permission.

Trespass of Airspace

The owner of the land has in private law the right to use the airspace for his own purposes. Thus, he may cut the overhanging branches of a tree growing in his neighbour's land, whether they do him harm or not; yet he has no right of action against the owner of the tree unless he can show actual damage. So he may cut and remove an unauthorized telegraph or other electric wire stretched through the air above his land, at whatever height it may be, and whether or not he can show that he suffers any harm or inconvenience from it.

The Majallah states that whoever owns a piece of land, is owner of what is above

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[16] Al-Muḥallā, vol.8, p.238.

[17] Schacht, An Introduction to Islamic Law, p.136.

it.[18] Consequently, every person who owns a piece of land, owns all above it to the sky and everything beneath it to the centre of the earth so long as what is above and beneath the land was not owned by other persons.[19]

Furthermore, the Majallah points out:

> "No person may extend the eaves of a room which he has constructed in his house over his neighbour's house airspace. If he does so, the amount which so extends over his neighbour's house airspace should be removed".[20]

The removing or cutting off the quantity extended is compulsory even though it does not cause any injury by reason of interference in another owner's land without permission. It is also prohibited in the case of land jointly owned by two persons when one of them extends the eaves of his room to his partner's airspace without permission of the partner.[21]

Trespass by Placing Objects on Land

It is a trespass to place anything upon the plaintiff's land, or to cause any physical object or noxious substance to cross the boundary of the plaintiff's land, or even simply to come into physical contact with the land, though there may be no crossing of the boundary: for example, to cause a Virginia creeper to grow upon it, or to lean a ladder,

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[18] Majallah, article 1194.

[19] ʿAlī Ḥaydar, Durar al-Ḥukkām, vol.10, p.217.

[20] See Majallah, article 1195.

[21] Salīm Rustam, Sharḥ al-Majallah, vol.1, p.656.

plank or a shed, or to pile rubbish against it.[22]

In Islām, the case of placing an object on land could be related to a Ḥadīth of the Prophet who said:

> "If anyone sows in other people's land without their permission, he has no right to any of the crop, but he may have what it cost him".[23]

The content of this Ḥadīth implies that a person cannot trespass to put any object on land in the possession of another without his permission. Besides, there is a legal maxim which could be linked to the discussion as being in conformity to the Ḥadīth:

> "No one is permitted to exercise any right in another's property without the latter's permission".[24]

A person, therefore, may not trespass on another's house or farm surrounded with a hedge or fence without the permission of its owner.[25]

In articles 906 and 907 of the Majallah, it is quoted that if buildings are erected or trees planted upon the land of another without his permission, the person who built the buildings and planted the trees is to be ordered to pull them down and restore the land. He should also give compensation for the loss of the value of the land arising from his action.

And, in article 909, it is mentioned that if someone occupies a piece of land belonging to another and places sweepings or any other thing, such a person shall be

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[22] Salmond and Heuston, p.48.

[23] Sunan al-Tirmidhī, vol.3, p.639 and vol.6, p.125; Sunan Ibn Mājah, vol.2, p.824; Sunan Abī Dāwud, vol.3, pp.261-262; Ibn Ḥajr, Bulūgh al-Marām, p.197.

[24] Majallah, article 96. *Lā yajūz li aḥad ʿan yataṣarraf fī milk lighayrih bi lā idhnih.*

[25] ʿAlī Ḥaydar, Durar al-Ḥukkām, vol.1, p.85.

obliged to remove such matter, and to evacuate the land.

It can also be seen in Mukhtaṣar:

> "The rightful proprietor (*mustaḥiqq*) of a piece of land may, if a mosque has been built on his land, demand that the said mosque be demolished".[26]

Ibn Ḍūyān, one of the Ḥanbalī jurists, has noted:

> "If a person (usurper) cultivated (a tree) or built (a building upon the other's land), he is responsible to uproot the tree and remove the building".[27]

Ibn Rajab stated:

> "If there is a palm tree owned by a person on another person's land, the owner of the land has authority to remove that tree".[28]

The case of causing any physical object or noxious substance[29] to cross the boundary of the plaintiff's land could be related analogously in Islām, to the case of lighting a fire by a person in order to burn something in his land, and the fire crosses the boundary of the neighbour's land and causes damage. The person who has lit the fire was held liable for the damage because he should have predicted that occurrence.[30] The same

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[26] Mukhtaṣar, p.229. See also al-Mudawwanah, vol.4, p.203; al-Ābī, Jawāhir al-Iklīl, vol.2, p.155; al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.303; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, pp.303-304.

[27] Manār al-Sabīl, vol.1, p.434. See also Ibn Rajab, al-Qawāᶜid fī al-Fiqh al-Islāmī, p.160; Majallat al-Aḥkām al-Sharᶜiyyah, article 79, p.91.

[28] Ibn Rajab, al-Qawāᶜid fī al-Fiqh al-Islāmī, p.156.

[29] *Mc Donald* v. *Associated Fuels* [1954] 3 D.L.R. 775 (blowing carbon monoxide into a house). Cited in Salmond and Heuston, p.48.

[30] Majmaᶜ al-Ḍamānāt, p.161; Radd al-Muḥtār, vol.6, p.88; al-Hidāyah, vol.4, p.192; Mukhtaṣar, p.291; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, pp.250-251; Jāmiᶜ al-Fuṣūlayn, vol.2, p.89; Lisān al-Ḥukkām, p.281; al-Ajwibah al-Khafīfah, p.390; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.1, p.83; al-Mudawwanah, vol.4, p.472; Tabṣirat al-Ḥukkām, vol.2, pp.242-243; al-Kinānī, al-ᶜAqd al-Munaẓẓam li al-Ḥukkām in the margin of Tabṣirat al-Ḥukkām, vol.2, p.80; al-Furūq, vol.4, p.27; al-Mawāq, al-Tāj wa al-Iklīl

is the case in irrigation by water when it trespasses the boundary of a neighbour's land.[31]

Trespass *Ab Initio*

One who has entered land with authority of law is liable as a trespasser in respect of his original entry if he commits some act on the land not justified by the authority under which he entered.[32]

In another words, it can be said that whenever a person has authority given him by law to enter upon lands or tenements for any purpose, and he goes beyond or abuses such authority by doing that which he has no right to do, then, although the entry was lawful, he will be considered as a trespasser *ab initio*.[33]

In Islām, the discussion of trespass *ab initio*, in general, could be recognized in the application of a legal maxim which enunciates: "Legal permission negates tortious

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in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.321; Zarrūq, Sharḥ Zarrūq ʿalā Matn al-Risālah, vol.2, p.245; al-Qawānīn al-Fiqhiyyah, p.218; al-Khirshī, Fatḥ al-Jalīl ʿalā Mukhtaṣar Khalīl, vol.8, p.111; al-Ābī, Jawāhir al-Iklīl, vol.2, pp.296-297; Mughnī al-Muḥtāj, vol.4, p.83 and vol.2, p.278; Nihāyat al-Muḥtāj, vol.7, p.355; al-Shibrāmalsi, Ḥāshiyah in the margin of Nihāyat al-Muḥtāj, vol.7, p.355; al-Shīrāzī, Kitāb al-Tanbīh, p.72; al-Muhadhdhab, vol.2, p.210; Sulaymān al-Jamal, Ḥāshiyat al-Jamal ʿalā Sharḥ al-Minhaj, vol.5, p.83; Tuḥfat al-Muḥtāj in the margin of Ḥawāshī al-Sharwānī wa Ibn Qāsim, vol.9, p.11; al-Sharwānī, Ḥāshiyat al-Sharwānī, vol.9, p.11; Ibn Qāsim, Ḥāshiyat Ibn Qāsim printed with Ḥāshiyat al-Sharwānī, vol.9, pp.11-12; Ibn Qudāmah, al-Sharḥ al-Kabīr printed with al-Mughnī, vol.5, p.447; al-Mughnī wa al-Sharḥ al-Kabīr, vol.5, p.453; Mūjabāt, vol.1, p.203. For a detailed discussion of fire, see the topic of "Liability for Fire", pp.282-299.

[31] ʿAlī Ḥaydar, Durar al-Ḥukkām, vol.1, p.83; Abū Yūsuf, Kitāb al-Kharāj, p.197. For details see this discussion in the topic of "Liability for Water", pp.300-313.

[32] C.D. Baker, Tort, p.65.

[33] Arthur Underhill, A Summary of the Law of Torts, p.77.

liability".[34] Any action which goes beyond the legal permission is restricted, whatever the case.

In cases of hire, if a hirer does what is contrary to what he is allowed to do by going beyond what was agreed, he must be liable. For example, if an animal is injured by loading weight of iron on it, when it was hired to carry so much weight of olive, the hirer is responsible.[35]

A person who has hired an animal to go to a fixed place, cannot go beyond that place to another place without the permission of the owner. If he does so and the animal is injured, he must make good the loss.[36]

In case of passage on the public road, every person has a right of using it on the condition of safety. If he goes beyond or abuses the authority or licence or law which is given and determined to all by the law, he is liable for any injury or loss which may be caused thereby.[37]

Underlining the examples above, it can be conceived that a person who has been authorized by law to carry out his task, cannot abuse it or go beyond such licence or authority by doing something which he has no right to do. In Islām, therefore, as for the case of entering upon land of others, analogously, the person who enters with authority

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[34] Majallah, article 91.

[35] Majallah, article 605.

[36] Majallah, articles 545 and 546. See also articles 548, 549, 550 and 551.

[37] Al-Mabsūṭ, vol.27, p.23; al-Hidāyah, vol.4, p.194; al-Durr al-Mukhtār, vol.2, p.467; Mughnī al-Muḥtāj, vol.4, p.206; al-Ajwibah al-Khafīfah, p.388; Aḥmad al-Zarqā', Sharḥ al-Qawā'id al-Fiqhiyyah, p.450; Wahbah, Nazariyyat al-Ḍamān, p.212.

to do so, should not abuse or go beyond such authority or go outside his given authority. He is considered a trespasser or transgressor (*mutaᶜaddin*) if he has done so.

TRESPASS AND CONVERSION OF GOODS

In Islām, the topic of trespass on goods and conversion of goods have been discussed by the *fuqahā'* in their writings on the topic of *ghaṣb*. However, before going further, there should be an examination of the Islamic law of tort.

With regard to **trespass on goods**, this is essentially prohibited by Islām and it makes it a duty of a trespasser or usurper to return the goods which have been usurped to their owner or the owner has a right of pecuniary compensation for his goods when the usurped goods are damaged or lost.[38]

Conversion implies any act whereby a person is denied his power to deal with his own property (*izālat al-taṣarruf*) and whose result is equivalent to usurpation (*ghaṣb*) is regarded as amounting to usurpation. Thus, if a person to whom property has been entrusted for safe keeping denies such a trust, such an act amounts to usurpation.[39]

Therefore, the circumstance (*ḥāl*) and state (*kayfiyyah*) are in effect equal to usurpation as regards the elimination of the power by disposition (*izālat al-taṣarruf*) which means the elimination of the power of disposition of someone without legal right is considered to amount to *ghaṣb* and the wrongdoer is obliged to liability (*ḍamān*) as in

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[38] Majallah, articles 890 and 891.

[39] Majallah, article 901.

actual *ghaṣb*.[40]

The topics of **conversion** could be put into the main words "the elimination of the power of disposition", because the cases of **conversion** will be pursued in the court when the power of the plaintiff to dispose or to deal with his own property is eliminated by the defendant whether by way of detention, converting, depriving or in any manner inconsistent with the plaintiff's right (excluding the *ḥadd* cases) to the use and possession of his property. The elimination of the power by the ways above, in Islām, is regarded as *ghaṣb*.

Ghaṣb etymologically comes from *gha-ṣa-ba* which means usurp or seize wrongfully.[41] In its literal sense, it means taking another's property wrongfully, unjustly or by violence. It is also taking another's property wrongfully (*ẓulman*) and publicly (*jihāran/mujāharah*).[42] Also, it means the taking of property from another by means of overcoming or conquest.[43]

In legal terminology, it will be listed in accordance with the Islamic schools:

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[40] ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.8, p.497.

[41] Harith Faruqi, Faruqi's Law Dictionary, p.246.

[42] Zakariyyā al-Anṣārī, Sharḥ Minhaj al-Ṭullāb in the margin of Ḥāshiyat al-Jamāl ᶜalā Sharḥ al-Minhaj, vol.3, p.469; Fatḥ al-Wahhāb, vol.1, p.274; Ḥāshiyatān Qalyūbī wa ᶜUmayrah, vol.3, p.27; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.20; al-Nawawī, Tashīḥ al-Tanbīh in the margin of Kitāb al-Tanbīh, p.71; Kifāyat al-Akhyār, p.384; al-Sirāj al-Wahhāj, p.266; Nihāyat al-Muḥtāj, vol.5, p.144; Tuḥfat al-Muḥtāj in the margin of Ḥawāshī al-Sharwānī wa Ibn Qāsim, vol.6, p.2; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.290; al-Yamanī, al-Naẓm al-Mustaᶜdhab printed with al-Muhadhdhab, vol.2, p.196; al-Ṣāwī, Bulghat al-Sālik, vol.2, p.193; al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.273; Mughnī al-Muḥtāj, vol.2, p.275; al-Iqnāᶜ, vol.2, p.55; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.3, p.58; Majmaᶜ al-Anhur, vol.2, p.455; Badr al-Muttaqā in the margin of Majmaᶜ al-Anhur, vol.2, p.455; Tabyīn al-Ḥaqā'iq, vol.5, p.221; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.76; Sharḥ Muntahā al-Irādāt, vol.2, p.399; al-Rawḍ al-Murbiᶜ, p.330; Zarrūq, Sharḥ Zarrūq ᶜalā Matn al-Risālah, vol.2, p.219; Tāj al-ᶜArūs, vol.3, p.484; Lane, ᶜArabic-English Lexicon, vol.2, p.285.

[43] Al-Hidāyah, vol.4, p.11; Tabyīn al-Ḥaqā'iq, vol.5, p.221; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.177.

In the Ḥanafī school

[1] *Ghaṣb* signifies the taking of another's property which is valuable and inviolable, without the consent of its owner, in such a manner as to eliminate the owner's possession of it.[44]

[2] The elimination of the possession of the rightful owner by the open establishment of an invalid possession by an unauthorized person of a valuable, inviolable property or a movable property without the owner's permission.[45]

[3] Taking and holding the property of another without his permission.[46]

However, they define the words in the following way:

"*Property*" excludes the carcass and the like.[47] However, the carrion of fish and of grasshoppers is considered as property.[48] But the word, in general, can be said to include property usurped or not.[49]

"*Valuable*" excludes the property which is valueless in Islām like wine and pig in the

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[44] Al-Hidāyah, vol.4, p.11; al-Fatāwā al-Hindiyyah, vol.5, p.119. *Akhdh māl mutaqawwam muḥtaram bighayr idhn al-mālik ʿalā wajh yazīl yadah.* See also Takmilat Fatḥ al-Qadīr, vol.9, p.316.

[45] Al-Durr al-Mukhtār, vol.2, p.331; Tabyīn al-Ḥaqā'iq, vol.5, p.222. *Izālah yad muhiqqah li ithbāt yad mubṭilah fī māl mutaqawwam muḥtaram qābil li naql bi ghayr idhn mālikah lā bi khafiyyah.* See also Majmaʿ al-Anhur, vol.2, p.455; Badr al-Muttaqā in the margin of Majmaʿ al-Anhur, vol.2, pp.455-456.

[46] Majallah, article 881. *Akhdh māl aḥad wa ḍabṭih bi dūn idhnih.*

[47] Al-Durr al-Mukhtār, vol.2, p.331; Majmaʿ al-Anhur, vol.2, p.455; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.178.

[48] Radd al-Muḥtār, vol.6, p.178.

[49] Sharḥ al-ʿInāyah ʿalā al-Hidāyah printed with Takmilat Fatḥ al-Qadīr, vol.9, p.316; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.5, p.707.

possession of a Muslim.[50]

"*Inviolable*" excludes the property of *ḥarbī* because it is not covered under the terms of inviolable property (*ghayr muḥtaram*).[51]

"*Without the consent of its owner*" excludes the property which has been permitted by its owner, such as a trust, or deposit, or a gift and the like which have been performed by a contract.[52]

"*Openly*" excludes theft because theft is a clandestine act.[53]

"*Movable property*" precludes immovable property. This is the opinion of Abū Ḥanīfah and Abū Yūsuf. However, Muḥammad b. al-Ḥasan al-Shaybānī, Zufar and the other jurists of the school have a view contrary to that opinion. They accept that *ghaṣb* can occur on immovable property. This is based on a Ḥadīth: "If anyone usurps a span of land unjustly, seven earths will be tied round his neck on the day of resurrection".[54] The later opinion is preferable.

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[50] Al-Durr al-Mukhtār, vol2, p.331; Sharḥ al-ᶜInāyah ᶜalā al-Hidāyah printed with Takmilat Fatḥ al-Qadīr, vol.9, p.316; Tabyīn al-Ḥaqā'iq, vol.5, p.222; Majmaᶜ al-Anhur, vol.2, p.455; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.5, p.707.

[51] Al-Durr al-Mukhtār, vol.2, p.331; Sharḥ al-ᶜInāyah ᶜalā al-Hidāyah printed with Takmilat Fatḥ al-Qadīr, vol.9, p.316; Tabyīn al-Ḥaqā'iq, vol.5, p.222; al-Shalabī, Ḥāshiyat al-Shalabī in the margin of Tabyīn al-Ḥaqā'iq, vol.5, p.222; Majmaᶜ al-Anhur, vol.2, p.455;
Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.5, p.707.

[52] Al-Durr al-Mukhtār, vol.2, p.331; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.179; Radd al-Muḥtār, vol.6, p.179; Majmaᶜ al-Anhur, vol.2, p.456; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.5, p.707.

[53] Al-Durr al-Mukhtār, vol.2, p.332; Takmilat Fatḥ al-Qadīr, vol.9, pp.316-317; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.179; Majmaᶜ al-Anhur, vol.2, p.456.

[54] Tabyīn al-Ḥaqā'iq, vol.5, p.224; Radd al-Muḥtār, vol.6, p.179; al-Fatāwā al-Hindiyyah, vol.5, p.119; Majmaᶜ al-Anhur, vol.2, p.455 and p.458; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.3, p.60; Bidāyat al-Mujtahid, vol.2, p.237; al-Hidāyah, vol.4, p.12; Fatāwā Ḥammādiyyah, vol.2, p.749; Mūjabāt, vol.1, p.158. The latter opinion has been followed by the Majallah and it has been enacted in articles 905-909.

In the Shāfiᶜī school

[1] The act of encroachment with aggression upon the right of another.[55]

They define these terms in the following way:

"*Encroachment*" occurs by way of force (*qahr*) and an act of conquest.[56]

"*Upon the right*" includes valuable and worthless property like the *dhimmī*'s wine, dog, skin of carcass and dung.[57]

"*With aggression*" is when it occurs wrongfully or unjustly (*ẓulman*) and is a transgression (*al-taᶜaddī*).[58]

In the Mālikī school

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[55] Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.146; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.20; al-Maḥallī printed with Ḥāshiyatān Qalyūbī wa ᶜUmayrah, vol.3, p.27; Minhāj al-Ṭālibīn in the margin of al-Sirāj al-Wahhāj, p.266; al-Sirāj al-Wahhāj, p.266; Kifāyat al-Akhyār, p.384; al-Nawawī, Taṣḥīḥ al-Tanbīh in the margin of Kitāb al-Tanbīh, p.71; *Al-Istīlā' ᶜalā ḥaqq al-ghayr ᶜudwānan.* Zakariyyā al-Anṣārī defined *al-ghaṣb* as "*istīlā' ᶜalā ḥaqq ghayr bi lā ḥaqq*". See Zakariyyā al-Anṣārī, Minhaj al-Ṭullāb printed with Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.146; Fatḥ al-Wahhāb, vol.1, p.274; Zakariyyā al-Anṣārī, Sharḥ Minhaj al-Ṭullāb in the margin of Ḥāshiyat al-Jamal ᶜalā Sharḥ al-Minhaj, vol.3, p.469. In al-Iqnāᶜ, its author used the word *bi ghayr* instead of *bi lā*. See al-Iqnāᶜ, vol.2, p.55. See also al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.290; Taqrīr al-Awḥad in the margin of al-Iqnāᶜ, vol.2, p.55. The author of Kifāyat al-Akhyār defined it as "*al-istīlā' ᶜalā māl al-ghayr ᶜalā jihat al-taᶜaddī*". See Kifāyat al-Akhyār, p.384.

[56] Mughnī al-Muḥtāj, vol.2, p.275. See also Sulaymān al-Jamal, Ḥāshiyat al-Jamal ᶜalā Sharḥ al-Minhaj, vol.3, p.469; Ḥāshiyatān Qalyūbī wa ᶜUmayrah, vol.3, p.27; Nihāyat al-Muḥtāj, vol.5, p.145; al-Shibrāmalsī, Ḥāshiyat al-Shibrāmalsī printed with Nihāyat al-Muḥtāj, vol.5, p.145; Tuḥfat al-Muḥtāj in the margin of Ḥawāshī al-Sharwānī wa Ibn Qāsim, vol.6, p.3.

[57] Mughnī al-Muḥtāj, vol.2, p.275; al-Sirāj al-Wahhāj, p.265; Fatḥ al-Wahhāb, vol.1, p.274; Nihāyat al-Muḥtāj, vol.5, p.144; Tuḥfat al-Muḥtāj in the margin of Ḥawāshī al-Sharwānī wa Ibn Qāsim, vol.6, p.2; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.21; Kifāyat al-Akhyār, p.384.

[58] Nihāyat al-Muḥtāj, vol.5, p.145; Tuḥfat al-Muḥtāj in the margin of Ḥawāshī al-Sharwānī wa Ibn Qāsim, vol.6, p.3; Mughnī al-Muḥtāj, vol.2, p.275.

[1] Forcibly taking a thing belonging to another or its benefits without the owner's permission and without the use of arms.[59]

[2] Taking another's property by force (*qahran*) and transgression (*taʿaddian*) without the use of arms (*ḥirābah*).[60]

[3] Taking another's property by force without the use of arms (*ḥirābah*).[61]

[4] Taking another's property by aggression (*ʿudwānan*) and force (*qahran*) without the use of arms (*ḥirābah*).[62]

They define these terms in the following way:[63]

"*Taking another's property*" means encroachment (*istīlāʾ*) which includes *ghaṣb* and the like such as when a person takes property which has been a trust or a debt to another.

"*Property*" means substance of a thing (*al-aʿyān al-mādiyah*), excludes the encroachment upon the benefit of something like dwelling in another's house or riding his animal.

"*By force*" excludes theft by reason of the fact that it is not taken by force and it also

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[59] Al-Qawānīn al-Fiqhiyyah, p.216. *Akhdh riqbah al-milk aw manfaʿatih bi ghayr idhn al-mālik ʿalā wajh al-ghalabah wa al-qahr dūn ḥirābah.*

[60] Mukhtaṣar, p.226; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.274; al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.274; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, p.193; Zarrūq, Sharḥ Zarrūq ʿalā Matn al-Risālah, vol.2, p.219; al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.653; al-Tāwadī, Sharḥ Arjūzah Tuḥfat al-Ḥukkām printed with al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.653. *Akhdh māl qahran taʿaddian bi lā ḥirābah.*

[61] Al-Kinānī, al-ʿAqd al-Munaẓẓam li al-Ḥukkām in the margin of Tabṣirat al-Ḥukkām, vol.2, p.70. *Akhdh al-māl qahran min ghayr ḥirābah.*

[62] Ibn Nājī, Sharḥ Ibn Nājī ʿalā Matn al-Risālah printed with Sharḥ Zarrūq ʿalā Matn al-Risālah, vol.2, p.218. See also al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.274. *Akhdh al-māl ʿudwānan qahran min ghayr ḥirābah.*

[63] Al-Dardīr, al-Sharḥ al-Kabīr, vol.3, pp.442-459; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, pp.193-194; al-Ābī, Jawāhir al-Iklīl, vol.2, p.148; al-Ṣāwī, Bulghat al-Sālik, vol.2, pp.193-194; Ibn Nājī, Sharḥ Ibn Nājī ʿalā Matn al-Risālah printed with Sharḥ Zarrūq ʿalā Matn al-Risālah, vol.2, p.218; al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.654; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.5, p.708.

excludes the thing borrowed (*musta^{c}ār*) and the gift, by reason of the fact that they are taken voluntarily (*ikhtiyāran*).

"*Transgression*" excludes anything which is wrongfully taken by force, but if it warranted by law, it is permissible to do so like seizure for debt or *zakāh*.

"*Without the use of arms*" means without a fight (*muqātalah*), and excludes anything taken by force of arms because it will be the crime of brigandage, not tort.

In the Ḥanbalī school

[1] The act which can customarily be considered as encroachment with aggression upon the right of another.[64]

[2] The encroachment upon the property of another forcibly without (getting) any right (to do so).[65]

[3] The act which can customarily be considered as encroachment, not in the case relating to *ḥarbī*, upon the right of another by force without any right (to do so).[66]

[4] The encroachment upon the property of another without any right (to do so).[67]

[5] The encroachment of a person upon the property of another without any right (to do

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[64] Manār al-Sabīl, vol.1, p.433. *Al-Istīlā' ʿurfan ʿalā ḥaqq al-ghayr ʿudwānan.*

[65] Al-Muqniʿ, p.145; al-Muqniʿ wa Ḥāshiyatuh, vol.2, p.232; Ibn Qudāmah, al-Sharḥ al-Kabīr printed with al-Mughnī, vol.5, p.374. *Al-Istīlā' ʿalā māl al-ghayr qahran bi ghayr ḥaqq.* Al-Bahūtī gives the similar definition as above, merely he uses the words "*ḥaqq ghayrih*" instead of the words "*māl ghayr*". See al-Rawḍ al-Murbiʿ, p.330. So, his definition becomes "*al-istīlā' ʿalā ḥaqq ghayrih qahran bi ghayr ḥaqq*".

[66] Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ, vol.4, p.76; Sharḥ Muntahā al-Irādāt, vol.2, p.399; Majallah al-Aḥkām al-Sharʿiyyah, article 1375, p.430. *Al-Istīlā' ghayr ḥarbī ʿurfan ʿalā ḥaqq ghayrih qahran bi ghayr ḥaqq.*

[67] Al-Mughnī wa al-Sharḥ al-Kabīr, vol.5, p.374. *Al-Istīlā' ʿalā māl ghayrih bi ghayr ḥaqq.*

so).[68]

With the definitions of *ghaṣb* above, the Shāfiᶜī and the Ḥanbalī schools in their definitions are quite similar to each other. They used the term *ḥaqq al-ghayr* (the right of another) which lies in the fact that it includes *māl mutaqawwam* (valuable property), its benefit and it also includes the setting up of a special area or domain (*sā'ir al-ikhtiṣāṣāt*) like the right of impeding (*ḥaqq al-taḥajjur*) which means the development of waste land (*iḥyā' al-mawāt*) by laying stones around it as a boundary, and *māl ghayr mutaqawwam* (worthless property) such as the wine of a *dhimmī*, a dog, skin of a carcass and dung.[69]

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[68] ᶜUmdat al-Fiqh, p.60; al-ᶜUddah Sharḥ al-ᶜUmdah, p.230. *Istīlā' al-insān ᶜalā māl ghayrih bi ghayr ḥaqq.*

[69] Mughnī al-Muḥtāj, vol.2, p.275; Nihāyat al-Muḥtāj, vol.5, p.145; Sharḥ Muntahā al-Irādāt, vol.2, p.399; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.76; al-Rawḍ al-Murbi, p.330; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.5, p.709. According to the *fuqahā'*, *māl mutaqawwam-* is *māl* which it is permitted by *shāriᶜ* to utilize in a normal situation and obtained by endeavour (*abāḥ al-shāriᶜ al-intifāᶜ bih fī ḥāl al-siᶜah wa ikhtiyār wa ḥāzah bi al-fiᶜl*). Included are *manqūl*, *ᶜaqār*, food, etc., which it is permissible to enjoy according to Islamic law. This *māl* is given protection by *shāriᶜ* and the liability, therefore, will be imposed on anyone who has destroyed it. See, Muḥammad Yūsuf Mūsā, al-Fiqh al-Islāmī, p.254; Ḍamān al-Mutlifāt, p.103. In the Majallah, *māl mutaqawwam* is enacted as follows: [1] The thing the benefit of which is permissible by law to enjoy (*mā yubāḥ al-intifāᶜ bih*). [2] The thing which is possessed (*al-māl al-muḥriz*). So a fish in the sea is not *māl mutaqawwam*; when it is caught, it is *māl mutaqawwam*. See article 127. In brief, *māl mutaqawwam* is acquired in two ways:
1- By endeavour (*al-ḥiyāzah bi al-fiᶜl*).
2- Its benefit is permissible by *sharīᶜah* in normal situation (not forced by necessity).
If anything cannot acquire two or one of the conditions above, the *fuqahā'* will put it under *māl ghayr mutaqawwam.*
Māl ghayr mutaqawwam- could be divided into two parts: [1] *Māl* that is permitted to be used according to *sharīᶜah* but is not under the possessor's control such as fish in the sea, bird in the jungle, gold or silver still in its mine, etc.. If it is destroyed by someone, he is not held liable. [2] *Māl* which can be under the possessor's control but is not permitted by *sharīᶜah* in normal situation like wine and pig for Muslims unless in circumstances of necessity but it is valuable for non-Muslims. Other examples are carcass and blood. The Qur`ān says:" Forbidden to you (for food) are: dead meat, blood, the flesh of swine". See al-Qur'ān, 5:3. The Qur'ān says again:" O ye who believe! Intoxicants, gambling, dedication of stones and divination by arrows are an abomination of satan's handiwork". See al-Qur'ān, 5:90. The Qur`ān says again:" He has only forbidden you dead meat and blood and the flesh of swine and any (food) over which the name of other than God has been invoked but if one is forced by necessity without wilful disobedience nor transgressing due limits, then God is Oft-Forgiving, Most Merciful". See al-Qur'ān, 16:115. Someone who is forced by necessity is permitted by *shāriᶜ* to benefit from unlawful things in order to save himself from death. This
situation is also marked by celebrated legal maxims: first, necessity renders prohibited things permissible and

The essentials of the definitions above are:

1- The act must be unlawful.

2- The act must have the element of defiance of the owner's right.

3- There is the element of transgression.

4- The act includes both intention and lack of intention.

5- It must be a direct result of aggression.

The *fuqahā'*s opinions upon the detemination of *ghaṣb*

1- Abū Ḥanīfah and his student Abū Yūsuf opined that there can be no liability of *ghaṣb* unless two elements had been established, namely:

i) The elimination of the possession of the rightful owner.

ii) The establishment of an invalid possession by an unauthorized person.[70]

If both elements do not exist, the tort of *ghaṣb* cannot be constituted.

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second, necessity is estimated by the extent thereof. Wine and pig in the possession of *dhimmī*, according to the Ḥanafī, the Mālikī and the Zaydī schools are reckoned as *māl mutaqawwam* but on the other hand, the Shāfiᶜī, the Ḥanbalī and the Ẓāhirī schools maintain that they are not to be reckoned as *māl mutaqawwam*. See al-Mabsūṭ, vol.11, p.102; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.147; al-Dardīr, al-Sharḥ al-Kabīr, vol.3, p.447; al-Rawḍ al-Naḍīr, vol.3, pp.477-478; Nihāyat al-Muḥtāj, vol.5, p.165; al-Muḥallā, vol.5, pp.171-173, issue 1266; al-Mughnī, vol.5, p.443; Muḥammad Salām Madkūr, al-Madkhal al-Fiqh al-Islāmī, p.476; Muḥammad Yūsuf Mūsā, al-Fiqh al-Islāmī, p.245 and al-Amwāl wa Naẓariyyat al-ᶜAqd fī al-Fiqh al-Islāmī, p.164; ᶜAysawī, al-Fiqh al-Islāmī al-Madkhal wa Naẓariyyat al-ᶜAqd, pp.236-237; Muḥammad Muṣṭafā Shalabī, Niẓām al-Muᶜāmalāt fī al-Fiqh al-Islāmī, p.95; ᶜAlī al-Khafīf, Aḥkām al-Muᶜāmalāt al-Sharᶜiyyah, pp.30-31; Ḍamān al-Mutlifāt, pp.103-105; Majallah, articles 21 and 22.
There are other terms used by the *fuqahā'* for *mutaqawwam* and *ghayr mutaqawwam*, viz, *māl muḥtaram* and *māl ghayr muḥtaram* or *māl lah qīmah* and *māl lā qīmah lah*. See al-Dardīr, al-Sharḥ al-Kabīr, vol.4, p.336; al-Muḥallā, vol.11, pp.334-335.

[70] Tabyīn al-Ḥaqā'iq, vol.6, p.224; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.143; al-Durr al-Mukhtār, vol.2, p.331; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.3, p.58; Majmaᶜ al-Anhur, vol.2, p.455; Badr al-Muttaqā in the margin of Majmaᶜ al-Anhur, vol.2, p.455; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.5, p.710. *Izālah yad al-mālik wa ithbāt yad al-ghāṣib/izālah yad al-muḥiqqah li ithbāt yad al-mubṭilah.*

2- The Shāfiᶜī, Mālikī and Ḥanbalī schools, including Muḥammad b. al-Ḥasan al-Shaybānī[71] disagreed with the opinion of Abū Ḥanīfah and Abū Yūsuf. They, excluding Muḥammad b. al-Ḥasan al-Shaybānī, asserted that the establishment of an invalid possession by an unauthorized person without its owner's permission is enough to constitute the tort of *ghaṣb*. They do not impose the elimination of the possession of the rightful owner as a condition of *ghaṣb*. On the other hand, Muḥammad b. al-Ḥasan al-Shaybānī stipulates the elimination of the possession of the rightful owner as a condition of *ghaṣb*. *Al-Istīlā'* (encroachment) here does not directly mean taking another's property or encroachment by severe action to another's property, but merely intervention (*ḥaylūlah*) between the property and its owner. Even though the property still remains in its previous place, the *ghaṣb* can still be constituted.[72]

The different opinions here may be best explained by a case of a person who sits on the carpet of another. According to the latter opinion, it may be reckoned as *ghaṣb*, for the right of the owner to possession is interrupted, while in the view of the former, it does not amount to *ghaṣb* unless the owner's possession is actually eliminated by the establishment of an invalid possession, here, the possession of the proprietor is not

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[71] Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.146; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.20; al-Maḥallī printed with Ḥāshiyatān Qalyūbī wa ᶜUmayrah, vol.3, p.28; Fatḥ al-Wahhāb, vol.1, p.274; al-Iqnāᶜ, vol.2, p.55; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.290; Nihāyat al-Muḥtāj, vol.5, p.147; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.276; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.3, p.58; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.178; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.143; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.77; Radd al-Muḥtār, vol.6, p.178; Majmaᶜ al-Anhur, vol.2, p.455; al-ᶜUddah Sharḥ al-ᶜUmdah, p.230; ᶜUmdat al-Fiqh, p.60; al-Rawḍ al-Murbi , p.330; Sharḥ Muntahā al-Irādāt, vol.2, p.399; Mughnī al-Muḥtāj, vol.2, p.275; al-Dardīr, al-Sharḥ al-Kabīr, vol.3, p.442; Tabyīn al-Ḥaqā'iq, vol.6, p.222; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.5, p.710.

[72] Al-Ṣāwī, Bulghat al-Sālik, vol.2, p.194; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, p.194; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.5, p.710.

destroyed.[73] For the former opinion, the cases like someone forcibly taking the service of a slave of another or loading an animal belonging to another, will be established as *ghaṣb*[74] because the emergence of two elements here is clear and unequivocal.

Ḍamān in *ghaṣb*

The *fuqahā'* unanimously agreed that a person who usurps property of another

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[73] Al-Hidāyah, vol.4, p.11; al-Shalabī, Ḥāshiyat al-Shalabī in the margin of Tabyīn al-Ḥaqā'iq, vol.5, p.222; al-Durr al-Mukhtār, vol.2, p.332; Minhāj al-Ṭālibīn, in the margin of Mughnī al-Muḥtāj, vol.2, p.275; al-Wajīz, vol.1, p.206. See also al-Fatāwā al-Hindiyyah, vol.5, p.120; al-Maḥallī printed with Ḥāshiyatān Qalyūbī wa ᶜUmayrah, vol.3, p.28; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.20; Fatḥ al-Wahhāb, vol.1, p.274; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.290; Kifāyat al-Akhyār, p.385; Nihāyat al-Muḥtāj, vol.6, pp.146-147; Sulaymān al-Jamal, Ḥāshiyat al-Jamal ᶜalā Sharḥ al-Minhaj, vol.3, p.470; al-Iqnā', vol.2, p.55; Mughnī al-Muḥtāj, vol.2, p.275; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.3, p.59; Majmaᶜ al-Anhur, vol.2, p.456; Tabyīn al-Ḥaqā'iq, vol.5, p.222 and p.225; Badr al-Muttaqā in the margin of Majmaᶜ al-Anhur, vol.5, p.456; Takmilat Fatḥ al-Qadīr, vol.9, p.318; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.179; Sharḥ al-ᶜInāyah ᶜalā al-Hidāyah printed with Takmilat Fatḥ al-Qadīr, vol.9, p.317.

[74] Al-Hidāyah, vol.4, p.11; Tabyīn al-Ḥaqā'iq, vol.5, p.222; Sharḥ al-ᶜInāyah ᶜalā al-Hidāyah printed with Takmilat Fatḥ al-Qadīr, vol.9, p.317; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.3, pp.58-59; Majmaᶜ al-Anhur, vol.2, p.456; Badr al-Muttaqā in the margin of Majmaᶜ al-Anhur, vol.2, p.456; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.179; Radd al-Muḥtār, vol.6, p.179; Takmilat Fatḥ al-Qadīr, vol.9, p.318.

must return it to its owner in its original state (*ᶜayn*)[75] because the Prophet said:[76]

> "It is incumbent upon a person who takes a thing from another to restore it to him".

and also,

> "Nobody among you should take a chattel from its owner with or without serious intention. If anyone takes even the stick of its owner, he should return it to him".

If the usurped property (*al-maghṣūb*) has been consumed, destroyed, or lost by a usurper (*al-ghāṣib*) (movable property according to the Ḥanafiyyah, or movable and immovable property according to the *fuqahā'* other than the Ḥanafiyyah) whether as a

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[75] Al-Wajīz, vol.1, p.208; Minhāj al-Ṭālibīn, in the margin of Mughnī al-Muḥtāj, vol.2, p.276; al-Hidāyah, vol.4, p.12; al-Durr al-Mukhtār, vol.2, p.332; al-Qawānīn al-Fiqhiyyah, p.216; al-Risālah, p.121; Manār al-Sabīl, vol.1, p.433; al-Mabsūṭ, vol.11, p.50; al-Muḥallā, vol.8, p.134; Fatāwā Ḥammādiyyah, vol.2, p.748; ᶜIz al-Dīn ᶜAbd al-Salām, Qawāᶜid al-Aḥkām fī Maṣāliḥ al-Anām, vol.1, p.180; Aḥmad al-Zarqā', Sharḥ al-Qawāᶜid al-Fiqhiyyah, p.287; Majallah, article 890; Majallat al-Aḥkām al-Sharᶜiyyah, article 1378, p.431; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.182; Radd al-Muḥtār, vol.6, p.182; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.3, p.59; Majmaᶜ al-Anhur, vol.2, p.456; Badr al-Muttaqā in the margin of Majmaᶜ al-Anhur, vol.2, p.456; Tabyīn al-Ḥaqā'iq, vol.5, p.222; al-Muhadhdhab, vol.2, p.196; Manār al-Sabīl, vol.1, p.433; al-Muqniᶜ, p.146; Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.146; Zakariyyā al-Anṣārī, Minhaj al-Ṭullāb printed with Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.146; Sulaymān al-Jamal, Ḥāshiyat al-Jamalᶜ alā Sharḥ al-Minhaj, vol.3, p.471; Fatḥ al-Wahhāb, vol.1, p.274; al-Maḥallī printed with Ḥāshiyatān Qalyūbī wa ᶜUmayrah, vol.3, p.29; Sharḥ Ibn al-Qāsim al-Ghazzī printed with Ḥāshiyat al-Bayjūrī, vol.2, p.21; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.290; Kifāyat al-Akhyār, pp.384-385; al-Sirāj al-Wahhāj, p.267; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.78; Sharḥ Muntahā al-Irādāt, vol.2, p.401; al-Rawḍ al-Murbiᶜ, p.331; al-Mughnī wa al-Sharḥ al-Kabīr, vol.5, p.374; al-Muqniᶜ wa Ḥāshiyatuh, vol.2, p.233; al-Kinānī, al-ᶜAqd al-Munaẓẓam li al-Ḥukkām in the margin of Tabṣirat al-Ḥukkām, vol.2, p.71; al-Thamar al-Dānī, p.510; al-Fawākih al-Dawānī, vol.2, p.175; al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.655; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.151.

[76] Nayl al-Awṭār, vol.5, p.316. Reported by Aḥmad, Abū Dāwud and al-Tirmidhī from al-Sā'ib b. Yazīd who received it from his father. See also one or both these Ḥadīths in al-Hidāyah, vol.4, p.12; al-Mabsūṭ, vol.11, p.49; Mughnī al-Muḥtāj, vol.4, p.277; Fatḥ al-Wahhāb, vol.1, p.274; al-Iqnāᶜ, vol.2, p.55; al-Ābī, Jawāhir al-Iklīl, vol.2, p.148; al-Muhadhdhab, vol.2, p.196; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.290; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.3, p.59; Radd al-Muḥtār, vol.6, p.182; al-ᶜUddah Sharḥ al-ᶜUmdah, p.230; al-Rawḍ al-Murbiᶜ, p.331; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, pp.78-79; Sharḥ Muntahā al-Irādāt, vol.2, p.401; al-Mughnī wa al-Sharḥ al-Kabīr, vol.5, p.374; al-Muqniᶜ wa Ḥāshiyatuh, vol.2, p.233; Manār al-Sabīl, vol.1, p.433; al-Thamar al-Dānī, p.510.

result of his transgression or not,[77] whether by another's action or by itself,[78] he must replace it if it is fungible property or pay the value of it, if it is infungible property. If, however, the usurper is not able to give a similar property in the case of fungible property, because no similar property is able to be found, in that case he becomes responsible for the value of it by reason of difficulty (*taʿadhdhur*) or necessity (*ḍarūrah*).[79]

This rule is in conformity with a legal maxim: "When the giving of the original thing has not been possible, its price is given".[80]

The time for assessment of the compensation of usurped property.

1- Fungible property.

In the Ḥanafī school, Abū Ḥanīfah opines that the usurper becomes responsible for the value which the article bears at the time of the judgement (*yawm al-qaḍāʾ/yawm*

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[77] Majallah, article 891. For detail see, ʿAlī Ḥaydar, Durar al-Ḥukkām, vol.8, p.463; Sharḥ Muntahā al-Irādāt, vol.2, pp.418-419; al-Rawḍ al-Murbiʿ, p.333; Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ, vol.4, p.106; al-Hidāyah, vol.4, p.13; Badāʾiʿ al-Ṣanāʾiʿ, vol.7, p.151.

[78] Al-Qawānīn al-Fiqhiyyah, p.218. *Talaf bi amr Allāh aw min makhlūk.* See also Majmaʿ al-Anhur, vol.2, p.456; Badr al-Muttaqā in the margin of Majmaʿ al-Anhur, vol.2, p.456; Minhāj al-Ṭālibīn waʿ Umdat al-Muftīn, p.147; Sharḥ Muntahā al-Irādāt, vol.2, pp.418-419; Majallat al-Aḥkām al-Sharʿiyyah, article 1388, p.433; Manār al-Sabīl, vol.1, p.435; al-Muqniʿ, p.149; al-Rawḍ al-Murbiʿ, p.333; Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ, vol.4, p.106; Badāʾiʿ al-Ṣanāʾiʿ, vol.7, p.151.

[79] Al-Hidāyah, vol.4, p.12; Badāʾiʿ al-Ṣanāʾiʿ, vol.7, pp.150-151; Majmaʿ al-Anhur, vol.2, p.456; Tabyīn al-Ḥaqāʾiq, vol.5, p.222; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.183; Manār al-Sabīl, vol.1, p.435; al-Muqniʿ, p.149; al-Rawḍ al-Murbiʿ, p.333; Sharḥ Muntahā al-Irādāt, vol.2, p.419; Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ, vol.4, p.107; al-ʿUddah Sharḥ al-ʿUmdah, p.231; ʿUmdat al-Fiqh, p.61; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, p.197; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.278; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.5, p.719.

[80] Majallah, article 53. *Idhā baṭal al-aṣl yuṣār ilā al-badal.*

al-khuṣūmah). Abū Yūsuf maintains that he becomes responsible for the value that the thing bore upon the day of *ghaṣb*. Muḥammad b. al-Ḥasan al-Shaybānī, on the other hand, said that he becomes responsible for the value it bore upon the day when it was not to be found or procured (*yaum al-inqiṭāʿ*).[81]

In the Mālikī school, the usurper becomes responsible for the value on the day he usurped it.[82]

In the Shāfiʿī school, the usurper becomes responsible for the maximum value (*aqṣā qīmah*) of the fungible property between the date of the *ghaṣb* to the time when it became impossible to procure an equivalent.[83]

In the Ḥanbalī school,the usurper becomes responsible for the value that it bore upon the day when a similar property was not to be found or procured.[84] This view is similar to the opinion of Muḥammad b. al-Ḥasan al-Shaybānī.

2- Infungible property.

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[81] Al-Hidāyah, vol.4, p.12; al-Durr al-Mukhtār, vol.2, p.332; al-Ajwibah al-Khafīfah, p.244; Tabyīn al-Ḥaqā'iq, vol.5, p.223; Majmaʿ al-Anhur, vol.2, p.457; Badr al-Muttaqā in the margin of Majmaʿ al-Anhur, vol.2, p.457; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.183; Radd al-Muḥtār, vol.6, p.183; al-Kanawī, al-Nāfiʿ al-Kabīr printed with al-Jāmiʿ al-Ṣaghīr, p.465; al-Fatāwā al-Hindiyyah, vol.5, p.119.

[82] Al-Qawānīn al-Fiqhiyyah, p.217; Mukhtaṣar, p.226; al-Thamar al-Dānī, p.510; al-Fawākih al-Dawānī, vol.2, pp.175-176; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, p.197; al-Ṣāwī, Bulghat al-Sālik, vol.2, p.197; al-Ābī, Jawāhir al-Iklīl, vol.2, p.148.

[83] Minhāj al-Ṭālibīn wa ʿUmdat al-Muftīn, p.147; Ḥāshiyatān Qalyūbī wa ʿUmayrah, vol.3, p.32; Minhāj al-Ṭālibīn in the margin of al-Sirāj al-Wahhāj, p.268. See also al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.24; Zakariyyā al-Anṣārī, Minhaj al-Ṭullāb printed with Minhāj al-Ṭālibīn wa ʿUmdat al-Muftīn, p.147; Fatḥ al-Wahhāb, vol.1, pp.275-276; al-Muhadhdhab, vol.2, p.198; ʿUmdat al-Sālik wa ʿUddat al-Nāsik, p.261. *Min waqt al-ghaṣb ilā taʿadhdhur al-mithl.* Al-Wajīz, vol.1, p.208. *Min waqt al-ghaṣb ilā al-ʿiwāz.*

[84] Al-Mughnī, vol.5, p.421; Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ, vol.4, p.107. *Yaum al-inqitāʿ.* Al-Qārī, Majallat al-Aḥkām al-Sharʿiyyah, article 1388, p.433. *Yaum al-taʿadhdhur.* See also Sharḥ Muntahā al-Irādāt, vol.2, p.419; al-Muqniʿ, p.149; al-Muqniʿ wa Ḥāshiyatuh, vol.2, p.248; al-ʿUddah Sharḥ al-ʿUmdah, p.231; al-Rawḍ al-Murbiʿ, p.333.

According to the Ḥanafī[85] and the Mālikī[86] schools, the value of this property is the value which it bore on the day of *ghaṣb*. According to the Shāfiᶜī school, it is the maximum value of the property between the date of the *ghaṣb* to the time of destruction,[87] while with the Ḥanbalī school, the value is counted at the time which the usurped property was destroyed.[88]

Place and expense of restoration of usurped property

It is to be observed that, according to the opinion of the *fuqahā'*, it is incumbent upon the usurper to return the usurped property to its owner in the place where he had usurped it.[89] The reason for that is that if the usurped property was returned at another

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[85] Al-Hidāyah, vol.4, p.12; al-Durr al-Mukhtār, vol.2, p.332; al-Ajwibah al-Khafīfah, p.244.

[86] Al-Qawānīn al-Fiqhiyyah, p.217; Mukhtaṣar, p.226; al-Thamar al-Dānī, p.510; al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.281; al-Muwaṭṭa', p.522; al-Kinānī, al-ᶜAqd al-Munaẓẓam li al-Ḥukkām in the margin of Tabṣirat al-Ḥukkām, vol.2, p.71; al-Fawākih al-Dawānī, vol.2, pp.175-176; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, p.197; al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.655; al-Ābī, Jawāhir al-Iklīl, vol.2, p.149; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.281.

[87] Al-Wajīz, vol.1, p.208; ᶜUmdat al-Sālik wa ᶜUddat al-Nāsik, p.261. *Min waqt al-ghaṣb ilā al-talaf.* Minhāj al-Ṭālibīn, in the margin of Mughnī al-Muḥtāj, vol.2, p.284. *Min al-ghaṣb ilā al-talaf.* See also al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.26; Ḥāshiyatān Qalyūbī wa ᶜUmayrah, vol.3, p.33; Fatḥ al-Wahhāb, vol.1, p.275; Kifāyat al-Akhyār, p.387; al-Muhadhdhab, vol.2, p.198; al-Shīrāzī, Kitāb al-Tanbīh, p.71. This is also the opinion of Ashhab, a jurist of the Mālikī school. See al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.281.

[88] Manār al-Sabīl, vol.1, p.435; al-Qārī, Majallat al-Aḥkām al-Sharᶜiyyah, article 1388, p.433; Sharḥ Muntahā al-Irādāt, vol.2, p.419; al-Rawḍ al-Murbiᶜ, p.333; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.108; al-Muqniᶜ, p.149; al-Muqniᶜ wa Ḥāshiyatuh, vol.2, p.248.

[89] Al-Hidāyah, vol.4, p.12; al-Durr al-Mukhtār, vol.2, p.332; Manār al-Sabīl, vol.1, p.435; al-Qārī, Majallat al-Aḥkām al-Sharᶜiyyah, article 1378, p.431; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.3, p.59; Majmaᶜ al-Anhur, vol.2, p.456; Badr al-Muttaqā in the margin of Majmaᶜ al-Anhur, vol.2, p.456; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.182; Tabyīn al-Ḥaqā'iq, vol.5, p.222; Sulaymān al-Jamal, Ḥāshiyat al-Jamal ᶜalā Sharḥ al-Minhaj, vol.3, pp.471-472; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.78; Sharḥ Muntahā al-Irādāt, vol.2, p.401; al-Rawḍ al-Murbiᶜ, p.331; Mukhtaṣar, p.226; al-Ābī, Jawāhir al-Iklīl, vol.2, p.149; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, p.196; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.8, p.456; Majallah, article 890.

place, the value of that thing might change in consequence. In other words, the value of the thing may vary in different places.[90] If the owner wanted to sell it, and its value had decreased, the owner would suffer loss. This is the reason the usurper should return it in the place where it was usurped.[91] However, if the owner meets the usurper in some other place, and the property is with him, it could be returned there with the agreement of the owner.[92] Further, whatsoever, either in the matter of place or expense which both parties the owner and the usurper have agreed with each other in returning the usurped property, is valid.[93]

Provision for the delivery and the expense of transport falls on the usurper because the obligation to return the property includes the obligation of the expenses involved in returning it[94], even though the usurper should expend a lot of money for that purpose.[95]

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[90] Al-Hidāyah, vol.4, p.12; al-Durr al-Mukhtār, vol.2, p.332; ʿAlī Ḥaydar, Durar al-Ḥukkām, vol.8, p.456; Tabyīn al-Ḥaqā`iq, vol.5, p.222; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.182; Majmaʿ al-Anhur, vol.2, p.456; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.5, p.718; Salīm Rustam, Sharḥ al-Majallah, vol.1, p.489.

[91] ʿAlī Ḥaydar, Durar al-Ḥukkām, vol.8, p.456.

[92] Majallah, article 890; ʿAlī Ḥaydar, Durar al-Ḥukkām, vol.8, p.455; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.243; Salīm Rustam, Sharḥ al-Majallah, vol.1, p.489.

[93] Sharḥ Muntahā al-Irādāt, vol.2, p.401; Majallat al-Aḥkām al-Sharʿiyyah, article 1380, p.341; Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ, vol.4, p.79; al-Muqniʿ wa Ḥāshiyatuh, vol.2, p.233.

[94] Badā'iʿ al-Ṣanā'iʿ, vol.7, p.148; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.5, p.718; Majallah, article 890. See also Mughnī al-Muḥtāj, vol.2, pp.276-277; Taqrīr al-Awḥad in the margin of al-Iqnāʿ, vol.2, p.55; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.23; Ḥāshiyatān Qalyūbī wa ʿUmayrah, vol.3, p.29; Sulaymān al-Jamal, Ḥāshiyat al-Jamal ʿalā Sharḥ al-Minhaj, vol.3, p.471; al-Iqnā , vol.2, p.55; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.290; Kifāyat al-Akhyār, p.385; al-Muqniʿ, p.146; Manār al-Sabīl, vol.1, p.433; Sharḥ Muntahā al-Irādāt, vol.2, p.401; Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ, vol.4, p.79; al-Rawḍ al-Murbiʿ, p.331; al-Muqniʿ wa Ḥāshiyatuh, vol.2, p.233.

[95] Mughnī al-Muḥtāj, vol.2, p.276; Ḥāshiyatān Qalyūbī wa ʿUmayrah, vol.3, p.29; al-Iqnāʿ, vol.2, p.55; Kifāyat al-Akhyār, p.385; Sulaymān al-Jamal; Ḥāshiyat al-Jamal ʿalā Sharḥ al-Minhaj, vol.3, p.471; al-Muftī al-

The alteration (*taghayyur*) of usurped property while in the usurper's possession

According to the *fuqahā'*, the alteration of the usurped property, whether occurring naturally or as a result of the act of usurper, is as follows:

1- If the usurped property changes its condition naturally while in the possession of the person who has usurped it, such as grapes becoming raisins, ripe dates (*ruṭab*) becoming dried dates (*tamr*), or any fruit becoming dry, the owner has the option either of taking back the usurped property or of asking for the value thereof to be paid. This is the opinion of the Ḥanafī school.[96] This is also the opinion of the Mālikī school.[97] Nevertheless, the Ḥanbalī school opines that the usurper should return the usurped property to its owner as well as pay damages (*arsh*) if there is a diminution of value.[98] According to the Shāfiᶜī school, the owner has the option either of demanding (*al-*

Ḥubayshī, Fatḥ al-Mannān, p.290; Sharḥ Muntahā al-Irādāt, vol.2, p.401; al-Muqniᶜ, p.146; Manār al-Sabīl, vol.1, p.433; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnā, vol.4, p.79; al-Rawḍ al-Murbi, p.331; al-Mufqni wa Ḥāshiyatuh, vol.2, p.233; Majallah al-Aḥkām al-Sharᶜiyyah, article 1379, p.431.

[96] Takmilat Fatḥ al-Qadīr, vol.9, pp.332-333; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.3, p.61; al-Mīdānī, al-Lubāb fī Sharḥ al-Kitāb in the margin of al-Jawharah al-Nayyirah, vol.2, pp.191-193; Radd al-Muḥtār, vol.6, p.190; al-Fatāwā al-Hindiyyah, vol.5, p.126; Majmaᶜ al-Anhur, vol.2, p.459; Majmaᶜ al-Ḍamānāt, p.133; al-Shalabī, Ḥāshiyat al-Shalabī in the margin of Tabyīn al-Ḥaqā'iq, vol.5, p.226; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.160; al-Mughnī wa al-Sharḥ al-Kabīr, vol.5, p.391; Majallah, article 897; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.8, p.454; Muṣṭafā Aḥmad al-Zarqā', al-Fiᶜl al-Ḍārr, p.153; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.5, p.725; The Jordan Civil Code, section 286 (1).

[97] Al-Risālah, p.121; al-Mudawwanah, vol.4, p.171; al-Thamar al-Dānī, p.510; al-Fawākih al-Dawānī, vol.2, p.175; Ibn Nājī, Sharḥ Ibn Nājī ᶜalā Matn al-Risālah printed with Sharḥ Zarrūq ᶜalā Matn al-Risālah, vol.2, p.219; al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.656; al-Kinānī, al-ᶜAqd al-Munaẓẓam li al-Ḥukkām in the margin of Tabṣirat al-Ḥukkām, vol.2, p.73; al-Kāfī, p.432; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.287; al-Dardīr, al-Sharḥ al-Kabīr, vol.3, p.453; Bidāyat al-Mujtahid, vol.2, p.238; al-Qawānīn al-Fiqhiyyah, p.217; Mukhtaṣar, p.219.

[98] Al-Mughnī, vol.5, p.237; al-Mughnī wa al-Sharḥ al-Kabīr, vol.5, p.395; Ibn Qudāmah, al-Sharḥ al-Kabīr printed with al-Mughnī, vol.5, p.386; al-Muqniᶜ wa Ḥāshiyatuh, vol.2, p.237.

muṭālabah) the value of *ruṭab*, or of demanding the similar *tamr* (*mithl al-tamr*).[99]

In the Shāfiᶜī school, there are a few examples which could be related in respect of this part.

[a] A person usurps a juice (*ᶜaṣīr*) and it ferments and then changes into wine and lastly changes into vinegar. The vinegar must, according to the most correct opinion (*al-aṣaḥḥ*), be returned to its owner with damages (*arsh*) when the value of the vinegar is less than the value of the juice.[100] Otherwise, if that value is not less than the value of the juice, the usurper is not liable for damages.[101] However, according to the other view, the usurper must replace the juice as well as he, according to the most correct opinion, must return the vinegar to its original owner. The other view says that the vinegar remains in the possession of the usurper.[102] Focussing on the case of a person who usurps juice which ferments and then changes into wine and lastly changes into vinegar, the opinion of the Ḥanbalī school is similar to the view of the Shāfiᶜī school, that is the vinegar must be returned to its owner with damages when the value of the vinegar is less than the value

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[99] Al-Wajīz, vol.1, p.209.

[100] Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.149; Zakariyyā al-Anṣārī, Minhaj al-Ṭullāb printed with Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.149; Nihāyat al-Muḥtāj, vol.5, p.181; Mughnī al-Muḥtāj, vol.2, p.290; Fatḥ al-Wahhāb, vol.1, p.279; al-Sirāj al-Wahhāj, p.272; al-Shīrāzī, Kitāb al-Tanbīh, p.72; al-Muhadhdhab, vol.2, p.202; Tuḥfat al-Muḥtāj in the margin of Ḥawāshī al-Sharwānī wa Ibn Qāsim, vol.6, p.40; Ḥāshiyatān Qalyūbī wa ᶜUmayrah, vol.3, p.39; al-Wajīz, vol.1, p.211; al-Ghamrāwī, Anwār al-Masālik, p.180; ᶜUmdat al-Sālik, p.262.

[101] Nihāyat al-Muḥtāj, vol.5, p.181; Mughnī al-Muḥtāj, vol.2, p.290; Fatḥ al-Wahhāb, vol.1, p.279; Tuḥfat al-Muḥtāj in the margin of Ḥawāshī al-Sharwānī wa Ibn Qāsim, vol.6, p.40; al-Maḥallī printed with Ḥāshiyatān Qalyūbī wa ᶜUmayrah, vol.3, p.39.

[102] Mughnī al-Muḥtāj, vol.2, p.290; al-Shīrāzī, Kitāb al-Tanbīh, p.72; al-Muhadhdhab, vol.2, p.202; Nihāyat al-Muḥtāj, vol.5, p.181; al-Sirāj al-Wahhāj, p.272; al-Maḥallī printed with Ḥāshiyatān Qalyūbī wa ᶜUmayrah, vol.3, p.39.

of the juice.[103] However, the Ḥanafī and Mālikī schools concurrently agree to give the option to the owner either of taking the similar juice from the usurper as damages or of taking the vinegar.[104] The Ḥanafī jurists also discuss a case which could be related to this part. They illustrate that if a person usurps wine belonging to a Muslim and it changes into vinegar, the owner of the wine is entitled to take the vinegar without giving anything to the usurper.[105] However, if the wine changes into vinegar by the act of the usurper e.g., he throws some salt into it, the vinegar becomes the property of the usurper without anything being liable from him for the owner of the wine by reason that the wine has been destroyed by mixing the salt into it.[106] This is the opinion of Abū Ḥanīfah. Otherwise, according to his disciples Abū Yūsuf and Muḥammad b. al-Ḥasan al-Shaybānī, the owner is entitled to take the vinegar and he should pay the compensation equal to the salt, which means giving the owner a quantity of vinegar equal to the weight of the salt. If the owner wishes to leave the vinegar with the usurper, he can take the compensation from the usurper for its value which means the value of the vinegar.[107]

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[103] Sharḥ Muntahā al-Irādāt, vol.2, p.421; al-Mughnī, vol.5, p.256; al-Mughnī wa al-Sharḥ al-Kabīr, vol.5, p.418; Ibn Qudāmah, al-Sharḥ al-Kabīr printed with al-Mughnī, vol.5, p.437; al-Muqniᶜ, p.149; al-Rawḍ al-Murbiᶜ, pp.333-334; al-Muqniᶜ wa Ḥāshiyatuh, vol.2, p.250; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.110.

[104] Al-Ābī, Jawāhir al-Iklīl, vol.2, p.149; al-Kinānī, al-ᶜAqd al-Munaẓẓam li al-Ḥukkām in the margin of Tabṣirat al-Ḥukkām, vol.2, p.73; Mukhtaṣar, p.226; al-Dardīr, Aqrab al-Masālik, p.151; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2,p.197; al-Mudawwanah, vol.4, p.187; al-Ṣāwī, Bulghat al-Sālik, vol.2, p.197; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.280; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.3, p.61; al-Fatāwā al-Hindiyyah, vol.5, p.126; Majmaᶜ al-Ḍamānāt, p.133; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.256.

[105] See a different opinion in this school in Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.235.

[106] Al-Kanawī, al-Nāfiᶜ al-Kabīr printed with al-Jāmiᶜ al-Ṣaghīr, p.468; Tabyīn al-Ḥaqā`iq, vol.5, p.237.

[107] Al-Hidāyah, vol.4, pp.21-22. See also Majmaᶜ al-Anhur, vol.2, p.468; Badr al-Muttaqā in the margin of Majmaᶜ al-Anhur, vol.2, p.468; al-Jāmiᶜ al-Ṣaghīr, p.468; al-Kanawī, al-Nāfiᶜ al-Kabīr printed with al-Jāmiᶜ al-Ṣaghīr, pp.467-468; Tabyīn al-Ḥaqā'iq, vol.5, pp.236-237; al-Shalabī, Ḥāshiyat al-Shalabī in the margin of Tabyīn al-Ḥaqā'iq, vol.5, pp.236-237; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.210; al-Durr

[b] A person usurps a juice and it ferments itself and then changes into wine. In this case, the usurper must replace it and return it to its original owner, and the wine should be poured out (*irāqah*).[108] This is also the opinions of the Ḥanafī, the Mālikī and the Ḥanbalī schools.[109] However, the Ḥanbalī school does not mention whether the wine should be poured out or not.

[c] When a usurper takes an egg and then it changes into a chicken incubation (*farkhan*), or he usurps grain and then it changes into plants (*zarᶜan*), the usurper must return it to its original owner because the egg and the grain are his own property. The usurper must also pay damages (*arsh*) when the value of the egg which upon incubation has changed into a chicken or the grain which has changed into plants is less than that of the original value of the egg or grain because the changing of the value which has happened is while in his possession. Nevertheless, if that value has been increased, the usurper has no right to claim anything because the egg or the grains is not his property.[110] This is also the opinion of the Ḥanbalī school. In addition, this school opines that the usurper is not entitled to claim any compensation upon what he has done like to grow the grains or to

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al-Mukhtār, vol.2,p.340; Radd al-Muḥtār, vol.6, pp.210-211; al-Fatāwā al-Hindiyyah, vol.5, pp.125-126; Majmaᶜ al-Ḍamānāt, p.131; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.256.

[108] Mughnī al-Muḥtāj, vol.2, p.290; Fatḥ al-Wahhāb, vol.1, p.279; Nihāyat al-Muḥtāj, vol.5, p.181; Tuḥfat al-Muḥtāj in the margin of Ḥawāshī al-Sharwāni wa Ibn Qāsim, vol.6, p.40; al-Muhadhdhab, vol.2, p.202; al-Wajīz, vol.1, p.211.

[109] Al-Fatāwā al-Hindiyyah, vol.5, p.126; Mukhtaṣar, p.226; al-Ābī, Jawāhir al-Iklīl, vol.2, p.149; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.280; al-Dardīr, Aqrab al-Masālik, p.151; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, p.197; al-Kinānī, al-ᶜAqd al-Munaẓẓam li al-Ḥukkām in the margin of Tabṣirat al-Ḥukkām, vol.2, p.73; al-Mughnī, vol.5, p.256; Sharḥ Muntahā al-Irādāt, vol.2, p.421; al-Mughnī wa al-Sharḥ al-Kabīr, vol.5, p.418; al-Muqniᶜ, p.149; Ibn Qudāmah, al-Sharḥ al-Kabīr printed with al-Mughnī, vol.5, p.437; al-Rawḍ al-Murbiᶜ, p.333; al-Muqniᶜ wa Ḥāshiyatuh, vol.2, p.250; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.110.

[110] Al-Muhadhdhab, vol.2, pp.201-202. See also Nihāyat al-Muḥtāj, vol.5, p.181; Mughnī al-Muḥtāj, vol.2, p.190; Raḥmat al-Ummah, p.176; al-Fiqh al-Manhajī, vol.7, p.190.

incubate the egg because his act is considered as *tabarruᶜ* (donation).[111] According to the Ḥanafī and Mālikī schools, the usurper must replace it because it is *mithlī* property and the egg or grains becomes his property.[112]

2- If the usurper, according to the Ḥanafī school, changes the nature (*waṣf*) of such property by adding anything of his own to it, the person whose property has been usurped shall be given the option of either paying the value of the addition and taking back the usurped property in kind, or of holding the usurper liable for its value. For example, in the case of dyeing usurped cloth or mixing usurped wheat with oil, the owner has the option either of taking from the usurper a compensation equal to the value of his cloth (because cloth is grouped as *māl qīmī*), or an equal quantity of flour (because flour is grouped as *māl mithlī*), giving the dyed cloth or the mixed flour to the usurper; or, of taking the dyed cloth or the mixed flour and giving to the usurper a compensation equal to the dyeing, or replacing his oil (because the oil is considered as *māl mithlī*).[113] This is also the opinion of the Mālikī school unless in the case of mixing usurped wheat with

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[111] Sharḥ Muntahā al-Irādāt, vol.2, p.407. See also al-Mughnī, vol.5, p.245; Ibn Qudāmah, al-Sharḥ al-Kabīr printed with al-Mughnī, vol.5, p.398; al-Mughnī wa al-Sharḥ al-Kabīr, vol.5, p.405; al-Muqniᶜ, p.146; al-Rawḍ al-Murbiᶜ, p.331; ᵍUmdat al-Fiqh, p.61; al-ᶜUddah Sharḥ al-ᶜUmdah, p.231; al-Muqniᶜ wa Ḥāshiyatuh, vol.2, pp.236-237; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.89.

[112] Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.234; Majmaᶜ al-Ḍamānāt, p.135; Mukhtaṣar, p.226; al-Ābī, Jawāhir al-Iklīl, vol.2, p.149; al-Dardīr, Aqrab al-Masālik, p.151; al-Kinānī, al-ᵍAqd al-Munaẓẓam li al-Ḥukkām in the margin of Tabṣirat al-Ḥukkām, vol.2, p.72; al-Kāfī, p.432.

[113] Al-Hidāyah, vol.4, p.17; Majmaᶜ al-Anhur, vol.2, p.463; Badr al-Muttaqā in the margin of Majmaᶜ al-Anhur, vol.2, p.463; al-Durr al-Mukhtār, vol.2, p.336; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, pp.196-197; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, pp.160-161; Tabyīn al-Ḥaqā'iq, vol.5, pp.229-230; Sharḥ âl- Ināyah alā al-Hidāyah printed with Takmilat Fatḥ al-Qadīr, vol.9, p.344; Radd al-Muḥtār, vol.6, p.197; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.3, pp.63-64; al-Fatāwā al-Hindiyyah, vol.5, p.121; al-Ajwibah al-Khafīfah, p.246; Majallah, article 898; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.8, p.454; Muṣṭafā b. Aḥmad al-Zarqā', al-Fiᶜl al-Ḍārr, p.154; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.5, pp.725-726; The Jordan Civil Code, section 286 (3).

oil. In this case, the usurper should replace the wheat to the owner or he is liable to pay the value of it in the case of no wheat being found.[114]

The Shāfiᶜī school maintains that in the case of dyed cloth, the usurper may be obliged to remove his dye if possible. If it is impossible, and the value of the cloth has not been increased by the addition, the usurper can claim nothing, but damages (*arsh*) may be claimed from the usurper if there is a diminution of value. Where, on the other hand, the dyeing has increased the value of the cloth, the owner and the usurper become its co-proprietors.[115]

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[114] Al-Mudawwanah, vol.4, p.185; Mukhtaṣar, p.227; al-Dardīr, al-Sharḥ al-Kabīr, vol.3, p.454; al-Fawākih al-Dawānī, vol.2, p.176; Bidāyat al-Mujtahid, vol.2, p.239; al-Kinānī, al-ᶜAqd al-Munaẓẓam li al-Ḥukkām in the margin of Tabṣirat al-Ḥukkām, vol.2, p.72; al-Ābī, Jawāhir al-Iklīl, vol.2, p.151; al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.287; al-Kāfī, p.432. In his book, Ibn Rushd mentioned that the taking of the original value of dyed cloth is borne on the day of *ghaṣb*. See Bidāyat al-Mujtahid, vol.2, p.239. See also al-Kāfī, p.432; al-Ābī, Jawāhir al-Iklīl, vol.2, p.151. This school opines that if the owner chooses to take the dyed cloth, he has to pay the usurper the value of the addition (*zayd*) which means the price of the dyeing, irrespective of whether the value of the dyed cloth has increased or not thereby. See al-Fawākih al-Dawānī, vol.2, p.176. If the value of the dyed cloth has been decreased thereby, the owner has the option either of taking the dyed cloth and claiming *arsh*, which is based on the day of the dyeing (the day of *jināyah/yawm al-jināyah*), or of the compensation equal to the value of his cloth which is based on the day of *ghaṣb*. The claim of *arsh* which is based on the day of dyeing is according to the opinion of Ibn al-Qāsim and Ashhab. But, according to Saḥnūn, *arsh* will be based on the day of *ghaṣb*. See Bidāyat al-Mujtahid, vol.2, p.238; al-Ābī, Jawāhir al-Iklīl, vol.2, p.151; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.287; al-Fawākih al-Dawānī, vol.2, p.176; al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.656; al-Risālah, p.121; al-Thamar al-Dānī, p.510. If the value of the dyed cloth has decreased due to *al-ᶜayb al-samāwī* (the *act of God*), the owner has the option either of taking the dyed cloth without claiming *arsh*, or of compensation equal to the value of his cloth which is based on the day of *ghaṣb*. See al-Fawākih al-Dawānī, vol.2, p.176; al-Kāfī, p.432;
al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.287; Bidāyat al-Mujtahid, vol.2, p.238; al-Kinānī, al-ᶜAqd al-Munaẓẓam li al-Ḥukkām in the margin of Tabṣirat al-Ḥukkām, vol.2, p.73; al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.656; al-Risālah, p.121; al-Thamar al-Dānī, p.510. If the value of the dyed cloth has been decreased by the acts of a person other than the usurper, the owner has the option either of claiming the value of his cloth from the usurper which will be valued on the day of *ghaṣb* (and the usurper can claim the payment from the person), or of taking the dyed cloth back and claiming *arsh* from that person. See al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.287; Bidāyat al-Mujtahid, vol.2, p.239; al-Kinānī, al-ᶜAqd al-Munaẓẓam li al-Ḥukkām in the margin of Tabṣirat al-Ḥukkām, vol.2, p.73; al-Fawākih al-Dawānī, vol.2, p.176; al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, pp.656-657.

[115] Al-Umm, vol.3, pp.289-290; Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.149; Zakariyyā al-Anṣārī, Minhaj al-Ṭullāb printed with Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.149; Minhāj al-Ṭālibīn, in the margin of Mughnī al-Muḥtāj, vol.2, pp.291-292; al-Sirāj al-Wahhāj, p.273; Nihāyat al-Muḥtāj, vol.5, p.184; Fatḥ al-Wahhāb, vol.1, p.279; al-Wajīz, vol.1, p.212; al-Fiqh al-Manhajī, vol.7, pp.190-191. See also Tabyīn al-Ḥaqā'iq, vol.5, p.230; Majmaᶜ al-Anhur, vol.2, p.463. For detail see al-Muhadhdhab, vol.2, p.204; al-Shīrāzī, Kitāb al-Tanbīh, p.71. If, for example, the value of cloth is ten pounds and of dye is also ten pounds, then the value of cloth after dyeing becomes fifteen pounds, the owner and the usurper become its co-proprietors, that

In this opinion, the owner has a right to tell the usurper to separate his dye from the cloth. This is based on analogy with the case of usurped ground on which the usurper erected a building. The owner is entitled to take the ground and insist on the usurper removing his building. The separation of a dye from cloth is as practicable as the removal of a building from the ground on which it stands.[116]

The Ḥanafī school argues against the Shāfiʿī opinion by making analogy with oil mixed in flour, because the separation of the oil is impracticable. An option, therefore, is allowed to the owner of the cloth, as he is the original owner. It is otherwise in the case of erecting a building on usurped ground, because the usurper is entitled to the fragments of the building after it is pulled down (that is, to the bricks, wood, etc.); whereas a dye when separated from cloth is lost, and cannot be collected by the usurper of the cloth. It is also contrary to the case of a cloth blown by the wind into the vat of a dyer, becoming stained in consequence. In this case, the dyer is not responsible and the owner must take the cloth, and pay the dyer the value of his dye, as in this case no degree of blame is imputable to him.[117]

According to the Ḥanbalī school, this case (dyeing the usurped cloth) is similar

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is, two thirds of the value of the cloth is for its owner, and one third of it is for the usurper. See al-Umm, vol.3, p.289; Mughnī al-Muḥtāj, vol.2, p.292; al-Muhadhdhab, vol.2, p.204; Nihāyat al-Muḥtāj, vol.5, p.185; Fatḥ al-Wahhāb, vol.1, p.279; al-Fiqh al-Manhajī, vol.7, p.191.

[116] Al-Hidāyah, vol.4, p.17; Mughnī al-Muḥtāj, vol.2, p.292; Fatḥ al-Wahhāb, vol.1, p.279; Nihāyat al-Muḥtāj, vol.5, p.184. However, there is in the Shāfiʿī school an opinion which is contrary to the opinion mentioned above. They opine that, by that analogy, the usurper will have difficulty in removing the dye from the cloth. So, that analogy is wrong.

[117] Al-Hidāyah, vol.4, p.17; Tabyīn al-Ḥaqā'iq, vol.5, p.230. See also al-Mughnī wa al-Sharḥ al-Kabīr, vol.5, p.433.

to the opinion of the Shāfiᶜī school in general,[118] but the usurper is not to be obliged to remove his dye by reason of the fact that removing the dye will cause damage to the cloth. It could not be compared to the case of removing the tree because it does not cause great damage to the ground and its benefit can still be taken. In this matter, the opinion of the Ḥanbalī school is similar to the opinion of the Ḥanafī school.[119]

3- If the usurper, according to the Ḥanafī jurists, alters the usurped property in such a way that the name and its original purpose (*manfaᶜah*) are changed, he shall be liable to make good the loss, which means he must replace it if it is fungible (*mithlī*) property or pay the value of it if it is infungible (*qīmī*) property and keep the property himself. For example:

a- If the usurped property is wheat, and the usurper makes flour out of it, he is responsible to make good the loss and the flour becomes his property.

b- If someone has usurped another person's wheat, and sown it in his field, he is responsible to make compensation for the wheat, and the crops become his property.

c- In the same way, a person usurps a goat, slaughters it, and afterwards roasts or boils it; or he usurps iron and makes a sword from it; or he usurps clay and makes a vessel from it, he is liable to make compensation for the goat, or the iron or the clay and that usurped property becomes his property.

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[118] Al-Mughnī wa al-Sharḥ al-Kabīr, vol.5, p.432; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, pp.95-96; Sharḥ Muntahā al-Irādāt, vol.2, p.411; al-Rawḍ al-Murbiᶜ, p.332; al-Muqniᶜ, pp.147-148; al-Muqniᶜ wa Ḥāshiyatuh, vol.2, p.241; al-Mughnī, vol.5, p.267.

[119] Al-Mughnī wa al-Sharḥ al-Kabīr, vol.5, p.433; Kashshāf al-Qināᶜ ᶜan Matn al-Qināᶜ, vol.4, pp.95-96; Sharḥ Muntahā al-Irādāt, vol.2, p.411; al-Rawḍ al-Murbiᶜ, p.333; al-Muqniᶜ wa Ḥāshiyatuh, vol.2, p.242; al-Mughnī, vol.5, p.268.

This is also the opinion of the Mālikī school.[120] Ibn Rushd adds that the property for compensation will be valued on the day of *ghaṣb* or the usurper replaces it if it is fungible property.[121]

In accordance with *istiḥsān*, the usurper is not entitled to derive any advantage from the usurped property until he pays the compensation.[122] Otherwise, in accordance with *qiyās*, he is entitled to derive benefit from such property even though he has not paid the compensation. This is a view of Abū Ḥanīfah (cited in original text as *al-imām*) and Zufar.[123]

The Shāfiᶜī and the Ḥanbalī schools maintain that, after the alteration in the property, the right of the owner to it is not extinguished, but he is entitled to take from the usurper his property which has been altered and he is also entitled to compensation from the usurper for the damage (*nuqṣān*). The Ḥanbalī school and al-Shīrāzī add that the usurper is not entitled to claim any increment because his act in giving increase the

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[120] Al-Qawānīn al-Fiqhiyyah, p.217; al-Thamar al-Dānī, p.511; Bidāyat al-Mujtahid, vol.2, p.240; Mukhtaṣar, p.226; al-Mudawwanah, vol.4, p.185 and p.187; al-Ābī, Jawāhir al-Iklīl, vol.2, p.149; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.280; al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.279; al-Kāfī, p.428 and p.431; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, p.197; al-Kinānī, al-ᶜAqd al-Munaẓẓam li al-Ḥukkām in the margin of Tabṣirat al-Ḥukkām, vol.2, p.72.

[121] Bidāyat al-Mujtahid, vol.2, p.240. See also al-Kāfī, p.429.

[122] Al-Hidāyah, vol.4, p.15; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, pp.190-192; Tabyīn al-Ḥaqā'iq, vol.5, p.226; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.3, p.62; Majmaᶜ al-Anhur, vol.2, pp.459-460; Badr al-Muttaqā in the margin of Majmaᶜ al-Anhur, vol.2, pp.459-460; al-Durr al-Mukhtār, vol.2, pp.334-335; Sharḥ Fatḥ al-Qadīr, vol.9, p.333 and p.345; al-Mughnī wa al-Sharḥ al-Kabīr, vol.5, p.403; al-Fatāwā al-Hindiyyah, vol.5, p.121; al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.6, p.182; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.255; al-Mughnī, vol.5, p.403; Ibn Qudāmah, al-Sharḥ al-Kabīr, vol.5, p.394; Ibn Qayyim, Iᶜlām al-Muwaqqiᶜīn, vol.2, p.25; Majmaᶜ al-Ḍamānāt, p.135; al-Ajwibah al-Khafīfah, p.245; Majallah, article 899; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.8, p.454; Muṣṭafā b. Aḥmad al-Zarqā', al-Fiᶜl al-Ḍārr, p.153; The Jordan Civil Code, section 286 (2).

[123] Majmaᶜ al-Anhur, vol.2, p.460; al-Durr al-Mukhtār, vol.2, p.335; Badr al-Muttaqā in the margin of Majmaᶜ al-Anhur, vol.2, p.460; Radd al-Muḥtār, vol.6, p.191; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.191; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.255; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.3, p.62.

value of the usurped property is considered as *tabarruᶜ* (donation).[124] There is also a report from Abū Yūsuf to the same effect. He, however, maintains that in case the owner chooses to take the flour of the wheat, he is not entitled to compensation for the damage, as that would lead to *ribāʾ*.[125]

4- If the usurped property changes by reduction in value as a result of use by the usurper, he shall return the property and shall be liable for the value of the reduction.

This allocation has been enacted in the Majallah, article 900. It has also been enacted in The Jordan Civil Code, section 286 (4). In fact, it has been discussed by al-MarghīnānĪ, al-Ḥaṣkafī, al-ZaylaᶜĪ, etc., in their writings. However, this topic will be discussed in the next section, that is, depreciation (*nuqṣān*) of usurped property.

Depreciation (*nuqṣān*) of usurped property (*maghṣūb*)

According to the Ḥanafī school, any diminution or depreciation of value, materially (*ḥissī māddī*) or immaterially (*maᶜnawī*) of usurped property while in the

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[124] Al-MughnĪ wa al-Sharḥ al-KabĪr, vol.5, pp.403 and 405; al-Muhadhdhab, vol.2, p.202; al-Hidāyah, vol.4, p.15; Ibn Qayyim, Iᶜlām al-Muwaqqiᶜīn, vol.2, p.25; Ibn Qudāmah, al-Sharḥ al-KabĪr, vol.5, p.394; al-QārĪ, Majallat al-Aḥkām al-Sharᶜiyyah, article 1385, p.432; Raḥmat al-Ummah, p.175; TabyĪn al-Ḥaqāʾiq, vol.5, p.226; Majmaᶜ al-Anhur, vol.2, p.460; ᶜUmdat al-Fiqh, p.61; al-ᶜUddah Sharḥ al-ᶜUmdah, p.231; al-MughnĪ, vol.5, p.243; al-Muqniᶜ, p.146; al-Muqnī wa Ḥāshiyatuh, vol.2, p.236; al-Rawḍ al-Mufbi , p.331; Sharḥ Muntahā al-Irādāt, vol.2, p.406; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.88; Minhāj al-ṬālibĪn wa ᶜUmdat al-MuftĪn, p.148; Fatḥ al-Wahhāb, vol.1, p.277; Nihāyat al-Muḥtāj, vol.5, p.175; al-Sirāj al-Wahhāj, p.271; MughnĪ al-Muḥtāj, vol.2, p.288; al-MĪzān al-Kubrā, vol.2, p.77; Sulaymān al-Jamal, Ḥāshiyat al-Jamal ᶜalā Sharḥ al-Minhaj, vol.3, p.486; al-WajĪz, vol.1, p.210 and p.211; al-Fiqh al-ManhajĪ, vol.7, p.191.

[125] Al-Hidāyah, vol.4, p.15; TabyĪn al-Ḥaqāʾiq, vol.5, p.226; Majmaᶜ al-Anhur, vol.2, p.460.

possession of the usurper, could be divided into four categories:[126]

1- The depreciation of value due to the decrease of price in the market. In this case, the usurper is not responsible, provided he returns the usurped property in the place of usurpation, because a diminution of price arises from the diminution of desire on the part of the purchaser, and not from the ruin or destruction of any of the parts of the usurped property.[127] This is also the opinion of the Shāfiᶜī school,[128] the Mālikī school[129] and the Ḥanbalī school.[130] However, on the other hand, Abū Thawr opines that the usurper is definitely liable in the case of diminution of value by reason that he is liable for any damage.[131]

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[126] Radd al-Muḥtār, vol.6, p.188.

[127] Al-Hidāyah, vol.4, p.13; Sharḥ al-ᶜInāyah ᶜalā al-Hidāyah printed with Takmilat Fatḥ al-Qadīr, vol.9, p.327; Majmaᶜ al-Ḍamānāt, p.133; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.3, p.61; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.243; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.155; Tabyīn al-Ḥaqā'iq, vol.5, p.225; Radd al-Muḥtār, vol.6, p.188; Majallah, article 900; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.8, p.454.

[128] Al-Nawawī, Rawḍ al-Ṭālibīn, vol.4, p.121; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.23; Ibn al-Qāsim, Sharḥ Ibn al-Qāsim al-Ghazzī ᶜalā Matn Abī Shujāᶜ printed with Ḥāshiyat al-Bayjūrī, vol.2, p.23; Kifāyat al-Akhyār, p.385; Minhāj al-Ṭālibīn in the margin of al-Sirāj al-Wahhāj, p.270; ᶜUmdat al-Sālik, p.261; al-Ghamrāwī, Anwār al-Masālik, p.179; Mughnī al-Muḥtāj, vol.2, p.287; Nihāyat al-Muḥtāj, vol.5, p.174; al-Wajīz, vol.1, p.210; al-Fiqh al-Manhajī, vol.7, p.192. In Minhāj al-Ṭālibīn: A usurper who returns a usurped property at a moment when its price has gone down, is not liable for this diminution in value.

[129] Mukhtaṣar, p.227; al-Ābī, Jawāhir al-Iklīl, vol.2, p.151; al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.285; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.285; al-Kāfī, p.428; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, p.200; Ibn Nājī, Sharḥ Ibn Nājī ᶜalā Matn al-Risālah printed with Sharḥ Zarrūq ᶜalā Matn al-Risālah, vol.2, p.219; al-Dardīr, al-Sharḥ al-Kabīr, vol.3, pp.452-453; al-Khirshī, Fatḥ al-Jalīl ᶜalā Mukhtaṣar Khalīl, vol.6, p.141.

[130] Al-Mughnī wa al-Sharḥ al-Kabīr, vol.5, p.400, p.401 and p.432; al-Mughnī, vol.5, p.242; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.91 and p.95; Sharḥ Muntahā al-Irādāt, vol.2, p.408 and p.411; al-Rawḍ al-Murbiᶜ, p.331; al-Muqnf wa Ḥāshiyatuh, vol.2, p.241; Ibn Qudāmah, al-Sharḥ al-Kabīr printed with al-Mughnī, vol.5, p.403; Majallat al-Aḥkām al-Sharᶜiyyah, article 1387, p.432.

[131] Al-Mughnī wa al-Sharḥ al-Kabīr, vol.5, p.400; al-Mughnī, vol.5, p.241; Ibn Qudāmah, al-Sharḥ al-Kabīr printed with al-Mughnī, vol.5, p.403.

2- The depreciation of usurped property due to a defect in it itself (*waṣf*). The usurper is in this case responsible for such depreciation, on the condition that the usurped property is not *māl ribā'* (property which is grouped to *ribawī* property); but that with respect to *māl ribā'*, either compensation for the depreciation or damage must not be taken along with the actual restitution, as that would necessarily induce usury (*ribā'*)[132] or demanding the value of it and that property is left to the usurper,[134] such as in the case of wheat which becomes foul.[135] In this case, the owner has an option either to take back his property without demanding the value of its depreciation, or to leave it in the possession of the usurper and to claim its replacement (because it is fungible property).[136]

The usurper is responsible for the usurped property (when it is not *māl ribā'*), in all its parts for depreciation.[137] For example, if an animal which has been usurped by someone, is in a weak state when returned to its owner, the person is responsible, also, for the diminution of its value.[138]

The Shāfiᶜī school[139] and the Ḥanbalī school[140] opine (they did not mention

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[132] Al-Hidāyah, vol.4, p.13; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.155 and 159; Majmaᶜ al-Ḍamānāt, p.133; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.8, p.496.

[134] Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.159; Radd al-Muḥtār, vol.6, p.188; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.3, p.61; Tabyīn al-Ḥaqā'iq, vol.5, p.225; Majmaᶜ al-Ḍamānāt, p.133; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.8, p.496.

[135] Sharḥ Fatḥ al-Qadīr, vol.9, p.328; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.159; Radd al-Muḥtār, vol.6, p.188; Majmaᶜ al-Ḍamānāt, p.133.

[136] Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.159; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.8, p.496.

[137] Al-Hidāyah, vol.4, p.13; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.155.

[138] Majallah, article 900; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.5, p.728. See examples which could be related to this part in Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.155.

[139] Mughnī al-Muḥtāj, vol.2, p.286; Nihāyat al-Muḥtāj, vol.5, p.171; al-Sirāj al-Wahhāj, p.270; Kifāyat al-Akhyār, p.386; Tuḥfat al-Muḥtāj in the margin of Ḥawāshī al-Sharwānī wa Ibn Qāsim, vol.6, p.31; Bidāyat

whether it is *māl ribā'* or not) that the usurper shall be liable for the depreciation of the usurped property, whether in its substance (*dhāt/ᶜayn*) or in its characteristic (*ṣifah*), whether by an *act of God* or by an act of the usurper. However, in the case of depreciation of food, which becomes moist (*ibtilāl*) or musty (*ᶜafin*), these two schools have their opinions respectively.[141] The Shāfʿī school maintains that if a slave who has been usurped by a usurper and a part of his body is damaged due to disease (by *act of God*), not caused by the usurper's usage while he is in the possession of the usurper, he is responsible the payment for damages (*arsh*) as a result of depreciation caused by the disease (*naqṣ*) plus an indemnity for rent. This principle is also applied to the damage caused by the usurper's usage, e.g., where a usurped coat has been used and has been destroyed.[142] Further, in the case of usurped food (or wheat) which becomes foul by itself, the owner has the right to take the food back as well as the compensation (*arsh*) for the damage.[143]

But, on the other hand, the Mālikī school opines that the usurper shall not be liable for the depreciation of usurped property by an *act of God.* The owner merely has

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al-Mujtahid, vol.2, p.238; al-Iqnāᶜ, vol.2, p.56. The Shāfʿī jurists used the term for *the act of God* "*bi āfah samāwiyah*".

[140] Majallah al-Aḥkām al-Sharʿiyyah, article 1393, p.434. See also Sharḥ Muntahā al-Irādāt, vol.2, p.407, p.409 and 420; Manār al-Sabīl, vol.1, p.434; al-Mughnī, vol.5, p.233 and p.242; al-Mughnī wa al-Sharḥ al-Kabīr, vol.5, p.401; al-Muqniᶜ wa Ḥāshiyatuh, vol.2, p.239; al-Muqniᶜ, p.147; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.89 and p.92; al-Rawḍ al-Murbiᶜ, p.331; al-ᶜUddah Sharḥ al-ᶜUmdah, p.231; ᶜUmdat al-Fiqh, p.61.

[141] For detail see al-Mughnī, vol.5, p.233; al-Nawawī, al-Majmūᶜ Sharḥ al-Muhadhdhab, vol.14, p.240; al-Muqniᶜ wa Ḥāshiyatuh, vol.2, p.239.

[142] Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.147; Mughnī al-Muḥtāj, vol.2, p.286; al-Iqnāᶜ, vol.2, p.56; al-Muhadhdhab, vol.2, p.200; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.23; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.291; Nihāyat al-Muḥtāj, vol.5, p.171. The Ḥanafī school does not bear the liability for compensation on the usurper on any usage of benefit (*manfaᶜah*). See Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.150.

[143] Al-Umm, vol.3, p.290; Mughnī al-Muḥtāj, vol.2, p.288; Nihāyat al-Muḥtāj, vol.5, p.176.

a right either to take back his property without demanding the depreciation of value or he can claim the value of it on the day of *ghaṣb* and leave the property to the usurper. Besides, there is an opinion that the owner has a right to take back his property along with its value of depreciation.[144]

3- The depreciation of usurped property due to defect in its immaterial quality which is required in its substance. For example:

(i) If a usurped slave has lost knowledge of his profession as a baker or any profession (*al-ḥirfah*) while in the possession of the usurper, the latter is liable for that depreciation.[145] It is also the opinion of the Shāfiᶜī school.[146] According to the Ḥanbalī school, the owner has an option either to keep him and take compensation for the deficiency, or claim replacement (*muṭālabah bi al-badal*).[147] Likewise, if a person usurps a female slave who afterwards has learnt a profession (*ṣanᶜah*) while in the possession

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[144] Al-Mudawwanah, vol.4, p.171; al-Dardīr, al-Sharḥ al-Kabīr, vol.3, p.453; al-Fawākih al-Dawānī, vol.2, pp.175-176; al-Risālah, p.121; Ibn Nājī, Sharḥ Ibn Nājī ᶜalā Matn al-Risālah printed with Sharḥ Zarrūq ᶜalā Matn al-Risālah, vol.2, p.219; al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.656; al-Kinānī, al-ᶜAqd al-Munaẓẓam li al-Ḥukkām in the margin of Tabṣirat al-Ḥukkām, vol.2, p.73; al-Kāfī, p.432; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.287; Bidāyat al-Mujtahid, vol.2, p.238; al-Qawānīn al-Fiqhiyyah, p.217; Mukhtaṣar, p.219; al-Thamar al-Dānī, p.510. In Bidāyat al-Mujtahid: *amr min al-samā'*. In al-Qawānīn al-Fiqhiyyah: *fiᶜl Allāh*. In Mukhtaṣar: *āfah samāwiyah*. In al-ᶜAqd al-Munaẓẓam li al-Ḥukkām: *ᶜayb samāwī*.

[145] Majmaᶜ al-Ḍamānāt, p.133; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.242; Radd al-Muḥtār, vol.6, p.188; al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.6, p.176; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.3, p.61; al-Fatāwā al-Hindiyyah, vol.5, p.123; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.8, p.496.

[146] Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.149; al-Iqnāᶜ, vol.2, p.56; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.23; Mughnī al-Muḥtāj, vol.2, p.290; al-Sirāj al-Wahhāj, p.272; al-Maḥallī printed with Ḥāshiyatān Qalyūbī wa ᶜUmayrah, vol.3, p.39; Ḥāshiyatān Qalyūbī wa ᶜUmayrah, vol.3, p.39; Nihāyat al-Muḥtāj, vol.5, p.180; Fatḥ al-Wahhāb, vol.1, p.279.

[147] Ibn Qayyim, Iᶜlām al-Muwaqqiᶜīn, vol.2, p.25.

of the usurper and the value of the female slave is increased in consequence, and then the value of her being decreased due to loosing knowledge of such a profession which he has learnt, the owner has a claim of compensation (*arsh*) against the usurper after the return of the female slave. This is the opinions of al-Shāfiᶜī and Aḥmad b. Ḥanbal. On the other hand, Abū Ḥanīfah and Mālik opine that he has no right to claim compensation.[148] Furthermore, in the case of a slave who has learnt a new profession (*ṣanᶜah*) with the usurper, the usurper is not liable for knowledge lost after returning.[149] This is because the new profession which is taught by the usurper to the slave is for different purposes (*li ikhtilāf al-aghrāḍ*).[150] This also may be because that new profession is not from the owner of the slave.

(ii) The usurper of a slave will be responsible for the latter's depreciation in the case of him becoming weak or old after *ghaṣb*.[151] But, according to Ibn Qayyim, the owner has an option like the above case.[152]

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[148] Al-Mīzān al-Kubrā, vol.2, p.76; Raḥmat al-Ummah, p.174; al-Mughnī, vol.5, pp.240-241; al-Muqniᶜ wa Ḥāshiyatuh, vol.2, p.239; ᶜUmdat al-Fiqh, p.61; al-ᶜUddah Sharḥ al-ᶜUmdah, p.231; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.92.

[149] Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.149; Minhaj al-Ṭullāb printed with Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.149; al-Sirāj al-Wahhāj, p.272; al-Maḥallī printed with Ḥāshiyatān Qalyūbī wa ᶜUmayrah, vol.3, p.39; Ḥāshiyatān Qalyūbī wa ᶜUmayrah, vol.3, p.39; Mughnī al-Muḥtāj, vol.2, p.290; Fatḥ al-Wahhāb, vol.1, p.279.

[150] Mughnī al-Muḥtāj, vol.2, p.290; Fatḥ al-Wahhāb, vol.1, p.279; Nihāyat al-Muḥtāj, vol.5, p.180; Tuḥfat al-Muḥtāj in the margin of Ḥawāshī al-Sharwānī wa Ibn Qāsim, vol.6, p.40.

[151] Majmaᶜ al-Ḍamānāt, p.133; Radd al-Muḥtār, vol.6, p.188; al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.6, p.176; al-Mughnī wa al-Sharḥ al-Kabīr, vol.5, pp.390-391; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.3, p.61; al-Fatāwā al-Hindiyyah, vol.5, p.123; al-Mughnī, vol.5, p.233; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.8, p.497.

[152] Ibn Qayyim, Iᶜlām al-Muwaqqiᶜīn, vol.2, p.25.

(iii) If a person usurps a slave who afterwards becomes fat and the value is decreased in consequence, the usurper is responsible for that depreciation.[153]

Al-Nawawī of the Shāfiᶜī school adds that where a person usurps a female slave, who afterwards becomes fat during usurpation, he is not responsible for compensation for the previous leanness when he returns her to the owner.[154] But, if a person usurps a fat female slave, who afterwards becomes lean and her value has been decreased thereby, and then she grows fat again and her value has been increased as well, he is held to compensate for a previous leanness when he returns her to the owner.[155] This may be because the previous leanness and the decrease of value of the female slave had happened in the possession of the usurper. On the other hand, he is not liable according to the Ḥanbalī school.[156] In another case, if a person usurps a female slave (or a cow, etc.), who afterwards becomes fat, and then becomes lean so that her value decreases, the owner has a claim of compensation against the usurper after the return of the slave. This is the opinions of al-Shāfiᶜī and Aḥmad b. Ḥanbal. On the other hand, Abū Ḥanīfah and Mālik

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[153] Al-Mughnī wa al-Sharḥ al-Kabīr, vol.5, p.390. See also Tabyīn al-Ḥaqā'iq, vol.5, p.233; ᶜUmdat al-Sālik wa ᶜUddat al-Nāsik, p.261.

[154] Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.149; Zakariyyā al-Anṣārī, Minhaj al-Ṭullāb printed with Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.149.

[155] Al-Sirāj al-Wahhāj, p.272; al-Muhadhdhab, vol.2, p.200; Mughnī al-Muḥtāj, vol.2, p.290; Nihāyat al-Muḥtāj, vol.5, p.180; Fatḥ al-Wahhāb, vol.1, p.279; Kifāyat al-Akhyār, p.385.

[156] Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.92; al-Mughnī, vol.5, p.240; Sharḥ Muntahā al-Irādāt, vol.2, pp.408-409; al-Muqniᶜ, p.147; al-Muqniᶜ wa Ḥāshiyatuh, vol.2, p.239; cf., al-Rawḍ al-Murbiᶜ, p.332.

disagreed and opined that the owner has no right to claim the compensation.[157]

Obviously the opinion of al-Nawawī above is different from the opinion of al-Marghīnānī, who says that where a person usurps a fat female slave who afterwards becomes lean, and then grows fat again; or who loses two of her teeth and then acquires two new ones or where a person cuts off the hand of a usurped slave while in the possession of the usurper, and the usurper receives compensation (*arsh*) from him, and returns it with the slave to the owner, no compensation for the depreciation is incumbent upon the usurper.[158]

4- The depreciation of usurped property causing some parts of it to sustain defect, could be divided into three classifications:

(1)- The depreciation of usurped property by an act of the usurper which causes a part or some parts to sustain defect, such as a usurper tearing a piece of cloth of another; he is in this case responsible to return that cloth to its owner and also responsible for the depreciation of its value because the damage existed as a result of the usurper's act.[159] This is also the opinions of the Mālikī,[160] Shāfiᶜī[161] and Ḥanbalī[162] schools.

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[157] Al-Mīzān al-Kubrā, vol.2, p.76; Raḥmat al-Ummah, p.174; al-Mughnī, vol.5, p.233; al-Rawḍ al-Murbiᶜ, p.332; Sharḥ Muntahā al-Irādāt, vol.2, p.408; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.92; al-Muqniᶜ wa Ḥāshiyatuh, vol.2, p.239; al-Muqniᶜ, p.147. See the case of an animal usurped which becomes lean after being fat in al-Fiqh al-Manhajī, vol.7, p.192.

[158] Al-Hidāyah, vol.4, p.19; Tabyīn al-Ḥaqā'iq, vol.5, p.233.

[159] Majallah, article 900; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.8, p.493 and p.454; al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.6, p.168 and p.177; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.256.

[160] Al-Dardīr, al-Sharḥ al-Kabīr, vol.3, pp.453-454; al-Mudawwanah, vol.4, p.185. According to this school, the owner has the option of either taking his property back including compensation for its depreciation, or of leaving it in the possession of the usurper and holding the usurper liable for its value which is based on the day

(2)- The depreciation of usurped property by the acts of a person other than the usurper. In this case, that person is considered to be in the same position as the first person (usurper) who has usurped that property.[163]

Consequently, if property which has already been usurped is again usurped from the first person by another and is destroyed by him or while in his possession, the owner has an option of claiming the compensation either for the first or second person. He also has the option of claiming a portion of the value of the property from the first person and a portion from the second person. If the first person has been liable for compensation, he can claim it back from the second person. But, if the second person has been liable for compensation, he cannot claim it back from the first person.[164] According to the Mālikī school, the owner has the option of either rendering the liability upon the usurper to pay the value of the property which will be valued on the day of *ghaṣb* (and the usurper can claim the payment from the third party), or of taking it back with its defect and

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of *ghaṣb*. See also al-Thamar al-Dānī, p.510; al-Fawākih al-Dawānī, vol.2, p.176; Bidāyat al-Mujtahid, vol.2, p.238; al-Risālah, p.121; Zarrūq, Sharḥ Zarrūq ʿalā Matn al-Risālah, vol.2, pp.219-220; Ibn Nājī, Sharḥ Ibn Nājī ʿalā Matn al-Risālah printed with Sharḥ Zarrūq ʿalā Matn al-Risālah, vol.2, p.219; al-Kāfī, p.432; al-Ābī, Jawāhir al-Iklīl, vol.2, p.151; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.287; al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.656; al-Risālah, p.121.

[161] Al-Wajīz, vol.1, p.210; al-Muhadhdhab, vol.2, p.200. See also al-Muqniʿ wa Ḥāshiyatuh, vol.2, p.236.

[162] Majallah al-Aḥkām al-Sharʿiyyah, article 1393, p.434; al-Muqniʿ, p.146; al-Muqniʿ wa Ḥāshiyatuh, vol.2, pp.236-237; ʿUmdat al-Fiqh, p.61; al-ʿUddah Sharḥ al-ʿUmdah, p.231; Manār al-Sabīl, vol.1, p.434; al-Mughnī, vol.5, p.242; Sharḥ Muntahā al-Irādāt, vol.2, p.420; Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ, vol.4, p.109; Ibn Qudāmah, al-Sharḥ al-Kabīr printed with al-Mughnī, vol.5, p.435.

[163] Majallah, article 910; ʿAlī Ḥaydar, Durar al-Ḥukkām, vol.8, p.494; al-Fawākih al-Dawānī, vol.2, p.176; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.24; Bidāyat al-Mujtahid, vol.2, p.239; Kifāyat al-Akhyār, p.386.

[164] Majallah, article 910; ʿAlī Ḥaydar, Durar al-Ḥukkām, vol.8, p.494; al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.6, p.169.

demanding the compensation (*arsh*) from the third party.[165]

(3)- The depreciation of usurped property due to a defect of its quality by *act of God* (*bi āfah samāwiyah*). If a person usurps an animal and afterwards it has a sickness while in his possession and is sick when it is returned to its owner and dies due to that sickness, the usurper is responsible for the value of its depreciation (*qīmat al-nuqṣān*) which is caused by that sickness, not the whole value of that animal. Likewise, if a person usurps a donkey, it suffers a wound and becomes too weak to walk, the usurper is responsible for the value of that depreciation. But, if the donkey absolutely cannot walk, the usurper is responsible for the whole value of it.[166] So far as an *act of God* is concerned, it has already been explained in the preceding pages, including the views of the Shāfiᶜī, the Ḥanbalī and the Mālikī schools.

The degree of depreciation of usurped property by the acts of usurper will be discussed into two categories:

i- *Yasīr* (small amount).

ii- *Fāḥish* (great amount).

If the depreciation is of a small amount (*yasīr*), the usurper is responsible for that depreciation and the usurped property remains with the owner. But, if the depreciation is of a great amount (*fāḥish*) so as to destroy many of its uses (if a rent of cloth were

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[165] See Bidāyat al-Mujtahid, vol.2, p.239; al-Fawākih al-Dawānī, vol.2, p.176; al-Kinānī, al-ᶜAqd al-Munaẓẓam li al-Ḥukkām in the margin of Tabṣirat al-Ḥukkām, vol.2, p.73; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.287; al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, pp.656-657.

[166] ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.8, p.494.

large), the owner would in that case have it in his option either to take the whole of the value on the day of *ghaṣb* from the usurper and give him the cloth (since he has destroyed it in every respect, even as much as if he had burnt it), or to keep the usurped property and take compensation for the depreciation.[167]

The significations of *fāḥish* and *yasīr* are as follows:[168]

i- *Fāḥish* (a large rent) is such as occasions a destruction of some parts of the property and also of some of its use; some of the parts and some of the uses still remaining. It is also observed by al-Qadūrī that *fāḥish* is such as occasions a destruction of many of the advantages.[169]

ii- *Yasīr* (a small rent) is such as does not induce a destruction of any of the uses, but merely occasions damage.

In the Majallah, however, these terms are described as follows:[170]

i- *Fāḥish* means the depreciation which is equal to or in excess of one fourth of the value of the usurped property.

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[167] Al-Hidāyah, vol.4, pp.16-17; Majmaᶜ al-Ḍamānāt, pp.133-134; Sharḥ al-ᶜInāyah ᶜalā al-Hidāyah printed with Takmilat Fatḥ al-Qadīr, vol.9, p.342; al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.6, p.177; Majmaᶜ al-Anhur, vol.2, p.462. The author of al-Fatāwā al-Bazzāziyyah mentioned that if the benefit of the cloth has been totally destroyed while the cloth was in the possession of the usurper, the owner is absolutely entitled to claim the value of the cloth. See al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.6, pp.177-178. See also the discussion of *yasīr* and *fāḥish* in the Mālikī school in al-Mudawwanah, vol.4, p.169.

[168] Al-Hidāyah, vol.4, p.17; al-Durr al-Mukhtār, vol.2, p.336; Sharḥ al-ᶜInāyah ᶜalā al-Hidāyah printed with Takmilat Fatḥ al-Qadīr, vol.9, p.342. See also Majmaᶜ al-Ḍamānāt, p.134; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.3, p.63; Majmaᶜ al-Anhur, vol.2, p.462; Badr al-Muttaqā in the margin of Majmaᶜ al-Anhur, vol.2, p.462.

[169] Sharḥ al-ᶜInāyah ᶜalā al-Hidāyah printed with Takmilat Fatḥ al-Qadīr, vol.9, p.341.

[170] Majallah, article 900; Sharḥ al-ᶜInāyah ᶜalā al-Hidāyah printed with Takmilat Fatḥ al-Qadīr, vol.9, p.341. See also Majmaᶜ al-Ḍamānāt, p.134; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.3, p.63; al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.6, p.178.

ii- *Yasīr* means the depreciation which does not amount to one fourth of the value of the usurped property.

Some *fuqahā'* signify these terms as follows:[171]

i- *Fāḥish* means the depreciation of usurped property equal or in excess of half of its value.

ii- *Yasīr* means the depreciation of usurped property which does not exceed a half of its value.

To sum up, from the discussions above, the Islamic law of tort obviously gives protection and security to people to have, possess and own property. They have a right of ownership and possession of property and have a legal right to claim remedy if their rights are intruded upon.

DESTRUCTION (*ITLĀF*)

The term *itlāf* is derived from *ta-li-fa* conveying the meaning of annihilation, destruction, injury and harm;[172] and the verb *atlafa* signifies that someone has taken an active part in the destruction.[173] In legal terminology, it means "exclusion of a thing from its usufructuary who uses it in normal circumstances".[174] This exclusion can be explained

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[171] Sharḥ al-ᶜInāyah ᶜalā al-Hidāyah printed with Takmilat Fatḥ al-Qadīr, vol.9, p.341; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.3, p.63.

[172] Hans Wehr, A Dictionary of Modern Written Arabic, p.96.

[173] Zainuddin Jaafar, The Concept and Application of *Ḍamān* in Islamic Commercial Law, (Unpublished Ph.d Thesis, 1994), p.34.

[174] Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.164. *Ikhrāj al-shay' min an yakūn muntafiᶜan bih manfaᶜah minh ᶜādah.*

in two senses:

a- When the destruction has been committed *in toto* (*ṣūratan wa maʿnan*) wherein both the object and its utility are destroyed.

b- When the destruction is limited to the utility only, whereas the object remains intact. This situation is called immaterial destruction (*itlāf maʿnan*).

In both cases, the destroyer will be liable for his acts, because the elements of transgression (*iʿtidā'*) and occurrence of the injury itself (*iḍrār*) were present in them.[175]

Al-Kāsānī mentions that if restitution is granted in *ghaṣb*, it is more recommended in the case of *itlāf*. This is because, there have been the elements of transgression and injury concurrently.[176]

Maḥmaṣṣānī maintains that every injurious act wrongfully committed against properties of others is called *itlāf*. The destroyer in this case will be liable for what he has committed. This principle, which is especially applied to the destruction of property, is gradually broadened by the *fuqahā'* to include injury to persons.[177] However, the injury to persons is normally discussed by the *fuqahā'* in the topic of criminal responsibility. This topic will not be discussed here. In this discussion at the moment, merely the topics of *itlāf* of things (*ashyā'*), *itlāf* of animals (*bahā'im*) and *itlāf* of inanimate beings (*jamādāt*) will be dealt with and grouped as *itlāf* of property.[178]

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[175] Badā'iʿ al-Ṣanā'iʿ, vol.7, p.165.

[176] Badā'iʿ al-Ṣanā'iʿ, vol.7, p.165.

[177] Maḥmaṣṣānī, "Transaction in the Sharīʿa", in Law in the Middle East, p.190.

[178] Other than *itlāf*, terms like *ifsād* and *istihlāk* are normally used for destruction. However, there is quite a difference between them. [a] *Itlāf* of things like killing of another's animal or burning of his cloth or tearing it and the like. [b] *Istihlāk* (consumption) means destruction of another's property by consuming it, like eating

There are certain conditions, in general, which must be present in order to give rise to the liability for *itlāf*:[179]

1- Injurious act (*al-fi^{c}l al-ḍārr*).

Injurious act is a deed that will bring about damaging (*ḍarar*) consequences, whether committed directly (*mubāsharah*) or indirectly (*tasabbub*), by commission (*ijābī*) or omission (*salbī*), by physical (*ḥissī*) or psychological (*nafsī*) means.

2- Harm or damage (*ḍarar*).

Ḍarar here means any form of harm or damage (*adhā*) which is inflicted on another's property and causes a pecuniary loss like tearing up a cloth or killing an animal; or deficiency of its utility; or damaging a part of its attributes (*awṣāf*) and so on.[180]

According to the *fuqahā'*, *itlāf* can be divided into two groups. First, direct *itlāf* (*itlāf bi al-mubāsharah*) and second, indirect *itlāf* (*itlāf bi al-tasabbub*). Both terms (*al-mubāsharah* and *al-tasabbub*) have already been explained in the topic of Strict Liability.

The *fuqahā'* opine that in the direct *itlāf*,[181] a *mubāshir* will be held liable in all tort

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another's food, drinking his milk and the like. [c] *Ifsād* is synonym for *itlāf* in the *fuqahā'*s application. But, according to Ibn Juzayy, *itlāf* and *ifsād* are different to each other. *Itlāf* is what has been mentioned before, whereas *ifsād* could be divided into two categories: [i] to annihilate required benefit of something like cutting of a slave's hand or cutting of an animal's leg. [ii] to spoil another's property with a small amount of destruction (*yasīr*) like piercing another's cloth or cutting an animal's tail off. In short, as far as the term *ifsād* is concerned, it has not any difference with the term *itlāf* which has been mentioned earlier, because *itlāf* has also two categories like it. See al-Qawānīn al-Fiqhiyyah, p.218; Ḍamān al-Mutlifāt, pp.199-200.

[179] Ḍamān al-Mutlifāt, pp.208-220.

[180] In the expression of *ḍarar*, carrying all forms of *ḍarar*, whether *ḍarar fāḥish* (abominable/grave injury) or *ḍarar yasīr* (small injury), because the property of others should be respected by every person, avoiding any injurious act even though *ḍarar yasīr*.

[181] According to ^{c}Izz al-Dīn b. ^{c}Abd al-Salām, direct *itlāf* can be classified into two categories: [1] *Itlāf* for the reason of restoration (*iṣlāḥ*) of the body and preservation (*ḥirz*) of the breath of life (*arwāḥ*) like in case of slaughtering animal, consuming foods and beverages and so on. This *itlāf* is allowed in favour of restoration. [2] *Itlāf* due to self-defence (*al-daf'*). This category could essentially be divided into seven sub-categories: (i)

actions whether intentional or unintentional, whether accidental or mistaken, whether negligent or not, whether minor or major, whether with knowledge or not, whether asleep or awake, whether he assumes that property is his or not, whether he is a sane person or a lunatic, whether the property is in his possession or in the possession of others.[182] However, according to the Shāfiᶜī school[183] there are certain circumstances which exclude the *mubāshir* from liability for destruction (*ḍamān al-mutlifāt*).[184] In short, the

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Killing, cutting and hurting on account of warding off an injurious assailant (*al-ṣiyāl*) from attacking life, dignity and property. (ii) Killing dangerous animals like a snake, scorpion, lion and hyena. (iii) Killing the enemy warding off the malicious injury and transgression upon *Muslimīn*. (iv) Killing the rebels (*bughāh*) in order to ward off their rebellion and to subject them to obedience to the *imām* which has been refused by them. (v) *Itlāf* for warding off the *maᶜṣiyah* (disobedience) like fighting tyrannies (*ẓulmah*) to ward off their suppression. Further cases are demolition of the enemies' houses, cutting of their plants and tearing their cloth. These cases are denominated as a part of *jihād*. (vi) *Itlāf* of anything which could bring to disobedience of God like idol and the like which can denote a way to *shirk*. (vii) *Itlāf* in favour of prevention (*zajr*), meaning the implementation of Islamic punishment like stoning punishment for a married male or female involved in *zinā*, *qiṣāṣ* for homicide and injuries and so on so that such preventions can prevent adultery and criminality. See ᶜIzz al-Dīn b. ᶜAbd al-Salām, Qawāᶜid al-Aḥkām fī Maṣāliḥ al-Anām, vol.2, pp.87-88.

[182] Ashbāh.N, p.308; Majmaᶜ al-Ḍamānāt, p.423; al-Muwaṭṭa', p.614; Aḥmad al-Zarqā', Sharḥ al-Qawāᶜid al-Fiqhiyyah, p.454; al-Qawānīn al-Fiqhiyyah, p.218; al-Qārī, Majallat al-Aḥkām al-Sharᶜiyyah, article 1423, p.443; Majallah, articles 912-916; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.8, p.531; Fatāwā al-Imām al-Nawawī, p.79; Muḥammad Jawād Maghniyyah, al-Fiqh ᶜalā al-Madhāhib al-Khamsah, p.630; Wahbah, Naẓariyyat al-Ḍamān, p.75. However, the Mālikī jurists differentiate the liability for *itlāf* of a minor *mumayyiz* and *ghayr mumayyiz*. See this discussion in the topic of Vicarious Liability in the sub-topic of Liability of Guardian for the Act of his Ward.

[183] Minhāj al-Ṭālibīn, in the margin of al-Sirāj al-Wahhāj, p.536; al-Sirāj al-Wahhāj, p.267; Mughnī al-Muḥtāj, vol.2, pp.277-278; Nihāyat al-Muḥtāj, vol.5, p.152; Wahbah, Naẓariyyat al-Ḍamān, pp.76-77.

[184] [1] Necessity (*ḍarūrah*). [2] Self-defence (*difāᶜ ᶜan al-nafs*), like in cases of reasonable defence of oneself or one's property or one's dignity from an assaulter by wounding his animal or breaking his weapon. [3] Legal execution (*tanfīdh amr al-sharᶜ*), like in case of breaking a container of wine when it cannot be poured out. [4] *Itlāf* occurs in a period of war (*ḥarb*) or rebellion of a group of Muslims (*baghy ṭāᶜifah min al-Muslimīn*). [5] *Force majeure* (*quwwah qāhirah*) like in a case of a person who enters a blacksmith shop while he is working on iron and sparks from his acts fly and burn the cloth of that person, the blacksmith is not liable even though that person enters with his permission. Likewise, in a case of dirt and mud are scattered by the hoofs of an animal and another person's clothes are splashed therewith while it is ridden by its owner. In the first case (for no. [5]), it is contrary to the opinion of the Ḥanafī school which opines that the blacksmith must make good the loss. See Majallah, article 926. In the second case, however, the Ḥanafī school opinion is similar to the Shāfiᶜī school opinion. See al-Mabsūṭ, vol.26, p.189; al-Fatāwā al-Hindiyyah, vol.6, p.50; al-Hidāyah, vol.4, p.198; Majallah, article 932. However, Ibn Abī Laylā opines that the owner or rider is responsible for any act of his animal to another person by making an analogy in the case of stopping or tying up his animal in the public highway. For him, an animal with its owner whether it in the position of walking or stopping is similar. See al-Mabsūṭ, vol.26, p.189.

basic conditions for *itlāf mubāsharah* are injurious act and harm.

In the indirect *itlāf*, the *fuqahā'* put forwards certain factors, besides injurious act and harm, as conditions before an injury can be classified as indirect *itlāf*:

1- *Al-Taᶜaddī* (Trespass or Transgression).[185]

Mentioned in the topic of Strict Liability. Here, it will be elaborated and elucidated with examples. Briefly, this term conveys the meaning "an excess of the legal limits".[186] For example, if a person digs a well in the public highway without any legal permission, or in his own land but with bad intention, and an animal belonging to another falls therein and is destroyed, he is liable because the element of *al-taᶜaddī* existed.[187]

Besides, the digger will also be liable for accidents where a well has been dug with the existence of such elements as in the following cases:

i- If he does so in the courtyard of his house and invites a person to such a spot which he knows to be dangerous and he falls in.

ii- On another's land without his permission.

iii- On a piece of land of which the digger is only the co-proprieter without any permission.

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[185] Al-Mabsūt, vol.27, p.22; Tabyīn al-Ḥaqā'iq, vol.5, p.149; Majmaᶜ al-Ḍamānāt, p.146 and p.165; al-Hidāyah, vol.4, p.191; Mughnī al-Muḥtāj, vol.4, pp.83-84; Ashbāh.N, p.248; Salīm Rustam, Sharḥ al-Majallah, vol.1, p.60; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.1, p.83; Fawzī Fayḍ Allāh, Naẓariyyat al-Ḍamān, pp.88-96; Muṣṭafā b. Aḥmad al-Zarqā', al-Fiᶜl al-Ḍārr, pp.76-79; Aḥmad al-Zarqā', Sharḥ al-Qawāᶜid al-Fiqhiyyah, p.455; Wahbah, Naẓariyyat al-Ḍamān, p.77.

[186] Wahbah, Naẓariyyat al-Ḍamān, p.77. *Tujāwaz al-ḥaqq aw māyusmaḥ bih al-sharᶜ.*

[187] Al-Hidāyah, vol.4, p.193; Mughnī al-Muḥtāj, vol.4, pp.82-83; Tabyīn al-Ḥaqā'iq, vol.5, p.145; al-Qawānīn al-Fiqhiyyah, p.218; al-Fatāwā al-Hindiyyah, vol.6, p.45; Aḥmad al-Zarqā', Sharḥ al-Qawāᶜid al-Fiqhiyyah, p.218; Salīm Rustam, Sharḥ al-Majallah, vol.1, p.515; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.1, p.83; Majmaᶜ al-Ḍamānāt, p.146; Wahbah, Naẓariyyat al-Ḍamān, p.199. Many examples can be seen in the topic of Strict Liability.

iv- On a narrow public way which can cause injury to the passer-by.[188]

According to Muṣṭafā b. Aḥmad b. Muḥammad al-Zarqā',[189] *al-taᶜaddī* in indirect *itlāf* could appear in three ways:

i- Indirect *itlāf* by action and simultaneously with *al-taᶜaddī* (*al-tasabbub bi al-fiᶜl maᶜa wujūd al-taᶜaddī*). In this case, when a *mutasabbib* directs his act which is accompanied with the element of *al-taᶜaddī*, he will be held liable. For example, if a person is riding his animal on the highway and another person strikes or goads that animal without the consent of the rider, so as to cause it to kill a man by kicking or treading him down or running over him, the responsibility rests upon the person who struck or goaded it, not upon the rider[190] as with the case of a person who digs a hole in the public highway without prior permission from the authority and causes damage to another person.[191]

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[188] Minhāj al-Ṭālibīn, in the margin of Mughnī al-Muḥtāj, vol.4, p.84. But there are certain cases in which the digger will not bear the liability, viz: [1] The road is wide and it does not cause injury to a passer-by. [2] If the authority has approved it. [3] If the well is dug for the public interest like for drinking or for collecting the rain.

[189] Muṣṭafā b. Aḥmad al-Zarqā', al-Fiᶜl al-Ḍārr, pp.81-82.

[190] Al-Hidāyah, vol.4, p.202; al-Mabsūṭ, vol.27, p.2; al-Iqnāᶜ, vol.2, p.242; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.468; Kifāyat al-Akhyār, p.644; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.423; al-Durr al-Mukhtār, vol.2, p.469; Lisān al-Ḥukkām, p.279; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.456; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.282; al-Shaybānī, Kitāb al-Aṣl, vol.4, p.501; al-Fatāwā al-Hindiyyah, vol.6, p.51; al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.6, pp.400-401; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.608; Radd al-Muḥtār, vol.6, p.608.

[191] Al-Hidāyah, vol.4, pp.192-193; al-Mabsūṭ, vol.27, p.14; al-Fatāwā al-Hindiyyah, vol.6, p.45; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.461; al-Jāmiᶜ al-Ṣaghīr, p.514; al-Jāmiᶜ al-Ṣaghīr in the margin Kitāb al-Kharāj, p.119; Majmaᶜ al-Ḍamānāt, p.178; Ashbāh.N, p.284; Tabyīn al-Ḥaqā'iq, vol.6, p.145; Mughnī al-Muḥtāj, vol.4, pp.82-83; Majmaᶜ al-Anhur, vol.2, p.652; Badr al-Muttaqā in the margin of Majmaᶜ al-Anhur, vol.2, p.652; al-Ajwibah al-Khafīfah, p.386; al-Wajīz, vol.2, p.149; al-Muhadhdhab, vol.3, p.206; al-Shīrāzī, Kitāb al-Tanbīh, p.127; al-Iqnāᶜ, vol.2, p.242; al-Ṣāwī, Bulghat al-Sālik, vol.2, p.385; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, pp.384-385; al-Durr al-Mukhtār, vol.2, pp.462-463; Muᶜīn al-Ḥukkām, pp.210-211; Fatḥ al-Wahhāb, vol.2, pp.174-175; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.274 and 278; al-Shaybānī, Kitāb al-Aṣl, vol.4, p.517.

ii- Indirect *itlāf* by omission and simultaneously with *al-taᶜaddī* (*al-tasabbub biᶜadam al-fiᶜl maᶜa wujūd al-taᶜaddī*). Omission is considered when a person failed to do what is regarded as a duty upon him in the course of an action. Any injury resulting from such omission is an actionable wrong. The *fuqahā'* unanimously agreed[192] that if a person has an extremely great necessity (*ḍarūrah*) for something owned by another, such as food for the hungry and water for the thirsty, and its owner did not permit that person to satisfy his need and as a result he perished, a tort liability is imposed upon the owner. His position is similar to a person who has omitted helping another who was burning or drowning.[193] Ibn Qudāmah maintains that if a fight take place between the owner of the property and the person who is in necessity, the result of which is the death of the latter, he becomes a *shahīd* (martyr) and the owner is liable. But, if the owner dies, it will be overlooked (*hadar*).[194] Nevertheless, according to al-Nawawī taking another's property by force is preferred to fighting between them.[195] But, if the fight happened and the owner died, the person who is in necessity would not be liable because he is not considered *al-mutaᶜaddī*. If he died, the owner would be liable for the *qiṣāṣ* punishment.[196]

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[192] Al-Mughnī, vol.8, p.602; al-Muhadhdhab, vol.2, p.877; al-Shāṭibī, al-Muwāfaqāt, vol.2, p.352; Radd al-Muḥtār, vol.5, p.238.

[193] Al-Mughnī, vol.8, p.602. In the Shāfiᶜī school, the owner of food or water merely bears a sin before God, he does not bear any liability before judge in the court. See al-Majmūᶜ Sharḥ al-Muhadhdhab, vol.9, p.43; Mughnī al-Muḥtāj, vol.4, p.309. However, he is definitely responsible to give his help to another who asks for food to prevent suffering from hunger. See Ashbāh.S, p.86; Minhāj al-Ṭālibīn in the margin of Mughnī al-Muḥtāj, vol.4, p.308.

[194] Al-Mughnī, vol.8, p.602; Manār al-Sabīl, vol.2, p.335.

[195] Al-Majmūᶜ Sharḥ al-Muhadhdhab, vol.9, p.43, cited in al-Muhadhdhab, vol.2, p.878.

[196] Mughnī al-Muḥtāj, vol.4, p.309; al-Iqnāᶜ, vol.2, p.276. See a few examples which could be related to omission of duty in the topic of Vicarious Liability. This discussion also could be seen in Tabṣirat al-Ḥukkām, vol.2, p.193 and al-Muḥallā, vol.6, p.230. In brief, the *fuqahā'* give permission to fight the owner who has

iii- Indirect *itlāf* in the case of negligence (*taqṣīr*) and simultaneus *al-taᶜaddī*. When a person has done an act out of his volition without taking proper care or precaution for its consequence, or if he is indifferent in his conduct to an act which a man is bound by law to do, he is considered to be guilty of negligence. The *fuqahā'* exemplified with a case of a father who handed his small son to a skilful swimmer to teach him to swim. The child drowns and the instructor is held to be negligent. The teacher will be held to have a liability for what had happened and as a result, his *ᶜāqilah* has to pay a *diyah* of manslaughter (*qatl shibh ᶜamd*) on his behalf.[197]

2- *Al-Taᶜammud* (Deliberately or Intentionally).[198]

In the Islamic law, it denotes "to act of one's own volition".[199] In relating to *itlāf*, it conveys "to do an action on one's own volition which leads the injury",[200] such as when two persons are tugging and a third person cut the rope in the middle with intent to knock down the tugging parties. If they fall down and die, the third person is liable because of his act. But, if his act is for the purpose of reconciling them, he will not be liable because

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omitted to help another who is in necessity. In case the owner die, it will be overlooked and such person should be liable for the value of the food which he has consumed.

[197] Minhāj al-Ṭālibīn in the margin of al-Sirāj al-Wahhāj, p.504; Mughnī al-Muḥtāj, vol.4, p.82; al-Mughnī, vol.7, p.831; Manār al-Sabīl, vol.2, p.336; al-Muhadhdhab, vol.2, p.192; Fatḥ al-Wahhāb, vol.2, p.174.

[198] Most of the *fuqahā'* prefer to apply merely the element of *al-taᶜaddī* rather than *al-taᶜammud* as the condition of *itlāf* indirectly. It is because in reality the element of *al-taᶜammud* is included in *al-taᶜaddī* conveying the meaning of *al-taᶜammud* is *al-taᶜaddī*. They give an example to uphold their opinion where if a lunatic shouts at an animal and as a result of his shouting, its rider or load is destroyed in consequence of the animal jumping with fright. The lunatic is liable for compensation even though he has no injurious intention, because he has been considered as *al-mutaᶜaddī*. See Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.5, p.749.

[199] Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.5, p.748.

[200] Wahbah, Naẓariyyat al-Ḍamān, p.198.

his act has not been direct and forcible and there is no malice.[201]

3- The injury from indirect *itlāf* is not resulted from an extraneous cause.

There is no extraneous cause involved with *mutasabbib* in an *itlāf* indirectly. Such *itlāf* cannot be called indirect *itlāf*. Therefore, in a case in which a *mubāshir* and a *mutasabbib* get together in an injurious act, the judgement falls on the *mubāshir*, not on the *mutasabbib*. For example, a person (*mutasabbib*) digs a well in the public highway and another person (*mubāshir*) causes an animal of another to fall therein and to be destroyed. *Mubāshir* is responsible therefore, and no liability rests with the *mutasabbib*.[202]

With regard to the time for assessment of the compensation (*taᶜwīḍ*) of *itlāf* property, it will be observed in accordance with the opinion of the *fuqahā'*. The Ḥanafī school ruled that it should follow the value on the day of *talaf*.[203] This is also the opinion of the Mālikī school[204] and the Shāfiʿī school.[205] However, the Ḥanbalī school has

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[201] Majmaᶜ al-Anhur, vol.2, p.661; al-Durr al-Mukhtār, vol.2, p.468; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.606; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.5, p.49; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.444; Tabyīn al-Ḥaqā'iq, vol.6, p.151; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, pp.273-274; al-Ajwibah al-Khafīfah, p.389.

[202] Majallah, article 90. There are also several examples in the same sense in Mughnī al-Muḥtāj, vol.4, p.82. It even mentions a formula which can be as groundwork and maxim, that is "*al-mubāsharah muqaddamah ᶜalā al-sabab*" meaning *mubāshir* takes precedence of responsibility over the secondary cause (*mutasabbib*). See also Ashbāh.S, p.162. However, there are certain exceptions in which *mutasabbib* still bears the liability. See Muṣṭafā Aḥmad al-Zarqā', al-Fiᶜl al-Ḍārr, p.93; Wahbah, Naẓariyyat al-Ḍamān, pp.191-192.

[203] Al-Mabsūṭ, vol.11, p.98; Tabyīn al-Ḥaqā'iq, vol.6, p.223; Jāmiᶜ al-Fuṣūlayn, vol.2, p.130; al-Durr al-Mukhtār, vol.2, p.333.

[204] Al-Qawānīn al-Fiqhiyyah, p.218; Bidāyat al-Mujtahid, vol.2, p.238; al-Dardīr, al-Sharḥ al-Kabīr, vol.2, p.443.

[205] Minhāj al-Ṭālibīn in the margin of Mughnī al-Muḥtāj, vol.2, p.284; Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.147; Mughnī al-Muḥtāj, vol.2, p.284; Ḥāshiyatān Qalyūbī wa ᶜUmayrah, vol.3, p.33; al-Iqnāᶜ, vol.2, p.58; Fatḥ al-Wahhāb, vol.1, p.276; Zakariyyā al-Anṣārī, Minhaj al-Ṭullāb printed with Minhāj al-Ṭālibīn wa

grouped the compensation in the two following kinds of property. Their positions are similar to the assessment for compensation in *ghaṣb*.[206]

This chapter has provided the discussion on torts against persons and property with brief academic bases. The scope of these torts is treated from classical and contemporary sources of Islamic law. It could be recognised that the protection of both person and property is a very important matter in Islām. Apart from that, the notion of liability for premises and animals will be given attention in the next chapter.

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[205] Umdat al-Muftīn, p.147; Zakariyyā al-Anṣārī, Sharḥ Minhaj al-Ṭullāb in the margin of Ḥāshiyat al-Jamal ᶜalā Sharḥ al-Minhaj, vol.3, p.481; Sulaymān al-Jamal, Ḥāshiyat al-Jamal ᶜalā Sharḥ al-Minhaj, vol.3, p.481. Its value is based on the place where *itlāf* occurred.

[206] Majallat al-Aḥkām al-Sharᶜiyyah, article 1429, p.444; al-Mughnī, vol.5, p.422. Its value is based on the state where *itlāf* occurred.

CHAPTER THREE

LIABILITY FOR PREMISES

INTRODUCTION

The *fuqahā'* generally provide a chapter concerning this topic in their manual texts. Specifically, the Ḥanafī jurists include a special chapter to deal with this topic which is recognized as "*al-ḥā'iṭ al-mā'il*" which may be translated as "inclining wall". However, the Mālikīs, Shāfi'īs and Ḥanbalīs generally deal with this topic in the chapter of "*al-diyāt*". The difference in the arrangement of this topic in the law texts between the Ḥanafīs and others may be on several reasons. In such a chapter, they demonstrate the theory and principles of liability for premises and a general theory of damages as well. They use the word "*al-ḥā'iṭ*" as including houses, buildings, balconies, wings and roof-gutters.

However, the prime importance which is attached to this section covers the following: the basis of liability, liability for defective premises, as well as the request and the statement of testimony, who is entitled to make *taqaddum* (request), collective ownership of dangerous premises, the case of attachments to a structure, liability for failing to remove the wreckage of building, the case of a cracked wall and conditions for the liability of dangerous premises.

THE BASIS OF LIABILITY

It should be remembered that no action can be taken, in Islamic law, against injury caused by inanimate beings because they are not born to perform any duty or do not have a specific legal duty to take care of someone else. Logically, neither any damages can be claimed from them. This exemption is considerably simplified by relying on a few celebrated Ḥadīths. One of them runs as follows:

> "Torts caused by animals, by (falling into) a well and a mine is to be overlooked....".[1]

From this Ḥadīth, it can be understood that no recompense is payable for a wound by falling into a well and a mine because they are considered as inanimate beings. In other words, if anybody (or any animal of another) dies as a result of falling down a well or a mine shaft without anybody causing his fall, there shall no compensation paid by anybody.[2] This is provided that the well or the mine is dug at the permitted place. Otherwise, its owner is responsible.[3] The cases of this Ḥadīth may be considered the same as others of inanimate beings like houses. If, however, the well is dug mainly for the purpose of doing harm to a person or some persons, then compensation becomes essential.

In the explanation of al-Nawawī of this Ḥadīth, if a person is injured by falling

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[1] Ṣaḥīḥ Muslim, vol.3, p.926; Muwaṭṭa', p.626. See also in Zarrūq, Sharḥ Zarrūq ʿalā Matn al-Risālah, vol.2, p.244; al-Thamar al-Dānī, p.526; Bidāyat al-Mujtahid, vol.2, p.312; al-ʿUddah Sharḥ al-ʿUmdah, p.448.

[2] Al-Risālah, p.126. See also al-Thamar al-Dānī, p.526; Zarrūq, Sharḥ Zarrūq ʿalā Matn al-Risālah, vol.2, p.244; al-Furūq, vol.4, p.28.

[3] Ibn Nājī, Sharḥ Ibn Nājī ʿalā Matn al-Risālah printed with Sharḥ Zarrūq ʿalā Matn al-Risālah, vol.2, pp.244-245; al-Furūq, vol.4, p.27.

into a well, this is overlooked. Likewise, if a person digs a well on land of his ownership or in uncultivated land (*mawāt*) and somebody is injured (by falling into it), no liability is due on the person. They said (*qīl*): The meaning of "*al-bi'r*" is "*al-bi'r al-qadīmah*" (the ancient well) who digger (owner) is unknown. They said (*qīl*): The meaning of this Ḥadīth is that if a person hires a hireling for restoration of his well or for irrigation and the hireling dies in it, the hirer is not liable.[4]

In another version, it is reported as follows:

> "Injury caused (by falling) into a well, into a mine and caused by animals is not actionable....".[5]

From the illustration of both Ḥadīths, the damage done by such inanimate beings does not entail liability. In explaining this Ḥadīth, the *fuqahā'* gives some cases as follows:[6]

1- If a person digs a mine in his own land or in uncultivated land and a man falls into it, the digger is not liable. Similarly, if a person hires some workers to work on his land or on uncultivated land and they fall into the mine, the person is also not liable.

2- If a person digs a well in his own land or in uncultivated land and a man falls into it, the person is not liable. In the same manner, if the person employs another to dig a well

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[4] Fatāwā al-Nawawī, p.294. See also Manār al-Sabīl, vol.2, p.337; al-ʿUddah Sharḥ al-ʿUmdah, p.448; al-Thamar al-Dānī, p.526.

[5] Ṣaḥīḥ Muslim, vol.3, p.926. See also Ibn Nājī, Sharḥ Ibn Nājī ʿalā Matn al-Risālah printed with Sharḥ Zarrūq ʿalā Matn al-Risālah, vol.2, p.244.

[6] Ṣaḥīḥ Muslim bi Sharḥ al-Nawawī, vol.11, p.226; Sharḥ al-ʿAynī ʿalā al-Bukhārī, vol.9, p.102. See also Amīn, al-Mas'ūliyyah al-Taqṣīriyyah ʿan Fiʿl al-Ghayr, p.217.

on his own land, he is free from liability if the digger (employee) is injured by falling into it.

3- If a person digs a well on the public highway or on another's land without his permission and a man falls into it and is injured, the liability for compensation is on the *ʿāqilah* of the digger and the payment of *kaffārah* is due on the property of the digger. Otherwise, if something other than human beings is damaged, the digger is liable and compensation is taken from the digger's property.

In the light of all the Ḥadīths and juristic judicial cases mentioned above, we may safely say that the notion of liability for premises does not cover any tort that might have emerged from them. Nonetheless, the owner or the occupier of the premises (inanimate things) is liable if he has contributed to the injury to others either through his negligence, mistake, nuisance, etc. In other words, in spite of non-liability of injuries arising due to premises or inanimate things, the contributory acts or omission of the owners or the occupiers of the dangerous inanimate things or premises and failure to keep them properly will make them liable for injuries suffered by others.

However, regarding the harm done by animals will not be discussed in this part.

LIABILITY FOR DEFECTIVE PREMISES

Injuries suffered as a result of the dangerous state of another's premises generally are discussed under this topic. However, defective premises will be divided into two groups, viz: first, an original defect in the premises (*al-khalal al-aṣlī fī al-binā'*) and second, an unexpected defect in the premises (*al-khalal al-ṭārī'*).[7]

An Original Defect in the Premises

It is an *ijmā'* among the *fuqahā'* that any person who builds a wall on his land and makes it lean or overhang the highway or the land of a neighbour at the initial time of construction shall be liable for any damage that its fall may cause to others. His act can be seen as an act of a tortfeasor as it obstructs the highway and renders it dangerous to the passer-by and the adjoining premises. The *fuqahā'* decide that he acted as a *mutaᶜaddīn* capable of prejudicing others' rights with defective premises at the initial time of construction. This rule is extended to any defective premises which have a defect from the beginning of the construction even if it is through negligence, in the same manner as a person who constructs an overhanging wing or balcony or gallery, etc., projecting over the highway or the land of another.[8]

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[7] Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.283; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.6, p.379.

[8] Al-Mughnī, vol.7, p.827; al-Hidāyah, vol.4, p.196; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.283; Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.284; Fatḥ al-Wahhāb, vol.2, p.175; al-Maḥallī printed with Ḥāshiyatān Qalyūbī wa ᶜUmayrah, vol.4, p.149; Minhāj al-Ṭālibīn in the margin of Mughnī al-Muḥtāj, vol.4, p.86; Tabṣirat al-Ḥukkām, vol.2, p.247; al-Mabsūṭ, vol.27, p.9; Majmaᶜ al-Ḍamānāt, p.183; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.5, p.47; al-Ajwibah al-Khafīfah, p.388; al-Durr al-Mukhtār, vol.2, p.466; al-Dardīr, al-Sharḥ al-Kabīr,

An Unexpected Defect at Premises

In a case of a properly constructed wall or building in vertical equilibrium at the initial time of construction, which later leans and slants onto the highway or another's property, the *fuqahā'* have a different opinion as to whether the owner of the wall or building is to be held liable for any damage that emerges from its collapsing after he has been warned by the inhabitants to demolish it but nevertheless ignores them. Their opinions can be divided into three groups.

The first group

The owner is absolutely liable by all means whether he is requested to demolish it or not when it began to lean. This is the opinion of some of the Shāfiᶜī jurists, Ashhab, Ibn Abī Laylā, Abū Thawr, Isḥāq and some of the Ḥanbalī jurists. This group argued that the owner is responsible for maintaining his premises in such a dangerous condition. If, therefore, he does not take care to maintain it, he is regarded as *mutaᶜaddīn* and has been negligent. Substantially, they equate this case with that of an inclining building or wall arising out of the initial construction.[9]

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vol.4, p.356; Ibn Nājī, Sharḥ Ibn Nājī ᶜalā Matn al-Risālah printed with Sharḥ Zarrūq ᶜalā Matn al-Risālah, vol.2, p.244; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, p.408; al-Mīdānī, al-Lubāb fī Sharḥ al-Kitāb, vol.2, p.138; al-Fatāwā al-Hindiyyah, vol.6, p.36; Zakariyyā al-Anṣārī, Sharḥ al-Taḥrīr in the margin of Ḥāshiyat al-Sharqāwī, vol.2, p.497; al-Khirshī, Fatḥ al-Jalīl ᶜalā Mukhtaṣar Khalīl, vol.8, p.111; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.124; Sharḥ Muntahā al-Irādāt, vol.2, p.429; Majallat al-Aḥkām al-Sharᶜiyyah, article 1445, p.449; Mūjabāt, vol.1, p.249; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.6, p.380; Wahbah, Naẓariyyat al-Ḍamān, p.260, cf., Ḍamān al-Mutlifāt, p.432.

[9] Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.284; al-Maḥallī printed with Ḥāshiyatān Qalyūbī wa ᶜUmayrah, vol.4, p.149; Sharḥ Muntahā al-Irādāt, vol.2, pp.428-429; al-Mughnī, vol.7, p.828; Mughnī al-Muḥtāj, vol.4,

The second group

The owner of the building or wall is not absolutely liable at all, as he built it on his own property which he has the right to, while the collapse down of the building or wall is not by his act, whether he has been requested to demolish it or not. This opinion is attributed to the Shāfiᶜī school (according to the most correct opinion), the Ẓāhirī school, the Ḥanafī school in accordance with *qiyās*[10] and it is a view of the Ḥanbalī school according to the popular opinion. They substantiate their opinion by reason that the owner is not considered *al-mutaᶜaddī*. He built it on his own property in vertical equilibrium and its tottering or the wind shaking it were not his acts. They also consider this case as if resulting from *an act of God.*[11]

The third group

If the owner had previously been warned to knock down his wall as it is likely to

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p.86; Nihāyat al-Muḥtāj, vol.7, p.359; al-Shīrāzī, Kitāb al-Tanbīh, p.128; al-Muhadhdhab, vol.3, p.207; al-Muḥallā, vol.10, pp.527-528, issue 2102; Ibn Nājī, Sharḥ Ibn Nājī ᶜalā Matn al-Risālah printed with Sharḥ Zarrūq ᶜalā Matn al-Risālah, vol.2, p.244; al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.321.

[10] The principle of *qiyās* in the view of this school is the owner is not a *mutaᶜaddīn* since the building or the wall is built properly on own property and the action of warning and request to pull it down will not impose liability on himself. See al-Mabsūṭ, vol.27, p.9.

[11] Al-Hidāyah, vol.4, p.195; al-Mabsūṭ, vol.27, p.9; al-Muhadhdhab, vol.3, p.207; al-Shīrāzī, Kitāb al-Tanbīh, p.128; Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.284; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.5, p.46; al-Sharqāwī, Ḥāshiyat al-Sharqāwī ᶜalā Sharḥ al-Taḥrīr, vol.2, p.459; Ashbāh.S, p.86; al-Fatāwā al-Hindiyyah, vol.6, p.36; Fatḥ al-Wahhāb, vol.2, p.175; al-Maḥallī printed with Ḥāshiyatān Qalyūbī wa ᶜUmayrah, vol.4, p.149; al-Muḥallā, vol.10, p.528, issue 2102; Mughnī al-Muḥtāj, vol.4, p.86; Nihāyat al-Muḥtāj, vol.7, p.359; al-Mughnī, vol.7, p.828; al-Mīzān al-Kubrā, vol.2, p.129; Raḥmat al-Ummah, p.275; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.124; al-Rawḍ al-Murbiᶜ, p.335.

collapse and sufficient time has elapsed for the wall to be knocked down, the owner is then obliged to make good the loss if the wall collapses and causes damage to any person or property. This group argues with emphasis that the right to the highway belongs to the public and as such the public has the right to request him to demolish his leaning wall before it could cause any damage. Failure to comply to that request will make him liable. If the public, however, keep silent about their right to request demolition, the owner will not be held liable. This group seems to emphasize the need for the owner to have had a previous request (*muṭālabah*) made to him. This group consists of Shurayḥ, al-Nakhaᶜī, al-Shaᶜbī, al-Ḥasan, al-Thawrī, etc. of the *tābiᶜīn* (*a'immat al-tābiᶜīn*), the Ḥanafī school in accordance with *istiḥsān*, the *jumhūr fuqahā'* of the Mālikī school and the preferred opinion (*qawl al-mukhtār*) of the Ḥanbalī school. In the same manner where a man finds a garment of another, and its owner demands (*ṭalab*) it of the man, if the man refuse to deliver it, he is guilty of a *al-taᶜaddī* and is consequently responsible for the garment if it should be lost while in his possession.[12]

They also asserted that the owner or anyone who has the right to demolish, such as a leasor (*mu'ajjir*), a pledger (*rāhin*), a partner (*shārik*), a trustee/executor (*waṣī*), a guardian (like a father), should be requested to do so. That is to say that a pledgee (*murtahin*), a lessee (*musta'jir*), a trustee (*mūdiᶜ*), a tenant (*sākin al-dār*), a borrower (*mustaᶜīr*) cannot be requested to demolish the building or wall because they have no

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[12] Al-Mughnī, vol.7, p.828; al-Hidāyah, vol.4, p.195; al-Mabsūṭ, vol.27, p.9; al-Mudawwanah, vol.4, p.667; Mukhtaṣar, p.348; Ibn Nājī, Sharḥ Ibn Nājī ᶜalā Matn al-Risālah printed with Sharḥ Zarrūqᶜ alā Matn al-Risālah, vol.2, p.244; al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.321; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.321; Majmaᶜ al-Ḍamānāt, p.182; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.283; al-Durr al-Mukhtār, vol.2, p.465; al-Fatāwā al-Hindiyyah, vol.6, p.36; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.5, pp.46-47; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, p.408; al-Mīzān al-Kubrā, vol.2, p.129; Raḥmat al-Ummah, p.275; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.124.

such right.[13]

In the Majallah, this issue has been enacted as follows:

"Provided that the person giving the warning has the right to do so. Thus, if the wall has collapsed on to a neighbour's house, the person giving the warning must be one of the inhabitants of that house. A warning given by a person outside (*min al-khārij* who is not one of the inhabitants) is of no effect. If the wall collapses on to a private road (*al-ṭarīq al-khāss*), the person giving the warning must be a person having a right of way over such road. If it collapses on the public highway (*al-ṭarīq al-ᶜāmm*), any person whatsoever has the right of giving the warning".[14]

THE REQUEST (*AL-MUTĀLABAH*), THE STATEMENT OF TESTIMONY (*AL-ISHHĀD*) AND THEIR CONDITIONS

In legal terminology, the *fuqahā'* use the word *al-taqaddum* for the signification of *al-muṭālabah* or *al-indhār* (warning/notice). It signifies the giving prior notice and recommendation in order to repel and remove an expected injury.[15] The *mutaqaddim*

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[13] Al-MughnĪ, vol.7, p.829; al-Mudawwanah, vol.4, p.667; al-Durr al-Mukhtār, vol.2, p.465; al-Mabsūṭ, vol.27, p.10; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.283; Majmaᶜ al-Ḍamānāt, p.182; al-Hidāyah, vol.4, p.196; al-Ikhtiyār li TaᶜlĪl al-Mukhtār, vol.5, p.47; al-DardĪr, al-Sharḥ al-ṢaghĪr in the margin of Bulghat al-Sālik, vol.2, p.408; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.124; ᶜAlĪ Ḥaydar, Durar al-Ḥukkām, vol.8, p.561.

[14] Majallah, article 928. Al-MarghĪnānĪ and al-ḤaṣkafĪ said: "If a wall leans over towards a neighbouring house, the owner of the house is entitled to require it to be pulled down, and also the occupants of the house (*sukkān*)- (whether they are hirers or tenants) have the same right. Further, if the owner (*ṣāḥib al-dār*) or occupants of the house grant the owner of the wall a term of delay, or exempt him from responsibility for any damage which may be occasioned by it, it is valid and accepted (*jā'iz*) and the owner of the wall is not responsible in the case of any thing being destroyed by its fall because the right of the owner or occupants alone is concerned. It is otherwise where a wall leans over a road and the *qāḍī* (magistrate/judge), or the person who made the request for it to be pulled down grants a term of delay or an exemption, for this is not valid (*lā yaṣiḥḥ*); the owner of the wall consequently remains responsible if the wall falls and destroys anything because in this case the right of every one is concerned, and the *qāḍī* or the person is not at liberty to annul the right of the public. See al-Hidāyah, vol.4, p.196; al-Durr al-Mukhtār, vol.2, pp.465-466. See also in al-MughnĪ, vol.7, pp.828-829.

[15] Majallah, article 889. *Al-Tanbīh wa al-tawṣiyah bi daf i al-ḍarar al-malḥūẓ wa izālatuh gabl wuqūᶜih.*

says: "Your wall has become dangerous, you must therefore repair it or take it down lest it prove destructive",[16] or: "Pull down your wall".[17]

The application of *muṭālabah* should indicate a claim to the owner of the wall by the expression for restoration (*iṣlāḥ*) or for demolition (*hadm*), not by the expression which indicates mere advice. For example, if a person said: "Your wall is leaning, so normally it has to be pulled down", this expression is not a request.[18]

It is to be observed that the application of *taqaddum* is a condition for responsibility. Consequently, if the owner neglects that *taqaddum* through not taking care of the wall by restoration or demolition, he will be held liable if the wall collapses and injures another. The *ishhād* is not as the *taqaddum* a condition which should be fulfilled. It is just to support the *taqaddum* to give rise to liability. In fact, the *ishhād* is called in aid merely with a view to establish the *taqaddum* in the case of the owner of the wall denying the *taqaddum*, and it is, therefore, used only for precaution (*iḥtiyāṭ*). As a result, if the owner of the wall denies the *taqaddum*, possibly the evidence of witnesses can establish his conviction as a tortfeasor.[19]

The type of *ishhād* is effected by a person who says to the bystanders, "Be you

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[16] Jāmiᶜ al-Fuṣūlayn, vol.2, p.211; Majmaᶜ al-Ḍamānāt, p.182; al-Mabsūṭ, vol.27, p.9; al-Dardīr, al-Sharḥ al-Kabīr, vol.4, p.356; Sharḥ al-ᶜInāyah ᶜalā al-Hidāyah printed with Natā'ij al-Afkār, vol.10, p.321; Ḍamān al-Mutlifāt, p.438.

[17] Majallah, article 928. *Ihdam ḥā'iṭik.*

[18] Jāmiᶜ al-Fuṣūlayn, vol.2, p.211; Majmaᶜ al-Ḍamānāt, p.182; Sharḥ al-ᶜInāyah ᶜalā al-Hidāyah printed with Natā'ij al-Afkār, vol.10, p.321; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.8, p.453; Ḍamān al-Mutlifāt, p.438.

[19] Al-Mabsūṭ, vol.27, p.9; al-Hidāyah, vol.4, p.196; Jāmiᶜ al-Fuṣūlayn, vol.2, p.211; Natā'ij al-Afkār, vol.10, p.322; Majmaᶜ al-Ḍamānāt, p.182; al-Fatāwā al-Hindiyyah, vol.6, p.36. See also al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.321; al-Ajwibah al-Khafīfah, p.387.

witnesses that I have required (*taqaddamtu*) this person to take down his wall".[20]

The *ishhād* should be laid down in three matters in order to proceed to a liability for a person. The first *ishhād* is a *taqaddum* to repair the wall. The second *ishhād* is destruction which has happened and which causes damage to another. The third *ishhād* is that the wall is under the tortfeasor's ownership from the time of *ishhād* to the time of an incident.[21]

The *ishhād* is established by the testimony of two men, or of one man and two women. It is to establish the *taqaddum*. This condition is also for convicting someone who fails to demolish his inclining wall after he has previously been warned and sufficient time has elapsed.[22]

It is proper, however, to remark that the *ishhād* before a wall has become ruinous or cracked is invalid as the element of *al-taᶜaddī* cannot be established.[23]

In brief, if the wall falls down and causes damage to any person or property without the element of *mubāsharah* or *tasabbub* as well as *al-taᶜaddī*, the owner of the wall is not liable for compensation. He is also not liable if the wall falls down very soon after *taqaddum* without much delay, or the incident happens when there is insufficient time to knock down the wall or the wall falls down within the time of finding the workers

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[20] Al-Hidāyah, vol.4, p.196; Natā'ij al-Afkār, vol.10, p.322; Jāmiᶜ al-Fuṣūlayn, vol.2, p.211; Majmaʿ al-Ḍamānāt, p.182; al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah vol.3, p.412; Ḍamān al-Mutlifāt, p.438. *Ashhadu annī qad taqaddamtu ilā hādhā al-rajul fī hadm ḥā'itih hādhā.*

[21] Al-Durr al-Mukhtār, vol.2, p.465; Ḍamān al-Mutlifāt, p.439.

[22] Al-Hidāyah, vol.4, p.196; al-Mabsūṭ, vol.27, p.9; al-Durr al-Mukhtār, vol.2, p.466; Sharḥ al-ᶜInāyah ᶜalā al-Hidāyah and Ḥāshiyah Sharḥ al-ᶜInāyah ᶜalā al-Hidāyah printed with Natā'ij al-Afkār, vol.10, p.321; Majmaᶜ Ḍamānāt, p.182; al-Fatāwā al-Hindiyyah, vol.6, pp.36-37; al-Ajwibah al-Khafīfah, p.388.

[23] Al-Hidāyah, vol.4, p.196; al-Durr al-Mukhtār, vol.2, p.466.

to repair or knock it down, by reason of the fact that the owner is not negligent (*taqṣīr*).[24]

WHO IS ENTITLED TO MAKE *TAQADDUM* ?

It is a condition that the person giving a warning or a request must have a right to do so. In the case of a wall leaning over the public highway, Muslim and *dhimmī* are treated on an equal footing with respect to the *muṭālabah* for pulling down the wall as all mankind are partners (*shurakā'*) in the right of passing along the road. The *taqaddum* is therefore valid by whomsoever it be made, whether man or woman or free man or slave (*mukātib*)- (provided his master gives him permission to litigate the point) or minor (with permission to litigate from his guardian). It is also valid whether made by the authority (*sultān*) or any other; for, as the *muṭālabah* affects a matter of right in which all are equally concerned, all are therefore equally entitled to make it.[25]

If the wall leans over towards a neighbouring house, the neighbour is entitled to require it to be pulled down. If in the neighbour's house there are others, whether lessees or borrowers or tenants, such persons in particular have the right to *muṭālabah*, not others.

If there are partners in the house or many persons occupy it, the *muṭālabah* by one

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[24] Jāmiᶜ al-Fuṣūlayn, vol.2, p.211; al-Mughnī, vol.7, p.828; al-Dardīr, al-Sharḥ al-Kabīr in the margin of Ḥāshiyat al-Dusūqī, vol.4, p.356; Majmaᶜ al-Ḍamānāt, p.182; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.8, p.558; al-Fatāwā al-Hindiyyah, vol.6, p.37; al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.412; Ḍamān al-Mutlifāt, p.440; Majallah, article 928.

[25] Al-Hidāyah, vol.4, p.196; al-Mabsūṭ, vol.27, p.9; al-Durr al-Mukhtār, vol.2,p.466; Sharḥ al-ᶜInāyah ᶜalā al-Hidāyah and Ḥāshiyah Sharḥ al-ᶜInāyah ᶜalā al-Hidāyah printed with Natā'ij al-Afkār, vol.10, p.321; Majmaᶜ al-Ḍamānāt, p.182; al-Fatāwā al-Hindiyyah, vol.6, pp.36-37; al-Mughnī, vol.7, p.828; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.124; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.8, p.563.

of them is as valid as if it has been required by all of them. This case is similar to the case of *muṭālabah* by one of the passers-by on the road to the owner of the leaning wall.[26]

If the wall leans over a private road, only a person, having a right of way over such a road, has a right of *muṭālabah*, not any other person.[27]

Any person who has the right of *taqaddum*, also has the right to grant delay (*al-ta'jīl*) and exemption (*al-ibrā'*) from the liability except in the case of the public highway. If, therefore, the wall leans over another's property and the owner of the property requests the owner of the wall to demolish it, and then the owner of the property delays or releases the owner of the wall from any liability for damage which may be occasioned by it, the owner of the wall is not liable if any thing is destroyed by its fall. The action of delay can also be taken by occupants (*sākinū hā/sākin al-dār* such as tenants). The delay and the remission made by the owner of the property or occupants are valid because the right of the owner of the property or occupants alone is concerned. But if they give a delay of a specific period and the wall collapses after that period, the owner of the wall will be then liable.[28]

If the wall leans over a track (*al-darb*), the right of *muṭālabah* is to the people using that track because they have a status of *milk* for that track. A *muṭālabah* to demolish the wall can be requested by one of them, but he cannot grant any delay or

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[26] Al-Mughnī, vol.7, p.828; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.124; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.8, p.563; Ḍamān al-Mutlifāt, p.441; Majallah, article 928.

[27] Majallah, article 928.

[28] Al-Mughnī, vol.7, p.829; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.124; al-Ajwibah al-Khafīfah, p.388; al-Hidāyah, vol.4, p.196; Jāmiᶜ al-Fuṣūlayn, vol.2, p.211; Majmaᶜ al-Ḍamānāt, p.183; al-Durr al-Mukhtār, vol.2, p.465; al-Fatāwā al-Hindiyyah, vol.6, p.37; al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.312; Ḍamān al-Mutlifāt, p.442. Al-Ḥaṣkafī said that *sākin* (occupant) is either a lessee or others.

remission without it being agreed by every one of them because the rights of all are concerned.[29]

It is otherwise where the wall leans over the public road and the *qāḍī* or the person who made the *muṭālabah* to pull it down, grants a term of delay or a remission, for this is invalid, and the owner of the wall consequently still remains responsible in case it collapses and destroys anything because the right of every passer-by is concerned and the *qāḍī* or the person who made the *muṭālabah* is not at liberty to annul the right of the public.[30]

The *taqaddum*, in brief, can take place in the case of an inclining wall which leans over another's property and in the case of an inclining wall which leans over the public highway. The validity, however, for remission applies to the person who is involved in the former case, not in the latter case because:

1- In the former case, the *taqaddum* to the owner of the wall is invalid unless it has been requested by a person having the right to do so because the trouble made by the inclining wall is to the person alone concerned contrary to the latter case where every person can make request because the public highway is for everyone.

2- If the owner is troubled by the inclining wall, after requiring the wall to be pulled down then he grants the owner of the wall a term of delay or remission from the liability, it is valid because the owner requests in respect of his own property and his right alone

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[29] Al-Mughnī, vol.7, p.829.

[30] Al-Hidāyah, vol.4, p.196; Jāmiᶜ al-Fuṣūlayn, vol.2, p.211; Majmaᶜ al-Ḍamānāt, p.183; al-Mughnī, vol.7, pp.828-829; al-Fatāwā al-Hindiyyah, vol.6, p.37; al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.412.

is concerned, whereas in the case of the public highway, the grant of a term of delay or remission is invalid because the position of that person actually is as a deputy for the public in *muṭālabah*, not as a deputy in abrogating their right.[31]

TO WHOM THE *TAQADDUM* IS MADE ?

The *taqaddum* to pull down the inclining wall and to remove (*tafrīgh*) it from the space is valid when it is made to any one who possesses the power to do so. The one who possesses the power is the owner of the wall or any other person who has the same right, i.e. who has the position of ownership or possession continually during the time of *muṭālabah* and *ishhād* to the time of collapse. If, after the *taqaddum*, the owner sells his wall which is leaning over and the purchaser takes possession of it, and anything be then destroyed by its collapse, there is no liability whatever upon either party. The seller is not liable, as tort cannot be established against him by reason of the fact that the wall is not in his ownership any more at that time and his ability terminated with the sale. Neither is the purchaser responsible because no *muṭālabah* has been made to him. But if the *muṭālabah* has been made to the purchaser after the sale, he then becomes responsible, as in that case he possesses the ability to comply with the *muṭālabah*.[32]

In order to validate the *taqaddum*, it should be expressed to the owner of the wall

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[31] Al-Mabsūṭ, vol.27, p.13.

[32] Al-Hidāyah, vol.4, p.196; al-Durr al-Mukhtār, vol.2, p.465; al-Mughnī, vol.7, p.829; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.125; al-Mabsūṭ, vol.27, p.10; Majmaᶜ al-Ḍamānāt, p.183; al-Fatāwā al-Hindiyyah, vol.6, p.37; Ḍamān al-Mutlifāt, p.443. In al-Hidāyah, it said that neither is the purchaser responsible because no testimony (*ishhād*) has been made to him. The word `testimony' here has been construed as meaning *taqaddum* (request). See also Hāshiyah Sharḥ al-ᶜInāyah ᶜalā al-Hidāyah printed with Natā'ij al-Afkār, vol.10, p.322.

who is a *mukallaf* (a competent person in full possession of his faculties) or to his private representative (*wakīl al-khāṣṣ*) or his general representative (*wakīl al-ᶜāmm*) who will be a person empowered to make decision while the owner is absent.[33] The private representative is, like parents or guardians of a minor and a lunatic, an administrator of a *waqf* (*nāẓir al-waqf*), etc.. It is valid for him to receive the *taqaddum*, and if after the *taqaddum* he neglects to pull down the inclining wall and anything is destroyed by its collapse, the compensation falls upon the minors' or lunatics' or the *waqf* property. The compensation is not against the parent or guardian or administrator of *waqf* because they merely deputize and work on behalf of them (minors, lunatics, *waqf*)(*li annahum yaqūmūn maqāmahum wa yaᶜmalūn lahum*). So their acts are in effect the acts of the minor, lunatic and (administrator of) *waqf*.[34]

The *taqaddum* for pulling down an inclining wall or a building is invalid when it is made to one who does not possess the power to pull it down and to make the space (*tafrīgh al-hawā'*) vacant like a borrower, a lessee, a trustee, a pledgee, etc. because they do not possess the power of demolition and the inclining wall is not owned by them.[35]

Regarding the case of *taqaddum* for the inclining wall or building, when the

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[33] Al-Dusūqī, Ḥāshiyah ᶜalā al-Sharḥ al-Kabīr, vol.4, p.356; al-Ṣāwī, Bulghat al-Sālik, vol.2, p.408.

[34] Jāmiᶜ al-Fuṣūlayn, vol.2, p.211; al-Mabsūṭ, vol.27, p.10; al-Hidāyah, vol.4, p.196; Majmᶜa al-Ḍamānāt, p.182; al-Mughnī, vol.7, p.829; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.124. The *fuqahā'* of the Mālikī school opine that a guardian of a person *ghayr mukallaf* will be liable for compensation from his own property when he neglects (*taqṣīr*) to pull down the leaning wall. Likewise the liability for compensation is upon the administrator of a *waqf* and the private representative where there is element of negligence in the case. See al-Dusūqī, Ḥāshiyah ᶜalā al-Sharḥ al-Kabīr, vol.4, p.356; al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, pp.321-322; al-Ṣāwī, Bulghat al-Sālik, vol.2, p.408. See also Ḍamān al-Mutlifāt, p.444.

[35] Al-Mughnī, vol.7, p.829; al-Hidāyah, vol.4, p.196; Majmaᶜ al-Ḍamānāt, p.182; al-Mudawwanah, vol.4, p.667; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.124; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.5, p.47; al-Dardīr, al-Sharḥ al-Kabīr, vol.4, p.356; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, p.408.

owner is incapable to reclaim (*istirjā'*) that building or to pull the wall down, the liability is not upon him because the occurrence happened without his negligence.[36] But, if the *taqaddum* is made to a pledger and he is able to redeem (*fikāk*) the pledge (whether the house or the wall), he will be liable for compensation if he does not do so, as he has the power to pull it down by redeeming it.[37]

COLLECTIVE OWNERSHIP OF DANGEROUS PREMISES

When an inclining wall is held in joint ownership or in inheritance by several heirs, and a person requests one of the owners of the wall to stop the danger of that dangerous wall, the *fuqahā'* have differed in their opinions.

The first opinion

One of the owners of the wall should not be held liable because he has no right to demolish the wall or building without the others' permission. He cannot afford to pull it down alone as he is unable to build it without partners. The *taqaddum* and the *ishhād* made to one of them without the other partners is regarded as invalid. He is regarded as incapacitated (*al-ᶜājiz*) and therefore is not *al-mutaᶜaddī* in omitting to perform his task. This is the opinion of Abū Ḥanīfah, in accordance with *qiyās,* and also one opinion in

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[36] Al-Mughnī, vol.7, p.829. See also al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.5, p.47.

[37] Al-Hidāyah, vol.4, p.196; al-Mughnī, vol.7, p.829; Majmaᶜ al-Ḍamānāt, p.182.

the Ḥanbalī school.[38]

The second opinion

One of the owners of the wall or building will be held liable if he is capable of abating the danger through the request to the partners to demolish it. If he refuses to do so, he is liable. He is regarded in this case as negligent in duty. The *taqaddum* and the *ishhād* which are addressed to him are valid. If they are regarded as invalid, the injury will occur whereas the injury must be removed (*al-ḍarar madfūʿ*). This matter also can be referred to the *qāḍī* if one of the owners of the wall is incapable of managing it alone.[39]

For compensation or *diyah*, Abū Ḥanīfah makes him liable proportionately to the degree of his share in the property. If the property has been owned by five persons, he is liable for one fifth of the *diyah*. Likewise, if that property has been shared by three persons, he is liable for one third of the *diyah*. But, Abū Yūsuf and Muḥammad b. al-Ḥasan al-Shaybānī held him liable for one half of the *diyah* and the other half of the

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[38] Al-Mabsūṭ, vol.27, p.10; Radd al-Muḥtār, vol.6, p.599; al-Mughnī, vol.7, p.829; Tabyīn al-Ḥaqā'iq, vol.6, p.148; Majmaᶜ al-Ḍamānāt, pp.182-185; Sharḥ al-ᶜInāyah ᶜalā al-Hidāyah printed with Natā'ij al-Afkār, vol.10, p.323.

[39] Al-Mabsūṭ, vol.27, p.10; Radd al-Muḥtār, vol.6, p.599; al-Durr al-Mukhtār, vol.2, p.465; al-Mughnī, vol.7, p.829; Tabyīn al-Ḥaqā'iq, vol.6, p.148; Majmaᶜ al-Ḍamānāt, pp.182-185; Sharḥ alᶜ Ināyahᶜ alā al-Hidāyah printed with Natā'ij al-Ifkār, vol.10, p.323. In the case of *taqaddum* made to one of several heirs, the *taqaddum* affects that heir in particular. Accordingly, if anything is afterwards destroyed by the falling of the wall, the heir who is requested is responsible in proportion to his share of inheritance, for it is in his power to have remedied the nuisance by referring the matter to the *qāḍī* and representing the circumstances to him, requiring his order to his copartners (if present) to pull down the wall,- or (if absent) his authority to do so himself. See al-Hidāyah, vol.4, p.197.

diyah comes from his partners.[40]

THE CASE OF ATTACHMENTS TO A STRUCTURE

There is a difference of opinion among the *fuqahā'* about the case of attachment of *janāḥ*[41] or *rawshan* or *jurṣun*[42] or *mīzāb*[43] or *sābāṭ*[44], etc., to a structure which causes

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[40] Tabyīn al-Ḥaqā'iq, vol.6, p.148; al-Fatāwā al-Hindiyyah, vol.6, p.38; al-Hidāyah, vol.4, p.197; al-Durr al-Mukhtār, vol.2, p.466; Majmaᶜ al-Ḍamānāt, pp.182-185; al-Mabsūṭ, vol.27, p.10; al-Mughnī, vol.7, p.829; Sharḥ al-ᶜInāyah ᶜalā al-Hidāyah printed with Natā'ij al-Ifkār, vol.10, p.323.

[41] A wing or a balcony of a building. This word is used in Mughnī al-Muḥtāj, vol.4, p.185; al-Durr al-Mukhtār, vol.2, p.466; al-Hidāyah, vol.4, p.196; Ibn Rajab, al-Qawāᶜid fī al-Fiqh al-Islāmī, p.217; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.276; Aḥmad b. Ruslān, Matn al-Zubad, p.43; al-Muhadhdhab, vol.3, p.207; Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.284; Minhaj al-Ṭullāb printed with Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.284; al-Furūq, vol.4, p.16; al-Mughnī, vol.7, p.831. Ibn Qudāmah says that *al-janāḥ* is *al-rawshan* which is situated half concealed inside the wall and the other half is projected towards the road. See al-Muqniᶜ, vol.2, p.128. See also Sharḥ Muntahā al-Irādāt, vol.2, p.269.

[42] *Rawshan* and *jurṣun*- In general, both of them convey similar meaning with *janāḥ*. It means a construction of a tree stump (*jadhī'*) which is attached to a structure and projects it into the highway as an extension of a building. The word *jurṣun* is used in al-Durr al-Mukhtār, vol.2, p.462; al-Hidāyah, vol.4, p.191; al-Jāmiᶜ al-Ṣaghīr, p.513; al-Kanawī, al-Nāfiᶜ al-Kabīr printed with al-Jāmi ᶜal-Ṣaghīr, p.513; Rad al-Muḥtār, vol.6, p.594; Tabyīn al-Ḥaqā'iq, vol.6, p.142; al-Shalabī, Ḥāshiyah in the margin of Tabyīn al-Ḥaqā'iq, vol.6, p.142.; al-Jāmiᶜ al-Ṣaghīr in the margin of Kitāb al-Kharāj, p.119. The word *rawshan* is used in Mukhtaṣar, p.215; al-Khirshī Fatḥ al-Jalīl ᶜalā Mukhtaṣar Khalīl, vol.6, p.61; al-ᶜAlīsh, Manh al-Jalīl, vol.3, p.334; al-Hidāyah, vol.4, p.191; Mughnī al-Muḥtāj, vol.2, p.182; al-Sirāj al-Wahhāj, p.235; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.276; Abū Shujāᶜ, Matn Abī Shujāᶜ, p.29; al-Ikhtiyār li Tâ līl al-Mukhtār, vol.5, p.45; al-Furūq, vol.4, p.16; al-Rawḍ al-Murbiᶜ, p.299. According to Aḥmad Riḍā, *rawshan* conveying the meaning of balcony is similar to *janāḥ*. See Muᶜjam Matn al-Lughah, vol.2, p.592. A group of *fuqahā'* say that *jurṣun* is *al-burj* "tower/water tower", and another group say it is *majrā mā' murakkab fī al-ḥā'iṭ* (water canal attached to a wall). See al-Shalabī, Ḥāshiyat al-Shalabī in the margin of Tabyīn al-Ḥaqā'iq, vol.6, p.142.

[43] A water-spout or a pipe or a channel that spouts forth water or that by which water pours down from a high place, to convey away the water from the roof of a house. See Lane, An Arabic-English Lexicon, vol.1, p.52. A pipe collecting the rain water from the roof. See Minhāj al-Ṭālibīn in the margin of Mughnī al-Muḥtāj, vol.4, p.85. In brief, it is a roof-gutter or an eave trough. See Hans Wehr, A Dictionary of Modern Written Arabic, p.14. This word is used in al-Wajīz, vol.2, p.149; al-Hidāyah, vol.4, p.191; al-Durr al-Mukhtār, vol.2, p.462; al-Mughnī, vol.7, p.831; al-Mabsūṭ, vol.27, p.6; al-Jāmiᶜ al-Ṣaghīr in the margin of Kitāb al-Kharāj, p.119; al-Muqniᶜ, vol.2, p.129; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.1, p.716; al-Muhadhdhab, vol.3, p.207; Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.284; Minhaj al-Ṭullāb printed with Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.284; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.5, p.45.

[44] A roof between two walls or between two houses having beneath it a road or way or passage which is a thoroughfare. See Lane, An Arabic-English Lexicon, vol.1, p.1295; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.276; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.1, p.715; Sharḥ Muntahā al-Irādāt, vol.2, p.269; al-Rawḍ al-Murbiᶜ,

damage to person or property of another. Their opinions can be divided into two groups.

The first group

It is allowed. This is the opinion of the Mālikī and Shāfiᶜī schools. However, there is a detailed exposition of opinions among them regarding the liability when it falls down.

The second group

It is precluded. This is the opinion of the Ḥanafī and the Ḥanbalī schools. There is also, however, a detailed exposition from both schools.

The detailed exposition from the first group

The Mālikī jurists opine that any person is allowed to construct a *janāḥ* on his own property. He can also erect a *sābāṭ* on a roof (*saṭaḥ*) between two houses or walls having a lane (*sikkah*) beneath them. The position of allowing here is so long as any injury does not occur to a passer-by from any one of these attachments. If injury does

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p.299. This word is used in al-Mughnī, vol.7, p.831; Mukhtaṣar, p.215; Ibn Rajab, al-Qawāᶜid fī al-Fiqh al-Islāmī, p.217; Mughnī al-Muḥtāj, vol.2, p.182; al-Sirāj al-Wahhāj, p.235; al-Muqniᶜ, vol.2, p.129.

occur to a passer-by, it is precluded.[45]

Thus, any person is also permitted to set out a *mīzāb* for collecting the rain water from the roof. He is not liable if it falls down onto property or a person of another and causes damage because his action is permitted and he is not considered as *al-mutaᶜaddī*. Projecting the *mīzāb* over the highway is similar to projecting it over one's own property. Further, the owner of the *mīzāb* is not held liable when the conditions enforced in the case of an inclining wall are not fulfilled. However, as soon as the conditions are fulfilled with the *mīzāb* inclining over the side of the highway, its owner has been warned and *ishhād* has occurred and sufficient time has elapsed without him making any effort to take care of that *mīzāb*, he will be held liable if it collapses and causes damage.[46]

The Shāfiᶜī jurists remark that the construction of a *janāḥ* placed in or projected over the highway is to be allowed (*jā`iz*) under the condition only of safety. If the *janāḥ* (or *mīzāb*) partly rests upon a wall, and the protruding portion (*al-khārij*) falls, the owner is responsible for the whole (*jamīᶜ*) *ḍamān* for the accident while he is responsible for only half (*niṣf*) of *ḍamān* where the part which rests upon the wall and the protruding portion both (*al-dākhil* and *al-khārij*) fall. In the former case, the owner is liable for the *ḍamān* because the entire occurrence of destruction is borne by the owner himself in particular. However, in the latter case, the owner is just liable for the portion of the *janāḥ* or *mīzāb* which projected over the highway, not the portion which projected over what

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[45] Al-KhirshĪ, Fatḥ al-JalĪl ᶜalā Mukhtaṣar KhalĪl, vol.6, pp.61-62; al-ᶜAlĪsh, Manḥ al-JalĪl ᶜalā Mukhtaṣar KhalĪl, vol.3, p.334; Zarrūq, Sharḥ Zarrūq ᶜalā Matn al-Risālah, vol.2, p.245; al-Furūq, vol.4, p.16; Ibn Shāṭ, Idrār al-Shurūq printed with al-Furūq, vol.4, p.16.

[46] Al-DardĪr, al-Sharḥ al-KabĪr, vol.4, pp.356-357; Tabṣirat al-Ḥukkām, vol.2, p.247; Ibn NājĪ, Sharḥ Ibn NājĪ ᶜalā Matn al-Risālah printed with Sharḥ Zarrūq ᶜalā Matn al-Risālah, vol.2, p.244; al-KhirshĪ, Fatḥ al-JalĪl ᶜalā Mukhtaṣar KhalĪl, vol.8, pp.11-12.

he owned.

Further, there are two opinions in the Shāfiᶜī school with respect to the case of a *mīzāb* which projected over the highway and caused damage by falling down. First, the owner is not responsible. This is *al-madhhab al-qadīm* by reason that the *mīzāb* is a needful thing, unlike the *janāḥ*. Second, the owner is responsible. This is *al-madhhab al-jadīd* by the reason that the owner may dig a well on his land rather than construct a *mīzāb*. This opinion is also upheld by al-Balqīnī who said that the preclusion of erection of the *mīzāb* is similar to the preclusion of projection of the *janāḥ*.[47]

The detailed exposition from the second group

In the Ḥanafī school, if a person constructs a *janāḥ* or a *mīzāb* or a *kanīf* (toilet/water closet) or a *jidhᶜ* (tree stump) from his wall or building over a public highway, and it happens to fall upon and destroy any other, he is liable (the *diyah* is due from his *ᶜāqilah*) because as a *mutasabbib* he is guilty of *al-taᶜaddī* in having erected a building in such a place. So he is *al-mutaᶜaddī* in the case of *tasabbub*. A person who

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[47] Al-Muhadhdhab, vol.3, p.207; Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.284; Minhaj al-Ṭullāb printed with Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.284; al-Maḥallī printed with Ḥāshiyatān Qalyūbī wa ᶜUmayrah, vol.4, p.149; Ḥāshiyatān Qalyūbī wa ᶜUmayrah, vol.4, p.149; Fatḥ al-Wahhāb, vol.2, p.175; al-Shīrāzī, Kitāb al-Tanbīh, p.128; al-Wajīz, vol.2, pp.149-150; Minhāj al-Ṭālibīn in the margin of Mughnī al-Muḥtāj, vol.4, p.85. However, al-Nawawī opines that a person is responsible for accidents caused by the construction of a *janāḥ* projecting over a public road. The word of al-Nawawī is elaborated by Muḥammad al-Sharbīnī al-Khaṭīb by saying that the liability is guaranteed whether that construction will be harmful or not, given permission by authority (*imām*) or not, because the right of utilization of the public highway is under the condition of safety from any injury. See Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.284; al-Maḥallī printed with Ḥāshiyatān Qalyūbī wa ᶜUmayrah, vol.4, p.149; Mughnī al-Muḥtāj, vol.4, p.85. If the construction of a *janāḥ* projecting over a private lane (*darb*) with the permission of other inhabitants, the person who constructed it is not responsible for accidents caused by that *janāḥ*. See al-Maḥallī printed with Ḥāshiyatān Qalyūbī wa ᶜUmayrah, vol.4, p.149; Ḥāshiyat Qalyūbī, vol.4, p.149.

occasions (*tasabbab*) destruction is responsible where he has in any respect transgressed (*taʿadda*). Every other person in the public highway is at liberty to use his right without any disturbance. The public are entitled to free passage along such a highway for themselves and their cattle.[48]

The Ḥanafī jurists elaborate the case of death occasioned by the fall of a *mīzāb*. If a *mīzāb* which is set out from a house over the public highway falls upon any person and kills him, an investigation must be made to discover which part of the *mīzāb* has hit the person. If it appears that he has been struck by a part of the *mīzāb* which projected over what he owned (*al-dākhil*), no liability is due from a person who set it up, because with respect to that part, he is not *mutaʿaddī* since he has placed it in his own property. But, if it appears that the deceased is struck by a part of it which was projected over the highway (*al-khārij*), the person who set it up is responsible, because with respect to that part he is *al-mutaʿaddī,* as having caused the *mīzāb* to project over the road without any necessity (*ḍarūrah*) since he might have achieved his purpose by fixing it so that it did not project over the road at all.[49] If, on the other hand, it appears that the deceased is struck by both ends of the *mīzāb*, the fixer is responsible for half of the *diyah* and the other half will not be due because a part of both ends certainly projected over his property and he is not *al-mutaʿaddī*. In the same manner as where a person is wounded by another

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[48] Al-Hidāyah, vol.4, p.191; al-Mabsūṭ, vol.27, p.6. See also al-Jāmiʿ al-Ṣaghīr, pp.513-514; al-Ikhtiyār li Taʿlīl al-Mukhtār, vol.5, p.45.

[49] It is to be observed that in this instance, *kaffārah* is not inflicted onto the person who has fixed up the *mīzāb*, nor is he excluded from *mīrāth* (inheritance) because he is not the actual perpetrator (*bi qātil ḥaqīqah*), but stands merely guilty of homicide by an intermediate cause. See al-Hidāyah, vol.4, p.191; Tabyīn al-Ḥaqā'iq, vol.6, p.144, al-Shalabī, Ḥāshiyat al-Shalabī in the margin of Tabyīn al-Ḥaqā'iq, vol.6, p.143. And also the liability is not dispelled even though the *mutaʿaddīn* is a lessee or a borrower or a usurper. See al-Durr al-Mukhtār, vol.2, p.463.

and also by a predatory animal like a lion or a tiger, and dies, only half of the *diyah* is due from the person who wounded him. If it cannot be discovered which part of the *mīzāb* struck the deceased, a half of the *diyah* is due, for the accident may have happened in either of two ways (certainly one of both ends is a part projecting over the owner's property). In one part the *diyah* is due and in the other nothing whatever and therefore in view of both circumstances, a half is imposed.[50]

The liability is not dispelled by leaving the owner's house. If, therefore, a person constructs a *janāḥ* by projecting it from his house over the highway and then sells the house and that *janāḥ* afterwards falls upon any other person and kills him, the seller is liable and nothing whatever falls upon the purchaser because the act of the seller (in constructing the *janāḥ*) is not done away by the extinction of his ownership of the property (*lam yanfasakh bi zawāl milkih*), and such an act occasions responsibility, he is responsible accordingly and not the purchaser who has not done any act to occasion responsibility.[51] This is also agreed by the Ḥanbalī school.[52]

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[50] Al-Hidāyah, vol.4, p.191; al-Ikhtiyār li Taʿlīl al-Mukhtār, vol.5, pp.45-46; al-Mabsūṭ, vol.27, p.7; Natā'ij al-Afkār, vol.10, p.308; Sharḥ al-ʿInāyah ʿalā al-Hidāyah printed with Natā'ij al-Afkār, vol.10, p.308; al-Durr al-Mukhtār, vol.2, p.463. In the elaboration of the case in which it cannot be discovered which part of the *mīzāb* strikes the deceased, a view in accordance with *qiyās* opines that there is no liability at all for the owner of the *mīzāb*. It is because the conviction of a person for liability must attain the degree of *yaqīn*, there must not be any weight of *shakk* attached, and consequently, the liability is not imposed by doubt (*al-ḍamān lā yajib bi al-shakk*). But, in accordance with *istiḥsān* the liability is a half of the *diyah* by reason that one part of the complete *diyah* is due and in the other no *diyah* is due and consequently in consideration of both circumstances, a half of the *diyah* is imposed. See al-Mabsūṭ, vol.27, p.7; al-Durr al-Mukhtār, vol.2, p.463; Tabyīn al-Ḥaqā'iq, vol.6, p.143.

[51] Al-Hidāyah, vol.4, pp.191-192; al-Mabsūṭ, vol.27, p.7; al-Durr al-Mukhtār, vol.2, p.463; Jāmiʿ al-Fuṣūlayn, vol.2, p.212; Tabyīn al-Ḥaqā'iq, vol.6, p.143; al-Ikhtiyār li Taʿlīl al-Mukhtār, vol.5, p.45.

[52] Al-Futūḥī, Muntahā al-Irādāt, vol.1, p.523; Kashshāf al-Qināʿ ʿan Matn al-Iqnā, vol.4, p.124; Sharḥ Muntahā al-Irādāt, vol.2, p.428. Aside from this case, the seller is not liable if the wall falls down because the building itself does not exist as a tort liability (*lianna nafs al-binā' laysa bi jināyah*). See also Ḍamān al-Mutlifāt, p.455.

Some jurists said that the construction of *janāḥ* or *mīzāb*, etc. is to be allowed over a public highway (*al-ṭarīq al-nāfidh*) if it does not cause any injury to passers-by, because its owner has a right of use and passage unless it may be proved detrimental. He, therefore, cannot erect or set up a *kanīf* or a *mīzāb* in a *darb* (lane) (which is *ghayr al-nāfidh/alladhī laysa bi nāfidh*) without the consent of other inhabitants whether it be injurious to them or otherwise, in contrast with the *ṭarīq nāfīdh* where he has a right of use and erection of anything on it unless such a thing will be injurious to the public. The differences between *al-ṭarīq al-nāfidh* and *al-ṭarīq ghayr al-nāfidh* is that in the former, it is impossible to obtain the acquiescence of every individual of the community. Each is therefore accounted a proprietor (*mālik*) virtually (*ḥukman*). Whereas in the latter, it is practicable to obtain the acquiescence of all the inhabitants of the lane. The privileges of partnership therefore hold good both actually (*ḥaqīqatan*) and virtually (*ḥukman*) with respect to each of them.[53] al-Nawawī said:

---*Al-Ṭarīq al-nāfidh*, nothing should be done in it which may harm to passers-by. Thus it is forbidden to construct a *janāḥ*, or a *sābāṭ* projecting into the road. Both *janāḥ* and *sābāṭ* are permitted to be constructed if at such a height as to allow a man standing upright to pass underneath (*muntaṣiban*).

---*Al-Ṭarīq ghayr al-nāfidh*, construction a *janāḥ* is not permitted to persons not living there. Those living there should obtain the permission of the other inhabitants if they want to construct a project. The inhabitants on this road is he who has a door opening

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[53] Al-Hidāyah, vol.4, p.191; Munlākhusrū, al-Durar al-Ḥikām fī Sharḥ Ghurar al-Aḥkām, vol.2, p.109; al-Jāmiᶜ al-Ṣaghīr, p.514; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.5, p.46; Ḍamān al-Mutlifāt, pp.455-456.

onto it, not a person whose house merely adjoins it with a wall.[54]

According to the Ḥanbalī jurists, it is not allowed to project a *janāḥ* or *sābāṭ* or *rawshan* or *mīzāb* into the highway because all people have a right to the highway under free passage and the permission from the authority will not be taken into consideration. If, therefore, the *janāḥ* or the *sābāṭ* accidentally falls on a passer-by or a property, whether a part of the *janāḥ* or the *sābāṭ*, or all of it, and causes damage, the owner of it is liable. This case is considered as a case of constructing an inclining wall towards the highway, which then falls down and causes damage to person or property of another, the *talaf* here resulting from the owner's bad faith (*bi ʿudwān*) just as when he builds a building on the highway.

Some of the Ḥanbalī jurists said that the projecting of the *janāḥ* or the *sābāṭ*, etc. is to be allowed when it will not be dangerous on the condition that it was built by permission from the authority. It is because the public highway is regarded as in public joint ownership among the people and a project particularly done by a person over it is not allowed unless by permission of the authority. There is, however, another opinion that all people are entitled to take the benefit of the highway and nobody can intervene or reduce (*yakhtal*) that right. So the permission of the authority is not necessary or required.

In case a person projected a *janāḥ* into a private *darb* (*darb ghayr nāfidh*) without the consent of the other inhabitants, that person is liable for injury. But if he is permitted by them, he is not liable, because it is permissible (*mubāḥ*) for him and he is not

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[54] Minhāj al-Ṭālibīn in the margin of Mughnī al-Muḥtāj, vol.2, pp.182-184. For detail see Mughnī al-Muḥtāj, vol.2, pp.182-184. In Majallah, the term *al-ṭarīq ghayr nāfidh* described as *al-ṭarīq al-khāṣṣ*. See Majallah, article 1220.

considered *al-mutaᶜaddī*. Likewise, in the case of a person who projected a *mīzāb* into the public highway when it is not allowed and if it causes damage to another person, he is liable. In another view, the projecting of the *mayāzīb* (pl. of *mīzāb*) to *darb al-nāfidh* is absolutely allowed on condition of no injury to the community, and some other jurists add that the projecting of the *mayāzīb* is a *sunnah* supporting it from a Ḥadīth from al-ᶜAbbās. (However, they did not mention the *matn* of this Ḥadīth).[55]

In general, the public at large possesses a right of way over the highway as the individual has legal rights over his land. The subsoil below and the space above remain parts of the proprietary rights of the respective owners of the land. So if a person constructs and projects the attachment of a *janāḥ* or a *sābāṭ* or a *mīzāb* or a *rawshan* or a *jurṣun* (a stair-case or a balcony or a wing or a roof-gutter) through his premises beyond the boundary line of his land, he is liable for any damage emanating from any one of these attachments. He can be considered a trespasser *ab initio*, for he utilizes a space which belongs to others without any legal right.

LIABILITY FOR FAILING TO REMOVE THE WRECKAGE OF A BUILDING

The *fuqahā'* had different opinion on this case. In fact it has been discussed in the

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[55] Al-Mughnī, vol.7, pp.830-831; Ibn Rajab, al-Qawāᶜid fī al-Fiqh al-Islāmī, pp.217-218; al-Futūḥī, Muntahā al-Irādāt, vol.1, p.523; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, pp.123-124; Sharḥ Muntahā al-Irādāt, vol.2, p.269 and p.428; al-Rawḍ al-Murbiᶜ, p.299; Ḍamān al-Mutlifāt, p.453. For detail see al-Muqniᶜ, vol.2, pp.128-129. However, the researcher found this Hadīth mentioned in chapter of *al-Sulḥ* of al-Mughnī, vol.4, p.501. This Ḥadīth mentioned that ᶜUmar Ibn al-Khaṭṭāb while passing by the house of al-ᶜAbbās uprooted the *mīzāb* which was erected projecting out towards the road. Then al-ᶜAbbās asked: "Are you removing that which the Prophet himself erected by his own hand". See also Sharḥ Muntahā al-Irādāt, vol.2, p.269. See a brief indication of this Ḥadīth in al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.1, p.716. See also Mughnī al-Muḥtāj, vol.4, p.85.

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The *fuqahā'* had different opinion on this case. In fact it has been discussed in the

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[55] Al-Mughnī, vol.7, pp.830-831; Ibn Rajab, al-Qawāᶜid fī al-Fiqh al-Islāmī, pp.217-218; al-Futūḥī, Muntahā al-Irādāt, vol.1, p.523; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, pp.123-124; Sharḥ Muntahā al-Irādāt, vol.2, p.269 and p.428; al-Rawḍ al-Murbiᶜ, p.299; Ḍamān al-Mutlifāt, p.453. For detail see al-Muqniᶜ, vol.2, pp.128-129. However, the researcher found this Hadīth mentioned in chapter of *al-Sulḥ* of al-Mughnī, vol.4, p.501. This Ḥadīth mentioned that ᶜUmar Ibn al-Khaṭṭāb while passing by the house of al-ᶜAbbās uprooted the *mīzāb* which was erected projecting out towards the road. Then al-ᶜAbbās asked: "Are you removing that which the Prophet himself erected by his own hand". See also Sharḥ Muntahā al-Irādāt, vol.2, p.269. See a brief indication of this Ḥadīth in al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.1, p.716. See also Mughnī al-Muḥtāj, vol.4, p.85.

books of *fiqh* by both Abū Ḥanīfah's disciples, Muḥammad b. al-Ḥasan al-Shaybānī and Abū Yūsuf and the Shāfiʿī jurists.

If a wall belonging to any person leans towards the public highway and he is requested to pull it down but ignores that until it falls down and a person stumbles and is injured by it, the owner is held liable. This is the opinion of Muḥammad b. al-Ḥasan al-Shaybānī. His opinion is regarded as a sound opinion (*al-ṣaḥīḥ*). But Abū Yūsuf denies the liability of the owner of the wall unless another request is made for the removal of the debris and rubble from the highway after it falls down.

Muḥammad b. al-Ḥasan al-Shaybānī maintains his opinion that the failure of the owner to remove his inclining wall is *al-taʿaddī* and he is considered a *al-mutaʿaddī*. All injurious results from the falling down of his wall are borne by him. Thus, if a person or an animal is killed by stumbling over some of the ruins, the owner is liable, as it is his business to clear the highway of all such fragments since these are his property and an *ishhād* with respect to the wall itself is an *ishhād* with respect to the fragments, the intention being to clear the highway.

Abū Yūsuf takes an exceptional view by requesting the people to make another request for the removal of the fragments from the highway to the owner of the collapsed building. He argues that the danger has gone away from the first circumstance in which the owner is liable. Since the falling of the building onto the highway is not made by his own volition, there is a need for him to be requested anew to remove the fragments or wreckage which has started to cause another danger. Abū Yūsuf links this situation to a case where someone places a big stone on the highway and it is pushed off the highway

to another place by others or a wind or torrential stream and then a person stumbles on this stone after it has been removed from the highway and he is injured. The first person who put the stone on the highway would not be held liable because the injury does not occur directly through the danger he had created on the highway.[56]

The Shāfiᶜī jurists do not discuss "the request" in their original texts like Muḥammad b. al-Ḥasan al-Shaybānī and Abū Yūsuf. They immediately remove the liability from the owner of the debris or wreckage. In other words, the responsibility will not be imposed on him in the case of a passer-by stumbling against the debris and falling and then being injured, or his property being destroyed. He is free from liability because he built the building on his own property in vertical equilibrium and the building collapsed without his action and volition whether he has been negligent in removing the debris or not. On the other hand, there is a view which opines that the owner is liable by reason that he has been negligent in leaving the debris on the road without removing it.[57]

THE CASE OF A CRACKED WALL (*TASHAQQUQ AL-ḤĀ'IṬ*)

Regarding this topic, is the case of a cracked wall similar to the case of an

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[56] Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.284; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.5, p.47; al-Hidāyah, vol.4, p.197; al-Durr al-Mukhtār, vol.2, p.466; Majmaᶜ al-Ḍamānāt, p.185. See also al-Muhadhdhab, vol.3, p.207; Mūjabāt, vol.1, p.251. Al-Kāsānī in his Badā'iᶜ al-Ṣanā'iᶜ says that if a person's wall falls on another's wall and the second wall falls on a man killing him, then the owner of the first wall is liable because the falling of his wall begins an uninterrupted chain of events. If, however, a man falls and is injured in the debris of the second wall, then the owner of the first wall is not liable for his injury since removal of the debris is not his responsibility. Neither is the owner of the second wall liable unless he had knowledge of the falling of his wall and did not remove the debris at an appropriate time. See Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.276.

[57] Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.284; Mughnī al-Muḥtāj, vol.4, p.86; al-Maḥallī printed with Ḥāshiyatān Qalyūbī wa ᶜUmayrah, vol.4, p.149.

inclining wall in its legal result?.

As to that, the *fuqahā'* have distinguished between two kinds of cracks (*al-shuqūq*). If the crack is vertical (*al-ṭawl*) which it is not feared will collapse, it is not obligatory to demolish the wall. It is like the rule pertaining to the sound wall when there is an absence of fear of its collapse. However, if it is feared that it would collapse because of the crack being horizontal (*al-ᶜarḍ*), then its rule is like the rule pertaining to an inclining wall which needs to be pulled down or repaired because it is feared that it will cause harm.[58] Consequently, its judgement is as the judgement in the previous topic, that is the topic of "unexpected defect in premises" discussed in the preceding pages.[59]

CONDITIONS FOR THE LIABILITY OF DANGEROUS PREMISES

In general, the *fuqahā'* have ruled two conditions which need to be fulfilled before compensation can be awarded resulting from dangerous premises. They are as follows:

1- The premises must be legally possessed by a person like the owner, the guardian, the heir, etc.. If the premises are owned by a group of partners or heirs, and if one member only can be advised about the dangerous premises, the group would be liable if nothing is done to remove the danger before it causes damage.[60]

2- The actual damage has been suffered by the plaintiff whether on the highway or on

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[58] Al-Mughnī, vol.7, p.830; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.125; Sharḥ Muntahā al-Irādāt, vol.2, p.429; Mūjabāt, vol.1, p.251.

[59] For details, see Mūjabāt, vol.1, pp.251-252; Ḍamān al-Mutlifāt, pp.447-448.

[60] Radd al-Muḥtār, vol.6, p.599 and p.601; al-Durr al-Mukhtār, vol.2, p.465; Majmaᶜ al-Ḍamānāt, p.184.

adjoining land resulting from the collapse of the premises after he has requested and warned the defendant to repair it or remove the danger from it and the defendant neglects that when a sufficient time has elapsed.[61]

It is obvious that the *fuqahā'* have ruled both elements, viz *taᶜaddīn* and *tafrīṭ*, as the basis of liability in the case of dangerous premises. The owner of the premises is liable for all danger from it and is under responsibility to take proper care of it. If his knowledge about the dangerous condition of his premises can be proved against him, he will be held liable for any injury emanating from it. This is the opinion of some *fuqahā'*(Abū Laylā, Abū Thawr, Ishāq, some of the Shāfiᶜī jurists, Ashhab and some of the Ḥanbalī jurists).[62]

In brief, all objects which have cracks, are about to collapse or are weak, inclining to topple may be included in this section. Likewise, in the case of a tree which has been requested and warned that it should be rooted out and its owner ignores that warning, then the tree falls down and a person is injured or the property of another is damaged as a result thereof, the owner is liable. This case is similar in its judgement to the case of the inclining wall. The judgement regarding the buildings or houses which have many storeys should also be considered as equivalent to those regarding an inclining wall. Thus, a person may dispose of his property in whatever way he wishes so long as there is no right of another attached to it. If so, the owner is not free to exercise his *milk*. Therefore, if a person who lives in a lower storey is threatened with damage from some parts of an upper

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[61] Majmaᶜ al-Ḍamānāt, p.182.

[62] Al-Muhadhdhab, vol.3, p.207; al-Mughnī, vol.7, pp.827-828; al-Mughnī wa al-Sharḥ al-Kabīr, vol.9, pp.571-572.

storey and he requests the owner of the upper storey to take the necessary measures to avert the danger, and if the owner of upper storey does not comply to the request of the owner of the lower storey, the legal decision for this case also is of the same effect as in the case of the inclining wall. As mentioned by the *fuqahā'*, the cases of inclining buildings or houses are analogous to that of the inclining wall.[63]

To sum up, all other dangerous premises are to be linked to the inclining wall and thus they will be operate under the same rule.

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[63] Radd al-Muḥtār, vol.6, p.598; Majmaᶜ al-Ḍamānāt, p.184; Nayl al-Awṭār, vol.7, p.80; Ḍamān al-Mutlifāt, pp.431-432.

LIABILITY FOR ANIMALS

INTRODUCTION

This section seeks to examine the liability, nature, position and legal requirement regarding all aspects of animals in the Islamic law of tort as perceived and discussed by the *fuqahā'* in their writings. This is, of course, a wide subject and needs to be thoroughly studied. Therefore, the books of classical and contemporary *fuqahā'* will be referred to either from the *sunnīī* schools or the Ẓāhirī school.

In this section there are a few sub-topics which will be discussed, viz: Ḥadīths on animals' liability, the *fuqahā'* opinions on the various circumstances on animals' torts, liability for animals on the highway, stopping or tying up an animal on the public road or at the market, the case of *al-nafḥah*, the liability of rider, driver and leader, and conditions for animals' tort.

ḤADĪTHS ON ANIMAL'S LIABILITY

The texts of Ḥadīths relating to this discussion can be divided into two groups. Firstly, the Ḥadīth "no liability is entailed on an the animal's act" and secondly, "its act is not exempted from bearing the liability". For the first group, the Ḥadīths are:

"Animal's tort by its hind-leg is to be overlooked".[1]

"Injury caused by animals is not actionable".[2]

The texts of these Ḥadīths obviously imply that the torts of animals are exempted from bearing any liability whatsoever. Al-Nawawī elaborates on such Ḥadīth mentioning that if the animal does harm for which its owner is in no way negligent or at the time the animal is not accompanied by its owner, the owner is not held liable whether that occurrence happens in daylight or at night. But, if it is accompanied by its driver or leader or rider, then the liability is to be held.[3] This is agreed by Abū Dāwud[4] and al-Tirmidhī[5].

For the second group, the Ḥadīths are:

"He who stationed an animal on one of the ways of the Muslims or in one of their markets and the animal trampled somebody down by its fore-leg or hind-leg, is to be liable".[6]

Similarly the Prophet adjudicated that:

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[1] Sunan Abī Dāwud, vol.4, p.196; Nayl al-Awṭār, vol.5, p.324 or vol.6, p.72. *Al-rijl jubār*. See also in al-Qurṭubī, al-Jāmiᶜ li Aḥkām al-Qur'ān, vol.11, p.318; Manār al-Sabīl, vol.1, p.439; al-ᶜUddah Sharḥ al-ᶜUmdah, p.448; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.126.

[2] Ṣaḥīḥ Muslim, vol.11, p.225; Sunan Abī Dāwud, vol.4, p.196; Sunan al-Tirmidhī, vol.3, p.652; Sunan al-Dārimī, vol.2, p.196; al-Muwaṭṭa', p.626; Ibn al-ᶜArabī, Aḥkām al-Qur'ān, vol.3, p.1268; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.125; Sharḥ Muntahā al-Irādāt, vol.2, p.429. See also al-Kawtharī, Tartīb Musnad al-Imām al-Shāfiᶜī, vol.2, p.107. *Al-ᶜajmā' jurḥuhā jubār*. This Ḥadīth has been enacted in the Majallah article 94 as a legal maxim with the statement: *Jināyat al-ᶜajmā' jubār*. See also Bidāyat al-Mujtahid, vol.2, p.242; Manār al-Sabīl, vol.1, p.439; al-Qurṭubī, al-Jāmiᶜ li Aḥkām al-Qur`ān, vol.11, p.315. *Jarḥ al-ᶜajmā' jubār*, see al-Muwaṭṭa', p.626.

[3] Ṣaḥīḥ Muslim, vol.11, p.225. The elaboration is on the second Ḥadīth of the first group. See also al-ᶜAynī, ᶜUmdat al-Qārī, vol.4, p.456; Nayl al-Awṭār, vol.5, p.343.

[4] Sunan Abī Dāwud, vol.4, p.197. Animals whose torts are to be overlooked are run-aways which have no one with it during the day, no at night. See also Ibn Ḥajar, Fatḥ al-Bārī, vol.12, p.225.

[5] Sunan al-Tirmidhī, vol.3, p.653. If injury arises from an animal with no person to restrain it, no compensation bears upon its owner. See also Ibn Ḥajar, Fatḥ al-Bārī, vol.12, p.225; al-ᶜAynī, ᶜUmdah al-Qārī, vol.11, p.216.

[6] Nayl al-Awṭār, vol.5, p.324 or vol.6, p.72. See also in Sharḥ Muntahā al-Irādāt, vol.2, p.429.

> "The owners of the garden are responsible for guarding it in the day, and the owners of the animals are liable for what the animals destroy at night".[7]

Both these Ḥadīths apparently have a general notion of liability of animal torts which is regarded as an exception to both Ḥadīths in the first group.

Rationally, the torts of animals should not be compensated for, because they are considered unable to intend harm. But, if the owner or keeper or rider and the like commits a breach of the duty to take care of it, he can be charged for compensation when it does harm.

The *fuqahā'* provide commentaries on the Ḥadīth : "Injury caused by animals is not actionable", in an attempt to determine its nature and scope. The Ḥanafī jurists seem obviously to construe the Ḥadīth in its original meaning. They maintain that in a case of damage by an animal which breaks loose and moves on its own accord, causing injury to man or property, its owner would not be held liable for its torts by night or by day. They call this kind of animal *al-munfalitah* (escape).[8] Al-

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[7] Al-Muwaṭṭa', p.530; Sunan Abī Dāwud, vol.3, p.298; Sunan Ibn Mājah, vol.2, p.781; Nayl al-Awṭār, vol.5, p.324 or vol.6, p.72. See also al-Kawtharī, Tartīb Musnad al-Imām al-Shāfi'ī, vol.2, p.107; al-Rawḍ al-Murbi', p.335; Bidāyat al-Mujtahid, vol.2, p.242; Manār al-Sabīl, vol.1, p.440; al-'Uddah Sharḥ al-'Umdah, p.449; al-Qurṭubī, al-Jāmi' li Aḥkām al-Qur'ān, vol.11, p.314; Ibn al-'Arabī, Aḥkām al-Qur'ān, vol.3, p.1267; Kashshāf al-Qinā' 'an Matn al-Iqnā', vol.4, p.128; Sharḥ Muntahā al-Irādāt, vol.2, p.430. This judgement was made when the female camel of al-Barā' b. 'Āzib entered the garden of a man and did some damage to it.

[8] Al-Mabsūṭ, vol.26, p.192; al-Hidāyah, vol.4, p.201; al-Durr al-Mukhtār, vol.2, p.469; Ibn al-'Arabī, Aḥkām al-Qur'ān, vol.3, p.1269; al-Ajwibah al-Khafīfah, p.389; Lisān al-Ḥukkām, p.279; al-Fatāwā al-Hindiyyah, vol.6, p.53; Salīm Rustam, Sharḥ al-Majallah, vol.1, p.525. See also al-Qurṭubī, al-Jāmi' li Aḥkām al-Qur'ān, vol.11, p.315; Wahbah Muṣṭafā al-Zuḥaylī, "Al-Mas'ūliyyah al-Nāshi'ah 'an al-Ashyā'" in Majallat al-Majma' al-Fiqhī al-Islāmī, pp.100-101; Nayl al-Awṭār, vol.6, p.73. Al-Ṭaḥāwī postulates in his pinpointing of Abū Ḥanīfah's school that the owner of an animal would not be liable for its torts if its owner has despatched (*arsala*) his animal with a keeper (meaning that the keeper alone will be responsible, not the owner), otherwise if it is despatched with no one guarding it, he would be liable. See Nayl al-Awṭār, vol.6, p.74; Lisān al-Ḥukkām, p.279; cf., Badā'i' al-Ṣanā'i', vol.7, p.273. But, the author of al-Ajwibah al-Khafīfah regulates that if a person despatches his animal (to a place) with no one driving it and it incurs injury or damage to another or his property, the person is not liable for the injury which occurs either by day or by night. See al-Ajwibah al-

Shāfiᶜī asserts that this Ḥadīth is a general statement in its application, but what is intended by it is particular. He maintains that the animal's torts are in some instances to be overlooked and in some others are not to be overlooked. In his argument he restricts this Ḥadīth using the Ḥadīth of al-Barā' b. ᶜĀzib (in the second group).[9] The Mālikī[10] and the Ḥanbalī[11] schools in this case concur with al-Shāfiᶜī's opinion. In brief, the *jumhūr* of the *fuqahā'* conclude that the animal's torts are to be overlooked when, its act arises from its own volition alone and there is no negligence by its owner and it is not a vicious kind of animal.[12] They also maintain that there is no liability for animal's torts by its own accord alone occurring in daytime, but if it is accompanied by its rider or leader or driver, its act is considered to be liable either in daytime or at night.[13]

The controversy which appears between Abū Ḥanīfah and another group: al-

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Khafīfah, p.389. This opinion probably follows the opinion of Muḥammad b. al-Ḥasan al-Shaybānī. See Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.273.

[9] Al-Shāfiᶜī, Ikhtilāf al-Ḥadīth in the margin of al-Umm, vol.7, pp.401-402. See also in Nayl al-Awṭār, vol.6, p.73; al-Qurṭubī, al-Jāmiᶜ li Aḥkām al-Qur'ān, vol.11, p.315; Ibn al-ᶜArabī, Aḥkām al-Qur'ān, vol.3, p.1268.

[10] Al-Qawānīn al-Fiqhiyyah, p.219; al-Furūq, vol.4, p.186; Bidāyat al-Mujtahid, vol.2, pp.242-243; al-Risālah, p.136; Tabṣirat al-Ḥukkām, vol.2, p.249. See also al-Qurṭubī, al-Jāmiᶜ li Aḥkām al-Qur'ān, vol.11, p.315; Ibn al-ᶜArabī, Aḥkām al-Qur'ān, vol.3, p.1268; Nayl al-Awṭār, vol.6, p.73.

[11] Manār al-Sabīl, vol.1, p.439; al-Rawḍ al-Murbiᶜ, p.335; al-Khirqī, Mukhtaṣar al-Khirqī, p.117; al-Mughnī, vol.8, p.336; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.125; Sharḥ Muntahā al-Irādāt, vol.2, p.429. See also al-Qurṭubī, al-Jāmiᶜ li Aḥkām al-Qur'ān, vol.11, p.315; Ibn al-ᶜArabī, Aḥkām al-Qur'ān, vol.3, p.1268.

[12] Nayl al-Awṭār, vol.6, p.73. See also Tabṣirat al-Ḥukkām, vol.2, p.249; Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.306; Mughnī al-Muḥtāj, vol.4, p.207; Kifāyat al-Akhyār, p.644; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.468; al-Iqnāᶜ, vol.2, p.242; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.323; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.125 and pp.127-128.

[13] Al-ᶜAynī, ᶜUmdah al-Qārī, vol.4, p.456; Ibn Ḥajar, Fatḥ al-Bārī, vol.12, p.228; Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.306; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.468; Kifāyat al-Akhyār, p.644; Mughnī al-Muḥtāj, vol.4, p.204; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.423; Fatḥ al-Wahhāb, vol.2, p.206; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.323; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.128; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, pp.408-409; al-ᶜUddah Sharḥ al-ᶜUmdah, p.449; Ḍamān al-Mutlifāt, p.468.

Shāfiᶜī, Mālik and Aḥmad b. Ḥanbal, is upon the point of period of damage done by the animal. In Bidāyat al-Mujtahid,[14] it notes al-Shāfiᶜī and Mālik[15] point out that the owner of the animal would be responsible for the injury or damage caused by his animal of it own accord to another's farm by night but not by day on two grounds. First, they refer to the case of animal's tort decided by the Prophets Dāwud and Sulaymān revealed in the Qur'ān.[16] The cogent point of the case was that the sheep got into the cultivated field by night and ate up the plants causing damage to the farm.[17] Second, they base their opinions on the Ḥadīth of judgement made when the female camel of al-Barā' b. ᶜĀzib trespassed on farm land and destroyed it.

Whereas, Abū Ḥanīfah definitely holds to the Ḥadīth "Injury caused by animals is not actionable" in its explicit meaning. This Ḥadīth, as stated by him, does not specify whether torts should be at night or in daylight but generally exempts the owners from bearing any liability. He, however, gave a condition that the owners' hands are not liable for the animals' acts when they are committing the mischief alone, otherwise they are held

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[14] Bidāyat al-Mujtahid, vol.2, p.242.

[15] In this book, it did not put the opinion of the Ḥanbalī school together with al-Shāfiᶜī and Mālik. It could be put together, however, on the basis of his opinion which is concurrent with them.

[16] Al-Qur'ān, 21:78. "And remember Dāwud and Sulaymān, when they gave judgement in the matter of the field into which the sheep of certain people had strayed by night". The word *nafashat* in the verse is interpreted to be "straying at night" by lexicographer. Bidāyat al-Mujtahid, vol.2, p.242.

[17] Prophet Dāwud in his seat of judgement considered the matter so serious that he awarded the owner of the farm the sheep themselves in compensation for his damage. His son, Prophet Sulaymān, a mere boy of eleven, thought of a better decision, where the penalty would better fit the offence. The loss was the loss of the produce of the farm. The *corpus* of the property was not lost. Sulaymān, therefore, suggested that the owner of the farm should not take the sheep altogether but only detain them long enough to recoup his actual damage from the milk and wool of the sheep while the owner of the sheep should keep the benefit as well until the farm returns to its normal shape and then re-exchange to normal position. Yūsuf ᶜAlī, The Holy Qur'ān, p.839. See also al-Alūsī, Tafsīr Rūḥ al-Maᶜānī, vol.17, pp.74-75; al-Qurṭubī, al-Jāmiᶜ li Aḥkām al-Qur'ān, vol.11, p.308; Ibn al-ᶜArabī, Aḥkām al-Qur'ān, vol.3, pp.1266-1267.

liable.[18]

THE OPINIONS OF THE *FUQAHĀ'* ON THE VARIOUS CIRCUMSTANCES ON ANIMALS' TORTS

The *fuqahā'* have discussed it in a wide ambit. Despite a comprehensive analysis, it is not arranged and formed in a way which is easy to understand. At present, a few contemporary *fuqahā'* like Ṣubḥī Maḥmaṣṣānī, Wahbah al-Zuḥaylī, Fawzī Fayḍ Allāh, Aḥmad Fatḥī Bahnasī, Sulaymān Muḥammad Aḥmad and ᶜAlī al-Khafīf have managed to separate it into a systematic compartment according to their own discipline. Here, the researcher will try to examine it looking at both classical and contemporary eras, and both the past and the present venerable *fuqahā'*.

Classes of Animals and their Liabilities

There are, explicitly or implicitly, two classes of animals: (1) animals of a dangerous character or animals *ferae naturae* (*al-ḥayawān al-khaṭir*).[19] (2) animals of domesticated nature or animals *mansuetae naturae* (*al-ḥayawān al-ᶜādī*).[20]

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[18] Bidāyat al-Mujtahid, vol.2, p.242.

[19] For examples, a tiger or a gorilla which are obviously of a dangerous nature, although individual animals may be more or less tamed. There are other terms which are used by the *fuqahā'*: *al-ḥayawān al-ḍārriyyah*, Manār al-Sabīl, vol.1, p.439, and *al-ḥayawān al-mufsid*, Mughnī al-Muḥtāj, vol.4, p.207.

[20] For examples, a dog, a cow, or a horse which have in individual cases given indications of the development of a vicious or dangerous disposition.

The *fuqahā'* unanimously agreed that where any damage is caused by the animal which belongs to a *ferae naturae* or *mansuetae naturae*, any person who is a keeper or owner or leader or driver or rider or the like of such an animal, is liable for the damage when he is *mutasabbib* of that damage or when he has had the malicious intention or there is contributory negligence in the care of it.[21] Al-Shīrāzī states:

> "If an animal is accompanied by its owner and it does harm to a person or destroys a property of another by its fore-feet or hind-feet or camine-teeth, or it urinates on the highway which causes a person to die in consequence (by falling down due to slippery state), the owner is held liable by reason that the animal is in his hand and his control. Tort committed by the animal is considered as done by its owner".[22]

If, in fact, he is not *mutasabbib* of such damage, the *fuqahā'* have a disparity of opinions among them. The Ḥanafī school opines that, if the animal *mansuetae naturae* causes damage by its own accord unaccompanied by its owner or the like to another's property or person, either by night or by day, either on the highway or in another's land, he is not liable because the Prophet has so ordained[23] and also, according to Muḥammad b. al-Ḥasan al-Shaybānī, because the act of the animal cannot, in this case, be attributed to him since he neither cast it off nor drove it;[24] unless it has been released and causes

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[21] Al-Qawānīn al-Fiqhiyyah, p.219; Minhāj al-Ṭālibīn in the margin of Mughnī al-Muḥtāj, vol.4, p.204; al-Wajīz, vol.2, p.186; al-Kāfī, p.606; al-Qārī, Majallat al-Aḥkām al-Sharʿiyyah, article 1449, p.450; Manār al-Sabīl, vol.1, p.439; al-Durr al-Mukhtār, vol.2, p.467; al-Hidāyah, vol.4, p.197.

[22] Al-Muhadhdhab, vol.3, p.207.

[23] "Injury caused by animals is not actionable". *Al-ʿAjmā' jubār*, al-Durr al-Mukhtār, vol.2, p.469. *Jarḥ al-ʿajmā' jubār*, al-Hidāyah, vol.4, p.201. *Jināyat al-ʿajmā' jubār*, Salīm Rustam, Sharḥ al-Majallah, vol.1, p.525.

[24] Al-Hidāyah, vol.4, p.201; al-Durr al-Mukhtār, vol.2, pp.468-469; Majmaʿ al-Ḍamānāt, p.191; al-Fatāwā al-ʿĀlamgiriyyah, vol.6, p.80; al-Mabsūṭ, vol.26, p.192; Majallah, articles 929 and 931; Raḥmat al-Ummah, p.305; al-Mīzān al-Kubrā, vol.2, p.174; Salīm Rustam, Sharḥ al-Majallah, vol.1, p.525; al-Mughnī, vol.8, p.337.

damage, the sender is liable during the day or at night.[25] But, the opinions of the Mālikī, Shāfiᶜī and Ḥanbalī jurists are different from those of the Ḥanafī jurists. Their views are that the owner of the animals *mansuetae naturae* is merely not responsible if the damage is caused to farms or elsewhere during the day. On the other hand, he is responsible if it happens during the night.[26]

In brief, the element of negligence is an important matter in the view of the Mālikī, Shāfiᶜī and Ḥanbalī schools for imposing liability on the owner for injury caused by his animals at night. There is an opinion that the owner is liable for the injury of his animal whether during the night or the day. This opinion is from al-Layth. However, he adds that the owner is not responsible for the value of compensation which

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[25] Raḥmat al-Ummah, p.305; al-Mīzān al-Kubrā, vol.2, p.174.

[26] Minhāj al-Ṭālibīn in the margin of Mughnī al-Muḥtāj, vol.4, p.206; al-Wajīz, vol.2, p.186; Aḥmad b. Ruslān, Matn al-Zubad, p.99; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.423; al-Shīrāzī, Kitāb al-Tanbīh, p.128; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.323; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.128; Sharḥ Muntahā al-Irādāt, vol.2, p.430; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, p.408; Manār al-Sabīl, vol.1, p.439; al-Mughnī, vol.8, p.336; al-Risālah, p.136; al-Ṭuruq al-Ḥukmiyyah, p.283; Bidāyat al-Mujtahid, vol.2, p.242; Raḥmat al-Ummah, p.305; Mukhtaṣar, p.292; al-Iqnāᶜ, vol.2, p.243. In Mukhtaṣar, it rules that if the damage is caused during the day, the owner is free from liability if his animals are put out to pasture far from the cultivated fields and with no one to look after them. If, on the other hand, they are in charge of a herdsman (*rāʿī*), he will be held responsible. Al-Nawawī puts a few exceptions on responsibility during the night: [1] The animal escapes after being properly tied up. [2] The owner of the field is present at the spot, but neglects to protect his crop from the trespassing animal. [3] The field is surrounded by a wall or other enclosure in which there is a gate that the owner has left open. Minhāj al-Ṭālibīn in the margin of Mughnī al-Muḥtāj, vol.4, p.207. See also al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.469; Aḥmad b. Ruslān, Matn al-Zubad, p.99; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.423; Fatḥ al-Wahhāb, vol.2, p.207; Taqrīr al-Awḥad in the margin of al-Iqnāᶜ, vol.2, p.243. Muḥammad al-Sharbīnī al-Khaṭīb put forward a few exceptions on the herdsman not being responsible during the daytime. Some of them are: [1] The animal is tied up on the highway or an other place and causes injury. [2] The location of grazing land is in the middle of the field and the owner lets his animals go to that land without a herdsman. [3] When the owner moves animals out from his field and as a result of that, they move to another's field and cause damage. [4] The injury occurs, contrary to *ᶜādah*, while the animal is dispatched to a certain place. [5] There are so many animals that the owner of farm is incapable to guard it. [6] A person who is hired to be a herdsman is responsible for injury which is done by his animals. Mughnī al-Muḥtāj, vol.4, p.206. See also Aḥmad b. Ruslān, Matn al-Zubad, p.99; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.423; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.469; Fatḥ al-Wahhāb, vol.2, p.207. For the case of despatch of animal, see Kifāyat al-Akhyār, p.644; Fatḥ al-Wahhāb, vol.2, p.207. Ibn Ḍūyān also rules that the owner is responsible for the injury caused by his animal during the night on the basis of negligence. Manār al-Sabīl, vol.1, p.439.

exceeds the animal's value.[27]

For Bees and Birds

The *fuqahā'* have different opinions about the injury caused by animals which, according to their natural life, cannot be tied up or controlled or kept from doing any harmful act like bees, birds, ducks, hens, cocks and the like. Their opinions can be classed into two groups:

1- The Ḥanafī,[28] Shāfiᶜī,[29] Ḥanbalī[30] schools and the majority of *fuqahā'* from the Mālikī school (Ibn al-Qāsim, Ashhab, Ibn Kināna and Aṣbagh)[31] opine that every person may own and possess those animals without having to take them out or transfer them to

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[27] Al-Mughnī, vol.8, p.336; Bidāyat al-Mujtahid, vol.2, p.242. For the matter of negligence, see also al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.423; Aḥmad b. Ruslān, Matn al-Zubad, p.99; al-Shīrāzī, Kitāb al-Tanbīh, p.128; Fatḥ al-Wahhāb, vol.2, p.207; Taqrīr al-Awḥad in the margin of al-Iqnāᶜ, vol.2, p.243; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.128; Sharḥ Muntahā al-Irādāt, vol.2, p.430.

[28] Al-Durr al-Mukhtār, vol.2, p.470. al-Ḥaṣkafī does, however, mention that some *fuqahā'* argue for liability in the case of bees that damage or injure fruit or man. Transferring the bees from other people's property is not required according to some of them, but it is required by others if damage or injury arises. The latter view comes from a *fatwā* (legal opinion) and it relates to what the *fatwā* specifies. It also uses the rule of *istiḥsān* (juristic preference). Radd al-Muḥtār, vol.6, p.537; Ḍamān al-Mutlifāt, pp.505-506; Bahnasī, al-Mas'ūliyyah al-Jinā'iyyah, pp.66-67.

[29] Mughnī al-Muḥtāj, vol.4, p.207; Nihāyat al-Muḥtāj, vol.8, p.41; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.469; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.423; Fatḥ al-Wahhāb, vol.2, p.207; al-Iqnāᶜ, vol.2, p.243.

[30] Al-Mughnī, vol.8, p.338; al-Mughnī wa al-Sharḥ al-Kabīr, vol.10, p.358.

[31] Al-Dusūqī, Ḥāshiyah ᶜalā al-Sharḥ al-Kabīr, vol.4, p.358; al-Tasūlī, al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.641; al-Bājī, al-Muntaqā, vol.6, p.61; Tabṣirat al-Ḥukkām, vol.2, p.250; al-ᶜAqd al-Munaẓẓam li al-Ḥukkām in the margin of Tabṣirat al-Ḥukkām, vol.2, pp.84-85; Mukhtaṣar, p.349; al-Ṣāwī, Bulghat al-Sālik, vol.2, p.409; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, pp.323-324; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, p.409; al-Qurṭubī, al-Jāmiᶜ li Aḥkām al-Qur'ān, vol.11, p.318; Ibn al-ᶜArabī, Aḥkām al-Qur'ān, vol.3, p.1270; Wahbah Muṣṭafā al-Zuḥaylī, "Al-Mas'ūliyyah al-Nāshi'ah ᶜan al-Ashyā'", in Majallat al-Majmaᶜ al-Fiqhī al-Islāmī, p.106; Ḍamān al-Mutlifāt, p.505.

another place, and their owner will not be liable for injuries caused by them to another's cultivated fields. The burden here is on the farmers or on the owners to protect their lands and plants.

2- Some of the Mālikī jurists (Maṭraf, Ibn Ḥabīb, and Ibn ᶜUrfah) and Ibn al-ᶜArabī[32] however, opine that no such animals can be owned or possessed when they may cause injury to cultivated fields and pastures. This means that any animal which can bring injury or harm to people in their farms and crops is to be interdicted.

As for the animals *ferae naturae*, they will be discussed in the following ways:

(a) For bull which has a tendency to gore and vicious dog (*al-kalb al-ᶜaqr*)

A person is responsible for what animals in his possession do. If a vicious dog is kept with the intention of killing a particular person and the dog kills him, then the *qiṣāṣ* is due whether or not the person was warned against keeping the dog. If the dog kills someone other than the intended victim, then indemnity (*diyah*) is due. If the dog is kept to kill an unspecified person and it kills someone, then indemnity is due whether or not the owner has been given a warning. If, however, a person keeps a dog with no intention

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[32] This is the citation of Maṭraf. He adds that the birds are impossible to control effectively unlike other livestock or cattle. It is upheld by Ibn Ḥabīb. In the same sense, Ibn ᶜUrfah mentions that the prevention of the owner from owning such animals is lighter than the injury which would be borne by the owner's cultivated fields and farms. Further, he conveys a maxim: "In the presence of two evils, the greater is to be avoided by the commission of the lesser". Ibn al-ᶜArabī also maintains this group's opinion. Al-Dusūqī, Ḥāshiyah ᶜalā al-Sharḥ al-Kabīr, vol.4, p.358; al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.641; al-Bājī, al-Muntaqā, vol.6, p.661; Tabṣirat al-Ḥukkām, vol.2, p.250; al-ᶜAqd al-Munaẓẓam li al-Ḥukkām in the margin of Tabṣirat al-Ḥukkām, vol.2, p.84; al-Ṣāwī, Bulghat al-Sālik, vol.2, p.409; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.324; Ibn al-ᶜArabī, Aḥkām al-Qur'ān, vol.3, p.1270; al-Qurṭubī, al-Jāmiᶜ li Aḥkām al-Qur'ān, vol.11, p.318; Ḍamān al-Mutlifāt, p.507.

of harming anyone and the dog kills a person, then, if the owner kept it for a justifiable reason, indemnity is due only if a warning had been given to him by the ruler or other authority before the killing. Otherwise, the person is not responsible. But, if he keeps the dog for some unjustifiable reason, he is liable for damages whether or not he was warned about the dog, when he knew that it was vicious, unless he did not know the dog had such character. In this case, he is not liable because the act of such a dog amounted to an act of *al-ᶜajmā'*, and injury caused by an animal is not actionable.[33]

The Ḥanafī and the Mālikī schools opine that the owner is liable for what such an animal did after he has been warned by one of the inhabitans of the place to take care of such an animal, and he nevertheless lets it loose and it destroys the animal or the property of another. The owner is bound to make good the loss. This case has been made on an analogy with a case of an inclining wall belonging to a person who neglects to knock it down as it is likely to collapse. For example, if the owner of an animal known to be of a destructive character such as a bull which gores, or a dog which bites, is warned by another to watch out but the owner does not concern himself about that, he will be

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[33] Al-Ābī, Jawāhir al-Iklīl, vol.2, p.257; al-Dusūqī, Ḥāshiyah ᶜalā al-Sharḥ al-Kabīr, vol.4, p.226; Zarrūq, Sharḥ Zarrūq ᶜalā Matn al-Risālah, vol.2, p.244; Ibn Nājī, Sharḥ Ibn Nājī ᶜalā Matn al-Risālah printed with Sharḥ Zarrūq ᶜalā Matn al-Risālah, vol.2, p.244; al-Fatāwā al-Khayriyyah, vol.3, p.18. See also Mukhtaṣar, p.273; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, pp.240-241; al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.241; al-Dardīr, Aqrab al-Masālik, p.180; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, p.356. In his Fatāwā, al-Ramlī has been asked about a case where a dog has been goaded or struck by a person, to cause it to kill a man, whether such person is liable to *al-qiṣāṣ* or *diyah*? He replied: "If the dog has a vicious character, the person is responsible for the *qiṣāṣ*". See al-Fatāwā al-Khayriyyah, vol.3, p.18. See also, Bahnasī, al-Mas'ūliyyah al-Jinā'iyyah, p.66. Abū Yūsuf opines that if a dog has been instigated by a person to bite someone, the person is responsible. Analogously, he compares this case with the case where a person despatches his animal to somewhere and the animal does injury to another while on the way. The person is liable. But, on the other hand, Abū Ḥanīfah opines that the person who has instigated his dog is not held liable by reason that the dog has committed biting of its own volition, and its act is overlooked. The most suitable *fatwā* is the opinion of Abū Yūsuf. See Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.273; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.455; Lisān al-Ḥukkām, p.279; al-Fatāwā al-Hindiyyah, vol.6, p.52.

bound by liability if such an animal causes damage.[34] In addition, al-Sarakhsī adds that if the vicious dog is left in a dwelling alone (whether tied it up or not), the owner is not liable for what had happened because he is not considered as *al-mutaʿaddī*.[35] The Mālikī school also adds that if the owner takes the necessary measures in respect of animals *ferae naturae* putting them in the proper place (*mawḍiʿ yajūz lah*), he is not responsible for what had happened until he has been warned by others. But if he put them in an unsuitable place (*mawḍiʿ lā yajūz lah*), he is responsible even though he has not been warned.[36]

The Shāfiʿī and the Ḥanbalī schools maintain that the owner of those animals *ferae naturae* is held liable for any injury whether it is done in daytime or at night. Their argument is that the owner is considered as *al-mutaʿaddī* and *mufarriṭ* (negligent) by virtue of possessing them. Consequently, he has to take care of them and tie them up properly unless a person enters his house without his permission or the visitor has known about the animals and has been injured by such animals *ferae naturae*. Here, the owner

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[34] Al-Durr al-Mukhtār, vol.2, p.470; al-Fatāwā al-Hindiyyah, vol.6, p.52; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.411; Lisān al-Ḥukkām, p.279; Majallah, article 929; al-Mudawwanah, vol.4, p.666; al-Kāfī, p.606; Mūjabāt, vol.1, p.243. The Ẓāhirī school also opines in the same way. Al-Ramlī (a Ḥanafī jurist) in his Fatāwā is asked about a man who borrows a bull knowing that it has a tendency to gore. The man drives it and it gores another person to death. Is the liability then on the borrower of the bull, the lender, or both, or neither?. He answers that the borrower's clan (*ʿāqilah*) is liable for *diyah* because there is neglect on the part of the borrower in letting the bull go. Such a bull must be tied up. See al-Fatāwā al-Khayriyyah, vol.4, p.43; Bahnasī, al-Mas'ūliyyah al-Jinā'iyyah, p.68.

[35] Al-Mabsūṭ, vol.27, p.5.

[36] Al-Mudawwanah, vol.4, p.666; al-Kāfī, p.606; al-Bājī, al-Muntaqā, vol.6, pp.61, 67 and 68; Ḍamān al-Mutlifāt, p.553. Khalīl ibn Isḥāq said that the fact of having tied up a vicious animal near a road, or keeping in one's house a dangerous dog and one well known to be dangerous, with the intention of causing hurt to some person, renders the doer liable to *qiṣāṣ* if the death of the person has been caused thereby. But if he had no intention of harming anyone, or if other than the person he intended to harm should succumb, then he is only liable to pay *diyah*. See Mukhtaṣar, p.273 (tr. by F.H. Ruxton, p.313).

is not liable.[37] Otherwise, if that person enters with his permission and at the same time he has no knowledge of the character of that animal, the owner of the animal is liable in consequence because he is *mutasabbib* to *itlāf*. In brief, the Shāfiᶜī school bases its opinion on the knowledge about the animal. If the visitor has knowledge, the owner is not held liable even though the visitor has permission from him.[38]

(b) For a voracious cat

In the case of a voracious cat, the owner is responsible if it has eaten a bird or some food or the like belonging to another with the knowledge that such a cat is particularly voracious. It is of no consequence whether that occurred by night or by day. Where, on the contrary, the owner is ignorant of the cat's voracity, he is not responsible

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[37] The injured person is considered as *mutaᶜaddīn* by action of entering and also *mutasabbib* in causing damage to himself. See al-Iqnāᶜ, vol.2, p.243; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.469; al-Shīrāzī, Kitāb al-Tanbīh, p.128; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, pp.119-120; Sharḥ Muntahā al-Irādāt, vol.2, p.426; al-Mughnī, vol.8, p.338; al-Rawḍ al-Murbiᶜ, pp.334-335; al-Qārī, Majallat al-Aḥkām al-Sharᶜiyyah, article 1447, p.450; Manār al-Sabīl, vol.1, p.438; Bahnasī, al-Mas'ūliyyah al-Jinā'iyyah, p.65.

[38] Nihāyat al-Muḥtāj, vol.8, p.40; Mughnī al-Muḥtāj, vol.4, p.208; al-Iqnāᶜ, vol.2, p.243; Raḥmat al-Ummah, p.276; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.469; al-Rawḍ al-Murbiᶜ, pp.334-335; al-Mughnī, vol.8, p.338. In this case, Abū Ḥanifah's opinion is similar to al-Shāfiᶜī opinion. Mālik opines that the owner is liable on condition he has known the animal is an animal *ferae naturae*. The Ḥanbalī school, in fact, has two opinions, but the most manifest (*aẓhar*) opinion is similar to al-Shāfiᶜī's and Abū Ḥanīfah's opinions. In addition, according to Mālik, a house is not a proper place to keep animals *ferae naturae*. So if a minor or a servant or a neighbour is injured by them and the owner has known the nature of the animal, he is liable. See al-Mudawwanah, vol.4, p.666. The Ḥanafī jurists further assert that the owner is definitely not liable whether the person enters his house with his permission or not. See al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.406; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.282; Mūjabāt, vol.1, p.243; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.273; Lisān al-Ḥukkām, p.279; Bahnasī, al-Mas'ūliyyah al-Jinā'iyyah, p.65, cf., Ḍamān al-Mutlifāt, p.552. In al-Kāfī, the author states if a person enters another person's house without permission from his owner and he is injured by a dog therein, the owner is not liable whether it is tied up or not. See al-Kāfī, p.606.

for the damage it caused. This is the opinion of the Shāfiᶜī[39] and the Ḥanbalī[40] schools.

Otherwise, according to the Ḥanafī school[41] and the Shāfiᶜī school (in the other opinion),[42] he is not responsible for damage that happened either in daytime or at night because the cat is not usually tied up and the Prophet ordained: "Injury caused by animals is not actionable". However, there is another opinion which considers the position of the cat as equivalent to other animals. Its owner, consequently, is liable for the damage it caused at night but not during the day.[43]

(c) For other animals *ferae naturae*

In the Ḥanafī school, al-Kāsānī states that 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 is *al-taᶜaddī* unless the snake or scorpion moves from the place in which it is thrown to another and then bites another person there, the thrower is not liable by reason of the fact that he is not *al-mutaᶜaddī*.[44] If a snake attacks a person and, in being pushed

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[39] Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.306; Minhāj al-Ṭālibīn in the margin of Mughnī al-Muḥtāj, vol.4, p.207; al-Iqnāᶜ, vol.2, p.243; al-Wajīz, vol.2, p.186; Kifāyat al-Akhyār, p.645; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.423; Fatḥ al-Wahhāb, vol.2, p.207; Fatāwā al-Nawawī, p.150; Raḥmat al-Ummah, p.305.

[40] Al-Mughnī, vol.8, p.338; Manār al-Sabīl, vol.1, p.438; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, pp.119-120; Sharḥ Muntahā al-Irādāt, vol.2, p.426.

[41] Jāmiᶜ al-Fuṣūlayn, vol.2, p.85; Ḍamān al-Mutlifāt, p.554.

[42] Mughnī al-Muḥtāj, vol.4, p.207; Nihāyat al-Muḥtāj, vol.8, pp.40-41; al-Wajīz, vol.2, p.186. See also Fatāwā al-Nawawī, p.150.

[43] Fatāwā al-Nawawī, p.150; Mughnī al-Muḥtāj, vol.4, p.207.

[44] Badāᶜiᶜ al-Ṣanāᶜiᶜ, vol.7, p.273; al-Durr al-Mukhtār, vol.2, p.448; Lisān al-Ḥukkām, p.229; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.455.

away, falls onto a second person who in turn throws the snake onto a third person who is bitten and dies, who would be liable for the death? Abū Ḥanīfah answered thus:

> "The first person is not liable because the snake did not hurt the second person. Neither is the second liable, or the third and so on if there were more persons involved. As far as the last person in the chain is concerned, if the snake falls on him and he is bitten as soon as the snake falls on him, thus giving him no time to throw it away, then the person who had thrown the snake on the last person is liable to the heirs of the deceased. If, however, the snake does not bite him immediately, then the person who had thrown the snake is not liable".[45]

Muḥammad b. al-Ḥasan al-Shaybānī is reported by al-Sarakhsī in al-Mabsūṭ: "If someone throws an insect at a man and that insect bites him, he is liable because he intentionally caused this injury".[46] This case is similar to a case which is recorded by the Mālikī jurists that, if a man throws a poisonous snake onto another, the one who threw the snake is sentenced to death if the snake kills that other man. And the man's statement: "I was playing ", is rejected because he knows what is in his hand.[47]

The Mālikī jurists elaborate the case of snake as follows: "If a big snake is thrown onto a person and he dies in consequence whether by being bitten or through fright, the person who threw it is liable for *qawad* (retaliation) whether it was done as a joke or through hostility. Otherwise, the person will be liable for *diyah* if he has thrown a small snake (which is unable to kill anybody) onto another and he dies of fear. In fact, the *diyah* will be regulated if the person did it as a joke. However, if he committed it through

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[45] Radd al-Muḥtār, vol.6, p.551; al-Durr al-Mukhtār, vol.2, p.448; Bahnasī, al-Mas'ūliyyah al-Jinā'iyyah, p.49.

[46] Cited in Bahnasī, al-Mas'ūliyyah al-Jinā'iyyah, p.51, cf., ʿAlī Ḥaydar, Durar al-Ḥukkām, vol.9, p.571.

[47] Mukhtaṣar, pp.273-274; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.241; al-Ābī, Jawāhir al-Iklīl, vol.2, p.257; Tabṣirat al-Ḥukkām, vol.2, p.167. See also Bahnasī, al-Mas'ūliyyah al-Jinā'iyyah, p.184.

hostility, the punishment of *qawad* remains imposed on him".[48] In the Shāfʿī school, Muḥammad al-Sharbīnī al-Khaṭīb gives a general theory about the animals *ferae naturae*. He indicates that if there is an animal which is usually passionately fond of wounding other animals (or persons) like a camel or a donkey, its owner is liable if an injury occurred due to it. And further, he theorizes that the owner of the animals *ferae naturae* which should be tied up properly, will definitely be liable for their injurious acts if he neglects that.[49]

LIABILITY FOR ANIMALS ON THE HIGHWAY

According to the Ḥanafī[50] and the Shāfʿī[51] jurists the right of passing on the highway is allowed to the whole community under the condition of safety, for it is the exercise of a privilege by the individual passer-by with respect to himself on the one side, and with respect to others on the other side. The right of passage being shared among the whole community, it is adjudged to all under the condition of safety from the standpoint of the interest of both parties. It is moreover to be observed that a restriction to the

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[48] Al-Ṣāwī, Bulghat al-Sālik, vol.2, pp.356-357; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, p.356; al-Dardīr, Aqrab al-Masālik, p.180; al-Dusūqī, Ḥāshiyah ʿalā al-Sharḥ al-Kabīr, vol.4, p.217.

[49] Mughnī al-Muḥtāj, vol.4, p.207. However, there is an opinion that the owner is not liable either during the day or the night by reason that such an animal (camel or donkey) is not normally tied up.

[50] Al-Hidāyah, vol.4, pp.197-198; al-Ikhtiyār li Taʿlīl al-Mukhtār, vol.5, p.47; al-Ajwibah al-Khafīfah, p.388; Radd al-Muḥtār, vol.6, pp.595-596 and p.603; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, pp.602-603; al-Durr al-Mukhtār, vol.2, p.467.

[51] Mughnī al-Muḥtāj, vol.4, p.205.

condition of safety can obtain only in matters where an attention to safety is practicable, otherwise the condition of safety is not required.

The Ḥanafī jurists continue their clarification by discussing the cases where the rider of an animal is responsible for anything which the animal destroys by treading it down with its fore-feet, or its hind-feet, or by goring it with its head, or by biting it with the front teeth, or by striking it with its fore-feet. The rider is also responsible for injury resulting from collision with something else. But, in cases of dirt or mud or small stones or gravel scattered about by the hoofs of an animal and another person's clothes are splashed or damaged, or a person's eye has been put out, he is not responsible. However, if the animal throws up a large stone, he is liable. In another case, if the animal while travelling discharges its dung or urine on the highway and any person perishes in consequence (falling down due to the slippery surface or the like), the rider is not responsible since it is impossible to guard against this.[52]

In the Shāfiᶜī school, its rider or driver or leader is responsible for any damage caused by the animal through its fore-feet or hind-feet, etc. Unlike the Ḥanafī jurists, the *fuqahā'* in this school do not make any difference between fore-feet and hind-feet. With

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[52] Al-Hidāyah, vol.4, pp.197-198; al-Durr al-Mukhtār, vol.2, p.467; al-Mabsūṭ, vol.26, pp.188-189; Majmaᶜ al-Anhur, vol.2, pp.659-660; Tabyīn al-Ḥaqā'iq, vol.6, p.149; Radd al-Muḥtār, vol.6, 603; Majmaᶜ al-Ḍamānāt, pp.185-186; Ḍamān al-Mutlifāt, p.518; al-Fatāwā al-Hindiyyah, vol.6, p.50; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.5, pp.47-48; al-Jāmiᶜ al-Ṣaghīr, p.516; al-Kanawī, al-Nāfiᶜ al-Kabīr printed with al-Jāmiᶜ al-Ṣaghīr, p.516; al-Ajwibah al-Khafīfah, p.388; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.272; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.455; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.,603. Muḥammad b. al-Ḥasan al-Shaybānī says in his writings: "A person rides an animal and stops (in an appropriate place) so that his animal discharges its dung or urine there, then a man perishes thereby, the person is not liable. Otherwise, if the person stops his animal for another purpose, but his animal discharges its dung or urine there and a man is damaged in consequence, the person is liable. See al-Jāmiᶜ al-Ṣaghīr, p.516. See also Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.455; al-Fatāwā al-Hindiyyah, vol.6, p.50; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.604. If a person rides his animal in his own land and the animal injures another, the person is not responsible unless in the case of it causing damage by treading down with its feet (*waṭ'*) (hind or front feet). See al-Ajwibah al-Khafīfah, p.388; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.272; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.456; al-Fatāwā al-Hindiyyah, vol.6, p.50.

regard to the case of mud or dirt or urine or dung scattered on the public road in the ordinary act of animals, if damage had happened in consequence, the rider is not held liable (even though the animal discharges its urine or dung while in the position of stopping). Otherwise, if the damage occurred as a result of unusual acts by such an animal, he is not free from liability.[53] This case seems parallel with the view of the Ḥanafī school.

In the Mālikī school, the rider or the leader or the driver shall be liable to pay compensation for what his animal trampled on, because he is considered as able to control and restrain his animal's acts, unless the injury occurs on its own accord like swishing with its tail or biting with the front teeth or the injury occurs without anything being done to the animal like inciting or goading it to cause it to kill a man by kicking or treading him down.[54]

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[53] Al-Umm, vol.7, p.232; Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.306; al-Muhadhdhab, vol.3, p.207; Abū Shujāᶜ, Matn Abī Shujāᶜ, p.49; Ibn al-Qāsim al-Ghazzī, Sharḥ Ibn al-Qāsim al-Ghazzī ᶜalā Matn Abī Shujāᶜ printed with Ḥāshiyat al-Bayjūrī, vol.2, pp.467-470; Kifāyat al-Akhyār, p.644; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.423; al-Shīrāzī, Kitāb al-Tanbīh, p.128; Fatḥ al-Wahhāb, vol.2, p.207; al-Iqnāᶜ, vol.2, p.243; Mughnī al-Muḥtāj, vol.4, pp.204-205; Minhāj al-Ṭālibīn in the margin of Mughnī al-Muḥtāj, vol.4, p.205; al-Sirāj al-Wahhāj, p.539; Tuḥfat al-Muḥtāj in the margin of Ḥāwāshī al-Sharwānī wa Ibn Qāsim, vol.9, pp.201-205; Ibn Ḥajar, Fatḥ al-Bārī, vol.12, p.228; Raḥmat al-Ummah, p.305; al-Mīzān al-Kubrā, vol.2, p.154; al-Durr al-Mukhtār, vol.2, p.467; Nihāyat al-Muḥtāj, vol.8, p.41. In Nihāyah, there is an exception that is if the owner intentionally puts urine or excreta on the highway to debar the passer-by from passing it to one place and there is no other way than that, the owner of the animal is liable if an injury occurs in consequence. See also Tuḥfat al-Muḥtāj in the margin of Ḥāwāshī al-Sharwānī wa Ibn Qāsim, vol.9, p.205; Sulaymān al-Jamal, Ḥāshiyat al-Jamal ᶜalā Sharḥ al-Minhaj, vol.5, p.177. According to al-Shīrāzī, in the case of urine scattered on the public road, the owner is held liable if a person is injured by falling down due to slippery surface of it. See al-Muhadhdhab, vol.3, p.207. See also Taqrīr al-Awḥad in the margin of al-Iqnāᶜ, vol.2, p.243. However, the owner is not liable if the person intentionally walks on that slippery surface. See Mughnī al-Muḥtāj, vol.4, p.205.

[54] Al-Mudawwanah, vol.4, pp.664, 665 and 666; al-Muwaṭṭa', p.626; al-Zurqānī, Sharḥ al-Zurqānī ᶜalā Muwaṭṭa', vol.4, p.199; al-Risālah, p.126; Tabṣirat al-Ḥukkām, vol.2, p.246; al-Thamar al-Dānī, pp.525-526; al-Kāfī, pp.605-606; Zarrūq, Sharḥ Zarrūq ᶜalā Matn al-Risālah, vol.2, p.243. In al-Mughnī, it reported that Mālik opines that the rider or the leader or the driver is not liable for animal tort whether to person or property of others because the Prophet said: "Injury caused by animals is not actionable". The animal with its owner is regarded as if it is alone. See al-Mughnī, vol.8, p.338.

If anything has been done to the animal like inciting or goading it so as to cause it to kick with its hind-legs, he is liable for any damage because the damage resulted from his *sabab*. Thus, in the case of biting with the front teeth or kicking with its front-legs, if any *sabab* emerges from him, he is liable; otherwise he will not be held liable.[55]

If there is a wavering between certainty and uncertainty (*shakk*) as to whether the damage occurred from the acts of an animal or the acts of *mutasabbib* (the rider or the driver or the leader), the damage will be overlooked.[56]

Further, the rider or the driver or the leader will be held liable for the damage resulting from a stone made to fly (*aṭārat*) by the animal while it is on the highway because the right of passing is allowed under the condition of safety.[57] However, there is an opinion in this school that there is no liability unless the animal throws up the stone by its hoofs while it is driven (*indafaᶜat*) by him; otherwise he will not be liable.[58]

Based on the Mālikī jurists' dissussion, it seems obvious that the standpoint to measure the tortious liability in animal tort cases for the rider or the driver or the leader is the *sabab*. If this element exists, he is liable, otherwise he is not liable.

In his comparative law treatise al-Mughnī, the Ḥanbalī jurist Ibn Qudāmah appears to coincide in opinion with the Ḥanafī school in the case of kicking incurred

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[55] Al-Mudawwanah, vol.4, pp.664, 665 and 666; al-Dusūqī, Ḥāshiyah ᶜalā al-Sharḥ al-Kabīr, vol.4, pp.357-358; al-Bājī, al-Muntaqā, vol.7, p.109; Tabṣirat al-Ḥukkām, vol.2, p.248; Raḥmat al-Ummah, p.305.

[56] Al-Dusūqī, Ḥāshiyah ᶜalā al-Sharḥ al-Kabīr, vol.4, p.358; Tabṣirat al-Ḥukkām, vol.2, p.248; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, p.409.

[57] Al-Dusūqī, Ḥāshiyah ᶜalā al-Sharḥ al-Kabīr, vol.4, p.358; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, p.409; Tabṣirat al-Ḥukkām, vol.2, p.248.

[58] Tabṣirat al-Ḥukkām, vol.2, p.248; Zarrūq, Sharḥ Zarrūq ᶜalā Matn al-Risālah, vol.2, p.244; Ibn Nājī, Sharḥ Ibn Nājī ᶜalā Matn al-Risālah printed with Sharḥ Zarrūq ᶜalā Matn al-Risālah, vol.2, pp.243-244.

through its hind-leg or swishing with its tail (without any mediate causation) where its rider or driver or leader is free from bearing liability. The basis of his argument is the Ḥadīth: "Animal's tort by its hind-leg is to be overlooked". Also, because he has no control over it at the time of its torts. The position of such an animal at that time is similar to its position when alone.[59]

In the cases of damage by biting with the front teeth, by striking with its fore-legs, by treading down with its hind-legs and damage incurred through its head and the like, the Ḥanbalīs' opinion coincided with the Ḥanafī school, the Shāfiʿī school and the Mālikī school, where the rider or the driver or the leader will be held liable.[60]

Although the Ḥanbalī school of law coincided in some cases with the Ḥanafī school, the Shāfiʿī school and the Mālikī school, in the case of the animal's urine or dung scattered on the public highway, it seems the Ḥanbalī school did not follow them. The school opines that the owner (*ṣāḥib*) should be held liable for any damage which emerges from it. The jurists of this school argue that since the hand of the rider or the driver or the leader is on the animal and he is controlling it while it is urinating or excreting, the damage will be linked to him. It is similar to the case of injury committed by fore-legs or mouth.[61] However, in accordance with *qiyās*, there is the opinion in the Ḥanbalī school

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[59] Al-Mughnī, vol.8, p.339. See also Manār al-Sabīl, vol.1, p.439; Majallat al-Aḥkām al-Sharʿiyyah, article 1449, p.450; ʿUmdat al-Fiqh, p.126; al-Mīzān al-Kubrā, vol.2, p.154; Raḥmat al-Ummah, p.305; alʿ Uddah Sharḥ al-ʿUmdah, p.448; Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ, vol.4, p.126; Sharḥ Muntahā al-Irādāt, vol.2, p.429.

[60] Al-Mughnī, vol.8, p.338; Manār al-Sabīl, vol.1, p.439; Majallat al-Aḥkām al-Sharʿiyyah, article 1449, p.450; ʿUmdat al-Fiqh, p.126; al-Mīzān al-Kubrā, vol.2, p.154; Raḥmat al-Ummah, p.305; Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ, vol.4, p.126; Sharḥ Muntahā al-Irādāt, vol.2, p.429.

[61] Al-Mughnī, vol.7, p.831; ʿUmdat al-Fiqh, p.126.

which opines that the owner should not be liable by reason that this case is out of his duty of care and control.[62]

STOPPING OR TYING UP AN ANIMAL ON THE PUBLIC ROAD OR AT THE MARKET

The *fuqahā'* have a similar opinion in the discussion of this topic. The Ḥanafī school recognizes that if any person stops his animal or ties it up on the public highway or at the market or at a place belonging to someone else without his permission, and if such an animal kicks with its hind-legs, or tramples with its legs, or swishes with its tail, or bites with its teeth, or inflicts injuries in any other way, that person will be obliged in every case to make good the loss caused by the animal, because he amounted to *al-mutaᶜaddī* in this indirect cause. Consequently, no person has the right of stopping or of tying up his animal in public property like the public highway or in private property belonging to others. The public highway and the markets are the places for people using them under the condition of safety, not for tying up animals. There is an exception, however, made in the case of places specially set aside for animals such as horse markets (*sūq al-dawāb*) and places where animals are sent out on hire (*al-maḥāll al-muᶜidd li wuqūf dawāb al-kirā'*).[63]

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[62] Al-Mughnī, vol.7, p.831.

[63] Al-Hidāyah, vol.4, p.198; al-Mabsūṭ, vol.26, p.190; Tabyīn al-Ḥaqā'iq, vol.6, p.149; al-Durr al-Mukhtār, vol.2, p.467; Jāmiᶜ al-Fuṣūlayn, vol.2, p.86; al-Fatāwā al-Hindiyyah, vol.6, p.50; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.5, pp.47-48; Lisān al-Ḥukkām, p.279; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.455; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.272; Majallah, article 934. Anyone who stops an animal at a mosque door or the like, if it does injury, will be liable unless the authority provides a place for that. In that case, he is not

The MālikĪ, ShāfiᶜĪ and ḤanbalĪ jurists demonstrate this matter by mentioning that the fact of having tied up or stopped an animal on the public road at a place which is not provided by the authorities for that purpose, renders its owner liable for an injury caused by his animal either with its fore-legs or hind-legs or teeth and so forth. Their reason is that every person has a right of way on the public highway under the condition of safety. If, however, the animal has been tied up or stopped in a place provided by the authorities, its owner will not be liable for the injury.[64] Further, if the animal is stopped on the highway near a mosque's door or a shop or etc. for a certain purpose, the owner of the animal is not liable for any injury which occurs through it unless the owner has known the character of his animal which is usually passionately fond of kicking with its hind-feet. The owner, in this case, is liable for any injury which happens.[65] What is the liability if an animal tied up or stopped on a wide highway? The ḤanbalĪ jurists are

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responsible for accidents. See al-Durr al-Mukhtār, vol.2, p.467; Jāmiᶜ al-Fuṣūlayn, vol.2, p.86; al-Ikhtiyār li TaᶜlĪl al-Mukhtār, vol.5, p.48; Lisān al-Ḥukkām, p.279; Fatāwā QāḍĪkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.456; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.272; al-Fatāwā al-Hindiyyah, vol.6, p.50 and p.51; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.604; Radd al-Muḥtār, vol.6, p.604.

[64] Al-Mudawwanah, vol.4, p.665; Zarrūq, Sharḥ Zarrūq ᶜalā Matn al-Risālah, vol.2, p.244; Ibn NājĪ, Sharḥ Ibn NājĪ ᶜalā Matn al-Risālah printed with Sharḥ Zarrūq ᶜalā Matn al-Risālah, vol.2, p.244; Bidāyat al-Mujtahid, vol.2, p.313; al-BājĪ, al-Muntaqā, vol.7, p.110; MughnĪ al-Muḥtāj, vol.4, p.206; Manār al-SabĪl, vol.1, p.438; al-ᶜUddah Sharḥ al-ᶜUmdah, p.449; al-MughnĪ, vol.8, p.430; ᶜUmdat al-Fiqh, p.126. Al-BayjūrĪ remarks that if an animal is tied up in front of the shop and it damages something at that place, its owner is responsible. See TaqrĪr al-Awḥad in the margin of al-Iqnāᶜ, vol.2, p.243. In ᶜUmdat al-Fiqh, p.126, Ibn Qudāmah prohibits to tying the animal up at another's land without permission. Its owner will bear liability if it causes injury. A MālikĪ jurist Ibn al-Qāsim seems to highlight whether what has been done by someone is permitted by law or not. If it is permitted, he does not incur liability. As such, if a rider of an animal stops his animal on the public road, or he steps down from it in case of a particular need, or stops it at a mosque door, or at a lavatory, or at a market (*sūq*), the rider or owner of the animal is not liable for any accident which happens due to his animal. See al-Mawāq, al-Tāj wa al-IklĪl in the margin of al-Ḥaṭṭāb, Mawāhib al-JalĪl, vol.6, p.241. See also al-ṢāwĪ, Bulghat al-Sālik, vol.2, p.356. See the case of tying up an animal on the public road with the intention of killing a particular person in Mukhtaṣar, p.273; al-DardĪr, Aqrab al-Masālik, p.180; al-ĀbĪ, Jawāhir al-IklĪl, vol.2, p.257; al-Mawāq, al-Tāj wa al-IklĪl in the margin of al-Ḥaṭṭāb, Mawāhib al-JalĪl, vol.6, p.241; al-DardĪr, al-Sharḥ al-ṢaghĪr in the margin of Bulghat al-Sālik, vol.2, p.356; al-ṢāwĪ, Bulghat al-Sālik, vol.2, p.356.

[65] Zarrūq, Sharḥ Zarrūq ᶜalā Matn al-Risālah, vol.2, p.244; Ibn NājĪ, Sharḥ Ibn NājĪ alā Matn al-Risālah printed with Sharḥ Zarrūq ᶜalā Matn al-Risālah, vol.2, p.244.

clearly concerned about this case. However, their opinions are divided into two:

[1] The owner is definitely liable because the use of the public road is under the condition of safety of others.

[2] The owner is not liable because he does not make any inconvenience to the public and he is not considered *mutaᶜaddin*.[66]

Relating to the case above, the owner is absolutely liable for any injury which occurs if the owner of the animal ties it up or stops it on the narrow road by reason that he did *al-taᶜaddī* in his action.[67] Further, the liability remains imposed on the owner of the animal if he stops it in the compound of someone's house without being a guest or on the highway without any reason, or keeps a dog in his house without lawful (*sharᶜiyyah*) reason and the animal or dog injures a person, then the *diyah* is due on the owner of the animal or of the dog.[68]

THE CASE OF *AL-NAFḤAH*[69]

The *fuqahā'* have a different opinions in the case of animal's tort, by its hind-legs or tail, while it is on the highway. Their opinions can be divided into two groups.

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[66] Al-ᶜUddah Sharḥ al-ᶜUmdah, p.449.

[67] Al-Rawḍ al-Murbiᶜ, p.334.

[68] Al-Ṣāwī, Bulghat al-Sālik, vol.2, p.356.

[69] *Al-Nafḥah* means swishing or blowing or kicking or striking by the hind-legs or by the tail. The action of *nafḥah* is kicking or swishing (*al-ḍarbah*) by the hind-legs (*al-rijl*). See Ibn Ḥajar, Fatḥ al-Bārī, vol.12, p.226; al-Muᶜjam al-Wasīṭ, vol.2, p.946; Tahdhīb Lisān al-ᶜArab, vol.2, p.635. But al-Zurqānī used the word *tarmaḥ* conveying the meaning of kicking or striking (*taḍrib*) by the hind-legs. See al-Zurqānī, Sharḥ al-Zurqānī ᶜalā Muwaṭṭa', vol.4, p.199; Tahdhīb Lisān al-ᶜArab, vol.2, p.635. Whereas in Muwaṭṭa', the word *tarmaḥ* is defined by *rafsah*, also conveying the meaning of kicking. See Muwaṭṭa', p.626.

The first group

The rider or the driver or the leader of an animal is answerable for anything which the animal destroys by kicking with its hind-feet or swishing with its tail. This is the opinion of Ibn Shubrumah, Ibn Abī Laylā, al- Shāfiᶜī, Shurayḥ and a view of the Ḥanbalī school.[70] Their reason is because the hand of the keeper (the rider or the driver or the leader) is on the animal and he was controlling it when it did the injury. The injury occurs as if from the keeper's hand.[71] Another reason is the animal in this circumstance is like a tool (*adāh*) which the owner has used to commit the injury. The position of all torts resulting from the hind-feet and the fore-feet is similar. The other *fuqahā'* maintain that the owner is not liable because he cannot control the animal's hind-feet. So in the case when the driver does not see the tort of the fore-feet, as a matter of expedience they said that the driver is liable for the hind-feet but not for the fore-feet. But they did not state it like that.[72]

The second group

The rider or the leader or the driver is not responsible for anything which the

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[70] Al-Umm, vol.7, 232; Mughnī al-Muḥtāj, vol.4, p.205; Nihāyat al-Muḥtāj, vol.8, p.38; Tuḥfat al-Muḥtāj in the margin of Ḥāwāshī al-Sharwānī wa Ibn Qāsim, vol.9, pp.201-204; al-Durr al-Mukhtār, vol.2, p.467; Bidāyat al-Mujtahid, vol.2, p.312; al-Mughnī, vol.8, p.339. See also al-Qurṭubī, al-Jāmiᶜ li Aḥkām al-Qur'ān, vol.11, p.318.

[71] Al-Mughnī, vol.8, p.339.

[72] Al-Umm, vol.7, p.232; al-Khaṭṭābī, Maᶜālim al-Sunan, vol.4, p.36; Ḍamān al-Mutlifāt, p.520. See also Mukhtaṣar al-Muzanī ᶜalā al-Umm, p.284.

animal may destroy by striking with its hind-feet or by swishing with its tail. This is the opinion of the Ḥanafī,[73] the Mālikī,[74] the Ḥanbalī[75] and the Ẓāhirī[76] schools. This is also the opinion of al-Awzāᶜī and al-Layth.[77]

The Ḥanafī jurists said that a restriction to the condition of safety can only obtain in matters where attention to safety is practicable. If the owner or the keeper cannot control his animal when travelling, the condition of safety is not emphasized and it is impracticable and he is not able to take reasonable care (*lā yumkinuh al-iḥtirāz*).[78] For example, the driver of an animal has no command over its hind-feet even though he sees them. He, therefore, is not responsible for the damage which may be occasioned by them. This is the more approved opinion (*aṣaḥḥ*).[79]

The Mālikī jurists emphasize that the liability is not upon the owner of the animal

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[73] Al-Hidāyah, vol.4, p.197; al-Mabsūṭ, vol.27, p.2; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.8, p.569; Salīm Rustam, Sharḥ al-Majallah, vol.1, pp.527-528; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.5, pp.47-48; al-Jāmiᶜ al-Ṣaghīr, p.516; al-Kanawī, al-Nāfiᶜ al-Kabīr printed with al-Jāmiᶜ al-Ṣaghīr, p.516; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.272; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.455; al-Fatāwā al-Hindiyyah, vol.6, p.50; al-Durr al-Mukhtār, vol.2, p.467; al-Mughnī, vol.8, p.339; Majallah, article 932.

[74] Al-Mudawwanah, vol.4, pp.664, 665 and 666; al-Thamar al-Dānī, pp.525-526; Muwaṭṭa', p.626; al-Zurqānī, Sharḥ al-Zurqānī ᶜalā Muwaṭṭa', vol.4, p.199; al-Kāfī, p.606. See also Zarrūq, Sharḥ Zarrūq alā Matn al-Risālah, vol.2, p.244; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, p.409.

[75] Al-Mughnī, vol.8, p.339; Manār al-Sabīl, vol.1, p.439; Majallat al-Aḥkām al-Sharᶜiyyah, article 1449, p.450; al-Rawḍ al-Murbiᶜ, p.335; al-Khirqī, Mukhtaṣar al-Khirqī, p.117; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.126; Sharḥ Muntahā al-Irādāt, vol.2, p.429.

[76] Al-Muḥallā, vol.11, p.20, issue 2118.

[77] Al-Qurṭubī, al-Jāmiᶜ li Aḥkām al-Qur'ān, vol.11, p.318.

[78] Al-Hidāyah, vol.4, p.198; al-Mabsūṭ, vol.26, p.189; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.5, p.47.

[79] Al-Hidāyah, vol.4, p.198; al-Fatāwā al-Hindiyyah, vol.6, p.50. However, there is an exception to it. The liability will be imposed on the rider and the like when the animal destroys something by swishing its tail or striking with its hind-feet while on the position of stopping because the rider is considered to be able to take reasonable care of his animal. See al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.5, p.47; al-Hidāyah, vol.4, p.198; al-Jāmiᶜ al-Ṣaghīr, p.516; al-Kanawī, al-Nāfiᶜ al-Kabīr printed with al-Jāmiᶜ al-Ṣaghīr, p.516; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.272.

if the case of kicking or swishing which is not caused by his intermediate causation; otherwise he is liable.[80]

The Ḥanbalī jurists also maintain that if the animal tort occurs from the hand of its possessor in case of taking it away by force with its bridle or hitting its face or the like and the animal does injury with its hind-feet in consequence, the possessor is held liable for the reason that he is *mutasabbib* to that incident.[81] Otherwise, he is not liable.

Another interesting juristic opinion on the torts of animals is that of Abū Muḥammad Ibn Ḥazm al-Ẓāhirī who opines that the keeper of an animal would not be held liable for any tort which the animal inflicted upon another person by its acts, whether by its fore-legs or mouth or any part of its body. He based his argument on the Ḥadīth: "Injury caused by animals is not actionable". The circumstances in which he felt the keeper can be held liable are:

i- When the damage happened through the load he put on the animal.

ii- When he incited the animal against a person or property.

iii- When he let the animal wander knowing that the animal could inflict injury upon the thing or person on its way before he could reach it.[82]

In brief, the reason of this group could be documented as follows:

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[80] Al-Mudawwanah, vol.4, pp.664, 665 and 666; al-Dusūqī, Ḥāshiyah ʿalā al-Sharḥ al-Kabīr, vol.4, p.358; al-Zurqānī, Sharḥ al-Zurqānī ʿalā Muwaṭṭa', vol.4, p.199; Bidāyat al-Mujtahid, vol.2, p.312. See also al-Qurṭubī, al-Jāmiʿ li Aḥkām al-Qur'ān, vol.11, p.318.

[81] Al-Mughnī, vol.8, p.339; al-Futūḥī, Muntahā al-Irādāt, vol.1, p.524; Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ, vol.4, p.126; Sharḥ Muntahā al-Irādāt, vol.2, p.429; al-Rawḍ al-Murbiʿ, p.335; Majallat al-Aḥkām al-Sharʿiyyah, article 1449, p.450; Ḍamān al-Mutlifāt, p.521.

[82] Al-Muḥallā, vol.11, p.8.

a- The Prophet said: "Animal's tort by its hind-leg is to be overlooked".[83] This Ḥadīth ordained that the *nafḥah* by the hind-legs is to be overlooked and its keeper is not to be held liable. Further, this Ḥadīth just specified the committing of *nafḥah*, not any act like trampling down or stepping or treading underfoot (*waṭa'*). Such acts can be prevented, unlike the case of *nafḥah*.[84]

b- The rider or the driver or the leader could not avoid accidents occasioned by the hind-feet; he therefore is not responsible for any injury resulting from it because his hands are considered in this circumstance to have no control over the animal.[85]

c- The rider is not liable for the acts of an animal's hind-legs or its tail because he has no view over it. Normally, the person who rides the animal, faces to the front, not the back.[86]

THE LIABILITY OF A RIDER, DRIVER AND LEADER[87]

This topic will be discussed in the following ways:

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[83] Sunan Abī Dāwud, vol.4, p.196; Nayl al-Awṭār, vol.6, p.72.

[84] Manār al-Sabīl, vol.1, p.439; al-Khaṭṭābī, Maʿālim al-Sunan, vol.4, p.36.

[85] Al-Mughnī, vol.8, p.339.

[86] Al-Mabsūṭ, vol.26, p.189; Ḍamān al-Mutlifāt, p.525.

[87] A Rider (*al-rākib*)- is a person who rides on the back of an animal. A driver (*al-sā'iq*)- is a person who drives an animal from behind. Leader (*al-qā'id*)- is a person who leads an animal in front of it by using the bridle or the like. See al-Muʿjam al-Wasīṭ, vol.1, p.369 and p.467, vol.2, p.771; Tahdhīb Lisān al-ʿArab, vol.1, p.639 and p.507, vol.2, p.427. See also Zarrūq, Sharḥ Zarrūq ʿalā Matn al-Risālah, vol.2, p.244; al-Thamar al-Dānī, p.525.

There is a rider, as well as a driver and a leader

The cases which have been mentioned in the previous topics regard the liability for a rider or driver or leader respectively. However, when the rider, the driver and the leader are jointly using an animal and such an animal does an injury, the opinions of the *fuqahā* can be divided into three distinct groups.

The first group

The Ḥanafī school in the more approved opinion (*al-aṣaḥḥ*)[88] and the scholars of the Ḥanbalī school[89] opine that they will be concurrently liable by reason of the fact that if they were individually liable at the time of jointly acting together, they would definitely be liable.

The Majallah shows practically no different position with regard to the liability for each of them. It maintains that the leader and the driver of an animal on the public highway are considered to be in the same position as the rider. That is to say, they are obliged to make good the loss sustained only to the extent that the person riding the

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[88] Al-Hidāyah, vol.4, p.199; al-Jāmiᶜ al-Ṣaghīr, p.516; al-Durr al-Mukhtār, vol.2, p.467; al-Ajwibah al-Khafīfah, p.388; Majallah, article 933. In another opinion, the liability is just upon the rider because he is *mubāshir*, not the driver and the leader because both of them are just considered as *mutasabbib*. If the *mubāshir* and *mutasabbib* come together, responsibility will be attached to the former not to the latter. See Radd al-Muḥtār, vol.6, pp.531-532; Ḍamān al-Mutlifāt, p.536.

[89] Al-Mughnī, vol.8, p.339; Manār al-Sabīl, vol.1, p.439; al-Futūḥī, Muntahā al-Irādāt, vol.1, p.524; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.127; Sharḥ Muntahā al-Irādāt, vol.2, p.429; ᶜUmdat al-Fiqh, p.126; Majallat al-Aḥkām al-Sharᶜiyyah, article 1449, p.450.

animal is so obliged.[90] This is endorsed by al-Marghīnānī[91] and al-Ḥaṣkafī[92] except in the case of the animal treading down a person (not in any other instance). The rider (and the *radīf* who sits at rear of the animal) is required to perform expiation (*al-kaffārah*) (as well as to pay *diyah*). But no expiatory act whatever is required from the leader and the driver. The reason is that the rider is, in effect, the perpetrator of the homicide, the animal being the instrument of such motion which is controlled by him. So the yardstick here is the weight of the animal being merely a dependent upon the weight of its rider. Therefore, the rider must be responsible for the movement of the animal. The leader and the driver are only the causer of indirect cause, and not the direct causer of the homicide. The expiation is enjoined in cases of homicide only where the offender is the direct perpetrator, not where it is effected by an indirect cause.[93]

The second group

The Mālikī jurists also discuss this topic. They clearly demonstrate that the liability is upon the leader and the driver, not the rider, unless the injurious act resulted

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[90] Majallah, article 933.

[91] Al-Hidāyah, vol.4, p.199.

[92] Al-Durr al-Mukhtār, vol.2, p.467; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.604. See also Radd al-Muḥtār, vol.6, p.604.

[93] In the same manner, the rider is excluded from succession to the deceased in inheritance (*al-mīrāth*) and bequest (*al-waṣiyyah*), but not the leader and the driver; the exclusion from inheritance or bequest being restricted to the direct perpetrator. See al-Hidāyah, vol.4, p.199 and also al-Mabsūṭ, vol.26, p.190; al-Ikhtiyār li Taʿlīl al-Mukhtār, vol.5, p.48. See also al-Jāmiʿ al-Ṣaghīr, p.516; al-Kanawī, al-Nāfiʿ al-Kabīr printed with al-Jāmiʿ al-Ṣaghīr, p.516; al-Ajwibah al-Khafīfah, p.388; Radd al-Muḥtār, vol.6, p.604; Badāʾi al-Ṣanāʾi, vol.7, pp.271-272 and p.280.

because of the rider only, without any intermediate cause from the driver and the leader. In this case, the rider alone is responsible.[94]

The third group

In the more acceptable (*arjaḥ*) view of the Shāfiᶜī school, the liability is upon the rider alone.[95] It also coincided with an opinion of the Ḥanafī school on account that the rider is *mubāshir*[96] and an opinion of the Ḥanbalī school by reason of the fact that the rider is stronger than the leader and the driver in conducting (*taṣarruf*) the animal.[97]

There is a rider, as well as a leader

With regard to this case, the *fuqahā'*s opinions could be separated into two groups.

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[94] Al-Mudawwanah, vol.4, p.667; Zarrūq, Sharḥ Zarrūq ᶜalā Matn al-Risālah, vol.2, p.244; Tabṣirat al-Ḥukkām, vol.2, p.246; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, p.409; al-Bājī, al-Muntaqā, vol.7, p.109; Ḍamān al-Mutlifāt, p.538.

[95] Mughnī al-Muḥtāj, vol.4, p.204; Nihāyat al-Muḥtāj, vol.8, pp.38-39; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.468; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.423; Fatḥ al-Wahhāb, vol.2, p.206. Another opinion determines that each of them is liable for the rate of one-third of the restitution. See al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.468; Kifāyat al-Akhyār, p.644.

[96] Al-Durr al-Mukhtār, vol.2, p.467; Majmaᶜ al-Anhur, vol.2, pp.660-661.

[97] Al-Mughnī, vol.8, p.339.

The first group

The first group of Muslim jurists to be concerned specifically with the type of case are the Ḥanafī jurists in their strong opinion and the Ḥanbalī jurists. They relate this topic as the first discussion (there is a rider, as well as a driver and a leader) where both the rider and the leader will concurrently be liable by reason of the fact that if they personally held liability, at the time of jointly acting together, they both will, of course, incur liability.[98]

The second group

The Mālikī school opines that the liability is imposed on the leader, unless the injurious act of the animal arises owing to a deed of the rider. In this case, the rider is liable alone so long as the leader does not involve himself as mediate causation. If the leader is involved, he and the rider together bear liability.[99] This opinion is also a view in the Ḥanbalī school that the rider will basically not be liable if he is accompanied by the leader.[100]

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[98] Badr al-Muttaqā in the margin of Majmaᶜ al-Anhur, vol.2, p.660; Majmaᶜ al-Anhur, vol.2, pp.660-661; al-Mughnī, vol.8, p.339; Badā`iᶜ al-Ṣanā`iᶜ, vol.7, p.280; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.127; Sharḥ Muntahā al-Irādāt, vol.2, p.430; al-Futūḥī, Muntahā al-Irādāt, vol.1, p.524; Majallat al-Aḥkām al-Sharᶜiyyah, article 1449, p.450; Ḍamān al-Mutlifāt, p.539.

[99] Tabṣirat al-Ḥukkām, vol.2, p.246; al-Dusūqī, Ḥāshiyah ᶜalā al-Sharḥ al-Kabīr, vol.4, p.358.

[100] Al-Mughnī, vol.8, p.339.

There is a rider, as well as a driver

This discussion will be separated into three groups.

The first group

This group opines that the rider and the driver concurrently bear liability because both of them amounted to *mutasabbib*. This is the opinion of the Ḥanafī (in the strong opinion) and the Ḥanbalī schools.[101]

The second group

According to the Mālikī school, the driver will be held liable alone if there is not any mediate causation from the deeds of the rider. Otherwise, both of them will incur liability together.[102]

The third group

There is an opinion in the Ḥanafī school which recognizes that the rider is

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[101] Al-Hidāyah, vol.4, p.199; Badr al-Muttaqā in the margin of Majmaᶜ al-Anhur, vol.2, p.660; Majmaᶜ al-Anhur, vol.2, pp.660-661; al-Mughnī, vol.8, p.339; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.5, p.48; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.280; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, p.127; al-Futūḥī, Muntahā al-Irādāt, vol.1, p.524; Sharḥ Muntahā al-Irādāt, vol.2, p.430; Ḍamān al-Mutlifāt, p.539.

[102] Al-Dusūqī, Ḥāshiyah ᶜalā al-Sharḥ al-Kabīr, vol.4, p.358.

responsible alone.[103]

There is a driver, as well as a leader

The *fuqahā'* of the *madhāhib* unanimously agree about this matter viewing that the driver and the leader concurrently incur liability if the animal in their charge does harm to the person or property of others.[104] Each of them is liable to pay half of the restitution.[105]

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[103] Al-Hidāyah, vol.4, p.199; al-Durr al-Mukhtār, vol.2, p.467; al-Ikhtiyār li Taʿlīl al-Mukhtār, vol.5, pp.48-49; Badā'iʿ al-Ṣanā'iʿ, vol.7, p.280. In al-Hidāyah, it has been elaborated as follows: If there is a rider, as well as a driver, responsibility attaches to the former, not to the latter. So if the animal treads down a man, no part of the responsibility falls upon the leader because the rider is accounted the *mubāshir* of the homicide, whereas the leader is the *mutasabbib* and the accident must be referred to the actual perpetrator rather than to the producer of the cause. See also Badā'iʿ al-Ṣanā'iʿ, vol.7, p.280.

[104] Radd al-Muḥtār, vol.5, p.532; al-Mughnī, vol.8, p.8, p.339; Manār al-Sabīl, vol.1, p.439; Badā'iʿ al-Ṣanā'iʿ, vol.7, p.280; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.468; Kifāyat al-Akhyār, p.644; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.423; Fatḥ al-Wahhāb, vol.2, p.206; Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ, vol.4, p.127; Sharḥ Muntahā al-Irādāt, vol.2, p.429; Majallat al-Aḥkām al-Sharʿiyyah, article 1449, p.450; al-Futūḥī, Muntahā Irādāt, vol.1, p.524; Nihāyat al-Muḥtāj, vol.8, p.39; Mughnī al-Muḥtāj, vol.4, p.204; al-Bājī, al-Muntaqā, vol.7, p.109; Zarrūq, Sharḥ Zarrūq ʿalā Matn al-Risālah, vol.2, p.244; Tabṣirat al-Ḥukkām, vol.2, p.246. In connection with the topic, al-Marghīnānī particularly discusses in this matter that the driver of an animal is responsible for any damage such an animal may occasion with either its fore or hind-feet, whereas the leader is just responsible for its fore-feet only, not for its hind-feet. This is the opinion of Qadūrī in his Mukhtaṣar and several *fuqahā'*. Their argument is that a person who drives an animal from behind has definitely a view of its hind-feet and he can avoid accidents, whereas a person who leads the animal at the front does not have any command over its hind-feet and cannot guard against such accidents. However, most of the *fuqahā'* opine that the driver of an animal has no command over its hind-feet, he, therefore, is not responsible even though he has seen it do injury because he cannot prevent the damage which may be occasioned by the animal. This view is more approved (*aṣaḥ*). See al-Hidāyah, vol.4, p.198.

[105] Mughnī al-Muḥtāj, vol.4, p.204; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.468; Kifāyat al-Akhyār, p.644; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.423; Fatḥ al-Wahhāb, vol.2, p.206.

There are several riders simultaneously

With regard to this topic, the *fuqahā'* have a different opinions on liability of the riders. Their opinions can be listed into two groups.

The first group

The Mālikī, the Ḥanbalī and the Shāfi'ī schools have documented that the liability will be incurred by the rider who rides and sits at the front (*al-muqaddim*) of the animal's back because he can properly conduct such an animal rather than a rider who sits at the rear of the animal (*al-radīf/al-mu'akhkhir*).[106]

The Mālikī jurists add that if the injury is due to mediate causation of a rear rider as he stroked or bit such an animal, the liability will be ascribed to both of them. *Al-Radīf* bears liability because he is the *mutasabbib* of the injury, *al-muqaddim* because the bridle is in his hand. But, if the *muqaddim* cannot conduct and control the animal after hard struggling, the liability is just upon the *radīf*.[107] Likewise, if the *muqaddim* is a person who is unable to conduct the animal because he is a minor or a sick person or a

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[106] Mughnī al-Muḥtāj, vol.4, p.204; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.468; Nihāyat al-Muḥtāj, vol.8, p.39; al-Mudawwanah, vol.4, p.664; Tabṣirat al-Ḥukkām, vol.2, p.247; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, p.409; Ibn Nājī, Sharḥ Ibn Nājī ʿalā Matn al-Risālah printed with Sharḥ Zarrūq ʿalā Matn al-Risālah, vol.2, p.243; al-Dusūqī, Ḥāshiyah ʿalā al-Sharḥ al-Kabīr, vol.4, p.358; al-Mughnī, vol.8, p.339; al-Rawḍ al-Murbiʿ, p.335; Manār al-Sabīl, vol.1, p.439; Majallat al-Aḥkām al-Sharʿiyyah, article 1449, p.450; al-Futūḥī, Muntahā al-Irādāt, vol.1, p.524; Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ, vol.4, pp.126-127; Sharḥ Muntahā al-Irādāt, vol.2, p.429; Mūjabāt, vol.1, p.245.

[107] Al-Mudawwanah, vol.4, p.664; Tabṣirat al-Ḥukkām, vol.2, p.247; Ibn Nājī, Sharḥ Ibn Nājī ʿalā Matn al-Risālah printed with Sharḥ Zarrūq ʿalā Matn al-Risālah, vol.2, p.243; Mūjabāt, vol.1, p.246.

blind man or the like, the animal is definitely in the charge of the *radīf* and he will be liable for the injury resulting from it, not the *muqaddim* because the acts of the animal at that time will be ascribed to the *radīf* not to the *muqaddim*.[108]

The second group

The Ḥanafī school opines that the rider (*rākib*) and the *radīf* together will be liable on account of the fact that they are both *mubāshir*. When any injury happened in consequence of themselves, the injurious act of the animal is attributed to them. The yardstick here is the weight of the injurious act of the animal being merely dependant upon the rider and the *radīf*, the animal being the instrument of such an injury which is controlled by both of them.[109]

CONDITIONS FOR ANIMAL'S TORT

According to the *fuqahā'*, the words "tort by an animal" (*jināyat al-ḥayawān*) is an exposition for any tort that it may inflict upon another person or property. All torts by animals must fulfil some conditions to impose liability on its rider or driver or leader or

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[108] Nihāyat al-Muḥtāj, vol.8, p.39; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.468; Tabṣirat al-Ḥukkām, vol.2, p.247; Ibn Nājī, Sharḥ Ibn Nājī ʿalā Matn al-Risālah printed with Sharḥ Zarrūq ʿalā Matn al-Risālah, vol.2, p.243; al-Mughnī, vol.8, p.339; Manār al-Sabīl, vol.1, p.439; Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ, vol.4, p.126; al-Futūḥī, Muntahā al-Irādāt, vol.1, p.524; Sharḥ Muntahā al-Irādāt, vol.2, p.429; Ḍamān al-Mutlifāt, p.541; Mūjabāt, vol.1, p.246.

[109] Al-Mabsūṭ, vol.26, p.190; Badr al-Muttaqā in the margin of Majmaʿ al-Anhur, vol.2, p.660; Radd al-Muḥtār, vol.6, p.604; al-Ikhtiyār li Taʿlīl al-Mukhtār, vol.5, p.48; Ḍamān al-Mutlifāt, p.542.

the like. In fact, the *fuqahā'* did not lay down distinctly and clearly the conditions in their writings. However, conditions could be understood through their discussions and illustrations. The conditions are:[110]

1- *Al-ᶜAmal al-ḍarr* (Injurious act).

This condition has been established through the famous and notable juristic dictum which says: "No liability where there is no injury". The injury can be a nuisance or damage inflicted upon the person or property of another by the act of the animal.[111]

2- *Al-Taᶜaddī* (The occurrence of trespass).

There must be a trespass on somebody's right or upon the public right. Where there is no trespass, there can be no liability. For instance, if an animal on the owner's land injures any other person by striking him with its fore-feet or with its tail or by kicking with its hind-legs, the owner of such an animal is not liable to make good the loss[112] because there is no *al-taᶜaddī* to be proved in this case if the animal was kept in its normal place by its owner. The same is the case of the animal tort when it is kept in the normal public place for animals or on the property of another person with his permission.[113] Therefore, if any person keeps his animal on the highway or on another's

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[110] Mūjabāt, vol.1, pp.237-244.

[111] Al-ᶜAynī, ᶜUmdat al-Qārī, vol.11, p.102. This discussion also has been explained in the topic of *itlāf*. Please refer to that topic for detail. See pp.146-155.

[112] Majallah, article 930.

[113] Majallah, article 931.

land without permission, it is considered as *al-taᶜaddī* and the owner of the animal is liable for any injury that may occur as a result of acts by such an animal.[114]

3- The connection between the injury and the trespass.

The injury caused by an animal alone cannot be held liable. There must be a person who is linked to the occurrence of the injury either directly or indirectly.

As a direct case, the injury emerges from a direct act of a person towards on animal which then inflicts an injury on another person or property as a consequence. This action could be described as a trespass and that person is liable. In the Majallah, the direct case from the act of the animal is propounded as follows:

> "If an animal ridden by a person tramples upon anything with either his fore or hind legs, whether in his own land or another's, and such thing is destroyed, its rider is considered to have directly (*mubāsharah*) destroyed it and in every case is bound to make good the loss".[115]

As a matter of fact, this case has been mentioned in al-Hidāyah which propounds that the rider is considered as a direct perpetrator because the weight of the animal is merely dependent upon the weight of its rider. The motion of the animal must be referred to him because in this case the animal is the instrument of such motion.[116]

However, al-Shāfiᶜī puts the position of the rider, the leader and the driver on the same level as a linkage between the injury and the trespass. The animal in this

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[114] Al-Mabsūṭ, vol.26, p.190; al-Hidāyah, vol.4, p.198; al-Fatāwā al-Hindiyyah, vol.6, p.50; al-Durr al-Mukhtār, vol.2, p.467; Majallah, articles 931 and 934; Mughnī al-Muḥtāj, vol.4, p.206.

[115] Majallah, article 936.

[116] The discussion of *mubāshir* here merely refers to the rider, not to the driver and the leader because both are considered *mutasabbib*. See al-Hidāyah, vol.4, p.199; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.281; Mūjabāt, vol.1, p.238.

circumstance, is like a tool which they used to commit mischief. For this, they are the direct tortfeasor. All the animal's acts are referred (*mansūb*) to them.[117]

In the case of indirect injury, the leader and the driver are described as trespasser and will be liable for any injury from the acts of their animal. Their position here is called *mutasabbib*. This is the Ḥanafī opinion.[118] However, the Shāfi ī school do not differentiate their position as mentioned before.

In brief, there will be no liability for animal acts unless the elements of *mubāsharah* or *tasabbub* existed between the injury and trespass. The Majallah said: "The owner of an animal is not liable to make good any damage caused by the animal of its own volition unless the owner of the animal is cognizant thereof and takes no steps to prevent the injury. The owner is bound to make good the loss".[119]

4- The existence of deliberate intent in an indirect case, or in other words, in an act which causes injury (*Al-Taᶜammud fī al-tasabbub*).

In the case of indirect cause for injury, there will be no liability unless the element of *taᶜammud* existed. *Taᶜammud* here means a mistake (*al-khaṭāʾ*) resulting from intention (*al-qaṣd*) or negligence (*al-taqṣīr*) or want of due care (*ᶜadam al-taḥarruz*). If none of these essentials can be proved there will be no liability. For instance, if the animal *mansuetae naturae* is beyond the control of the rider or he is unable to hold its head and

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[117] Al-Umm, vol.7, p.138; Mughnī al-Muḥtāj, vol.4, p.204; al-Iqnāᶜ, vol.2, p.242.

[118] Al-Hidāyah, vol.4, p.199.

[119] Majallah, article 929.

it causes an injury upon the person or property of another, the rider is not responsible thereof,[120] because the essentials of *qaṣd* or *taqṣīr* or *ʿadam al-taḥarruz* do not emerge. For more illustrations, this discussion will be elaborated in accordance with the *fuqahā'*s examples for each one of these three circumstances.

a- *Al-Qaṣd*[121]

The *fuqahā'* have laid down many examples for this essential element. Among them is a case of a person who incites a dog to bite another and causes damage (to his body or clothes). The person who incited it is liable because the element of wrongful intent existed in his deed.[122] In the case of a cat that has eaten a bird or some food belonging to another person, its owner is responsible if he knew that the animal was particularly voracious. Otherwise, he is not responsible.[123] Mālik also made the keeper of an animal liable for anything he, with wrongful intent, allows it to damage even if by its hind-legs.[124] Ibn Ḥazm also exemplified the case of a hunter who shot with intent to scare away an animal of another or to make the animal cause damage to another's

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[120] Majallah, article 937.

[121] Most of the *fuqahā'* prefer to make this essential in the element of *al-taʿaddī*, because they said that this element *al-taʿammud* is included in *al-taʿaddī*. So the element of *al-taʿaddī* is sufficient to convict *mutasabbib* of his injurious act. See the discussion of Strict Liability, pp.50-62. However, Maḥmaṣṣānī puts forward this essential as one of the conditions for convicting the tortfeasor of an animal's acts. See Mūjabāt, vol.1, p.239.

[122] This is the opinion of Abū Yūsuf. Abū Ḥanīfah's opinion is contrary to Abū Yūsuf's opinion. However, the opinion of Abū Yūsuf is implemented in *fatwā* as mentioned in Fatāwā Qāḍīkhān. See al-Fatāwā al-Hindiyyah, vol.6, p.51; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.456.

[123] Minhāj al-Ṭālibīn in the margin of Mughnī al-Muḥtāj, vol.4, p.207.

[124] Al-Khirshī, Fatḥ al-Jalīl ʿalā Mukhtaṣar Khalīl, vol.8, p.113.

property. The hunter is liable for any damage that the animal might have inflicted.[125]

b- *Al-Taqṣīr*

The owner or the keeper of animals incurs tortious liability where he commits negligence in keeping them. Otherwise he is not liable where it is established that he has not been negligent.

In a case of a person driving an animal along, and the animal's saddle or load or anything else which may be upon it, falls off and kills a man, the driver is responsible as having been guilty of a transgression (*mutaᶜaddin*) and in neglecting (*taqṣīr*) to secure the load properly upon the animal. If it had been sufficiently secured, it could not have fallen off.[126] Likewise, if a person rides or drives an animal which is hard to control (*al-dābbah al-ṣuᶜūbah*) and it enters a market and causes damage to person or property, the driver or the rider is responsible for such damage as the damage occurs owing to his negligence.[127]

c- *ᶜAdam al-taḥarruz*[128]

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[125] Al-Muḥallā, vol.11, p.11. For the same example, see Majallah, article 923.

[126] Al-Hidāyah, vol.4, p.200 and see also p.194; al-Fatāwā al-Hindiyyah, vol.6, p.43; al-Mabsūṭ, vol.26, p.189; Radd al-Muḥtār, vol.6, p.606; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.606; Majmaᶜ al-Anhur, vol.2, p.661; al-Shaybānī, Kitāb al-Aṣl, vol.4, p.499; al-Jawharah al-Nayyirah, vol.2, p.136; al-Shaybānī, al-Amālī, p.52; al-Jāmiᶜ al-Ṣaghīr, pp.515-516; al-Kanawī, al-Nāfiᶜ al-Kabīr printed with al-Jāmiᶜ al-Ṣaghīr, p.515; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.423; Ḍamān al-Mutlifāt, p.415.

[127] Mughnī al-Muḥtāj, vol.4, p.205.

[128] This condition is also like *al-qaṣd* which can be put under *al-taᶜaddī* because, in the examples which are put forward under it, the existence of *al-taᶜaddī* appears. However, Maḥmaṣṣānī prefers to discuss it separately from *al-taᶜaddī*.

The owner or possessor of an animal is liable for the damage caused by that animal resulting from his lack of due care. This situation emerges as a result of the acts of the owner or the possessor with no regard to its consequences, where such consequences can be predicted. Thus, this discussion will be illustrated with a few examples to make it clearer.

When a keeper or any person incites an animal and the animal hits or knocks down a person or property and causes damage in consequence, the keeper or the person who incited it is held liable because the animal has been incited without due care of what might result from the incitement.[129] It can also be linked to a case of a person who tied up his animal in the public highway. If such an animal injures a passer-by, the person is liable for want of due care.[130]

Similarly, if a person throws a snake on the road and it bites someone or another's animal, the thrower is liable even though he did not have in mind any intention to cause injury. But, he is found to be guilty by want of due care.[131] Likewise, a herdsman that rears his sheep around the farm or the house of another and they cause damage to the farm or enter the house without the permission of the owner of the house, is also liable.[132]

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[129] Al-Mabsūṭ, vol.27, p.2; al-Mudawwanah, vol.4, p.666; al-Mughnī, vol.8, p.339; al-Hidāyah, vol.4, p.202; al-Rawḍ al-Murbiʿ, p.335; Mughnī al-Muḥtāj, vol.4, p.204; Nihāyat al-Muḥtāj, vol.8, p.38; al-Ikhtiyār li Taʿlīl al-Mukhtār, vol.5, p.48; Lisān al-Ḥukkām, p.279; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.456; Badāʾiʿ al-Ṣanāʾiʿ, vol.7, p.282; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.468; Kifāyat al-Akhyār, p.644; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.423; Fatḥ al-Wahhāb, vol.2, p.206; al-Iqnāʿ, vol.2, p.242; Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ, vol.4, p.126; Sharḥ Muntahā al-Irādāt, vol.2, p.429; al-Ṣāwī, Bulghat al-Sālik, vol.2, p.409; al-Fatāwā al-Hindiyyah, vol.6, p.51; Mūjabāt, vol.1, p.240.

[130] Majallah, article 934; Mughnī al-Muḥtāj, vol.4, p.206; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.423; Aḥmad b. Ruslān, Matn al-Zubad, p.99.

[131] Jāmiʿ al-Fuṣūlayn, vol.2, p.118; Mūjabāt, vol.1, p.240.

[132] Al-Mīzān al-Kubrā, vol.2, p.154; Mukhtaṣar, p.349.

CHAPTER FOUR

LIABILITY FOR CHATTELS

INTRODUCTION

The preceding discussion has clearly demonstrated the liability for animals. This part will specifically deal with another topic of liability in Islamic law of tort that is "liability for chattels" (inanimate objects). The *fuqahā'* have clearly outlined this topic in their writings. They are Ibn Qudāmah, al-Ḥaṣkafī, Muḥammad al-Sharbīnī al-Khaṭīb, al-Sarakhsī, al-Marghīnānī, Ibn Qāḍī Samāwanah, al-Baghdādī and others. This topic also has been discussed by the contemporary *fuqahā'* in their writings: Ṣubḥī Maḥmaṣṣānī, Wahbah al-Zuḥaylī, Muḥammad Fawzī Fayḍ Allāh, Sulaymān Muḥammad Aḥmad and others.

The present study will be an overview of a few sub-topics: the basis of the liability, chattels dangerous in themselves, chattels non-dangerous in themselves and liability based on fault.

THE BASIS OF THE LIABILITY

The liability for damage caused by chattels arises from the lack of a duty to take care which the defendant owes to the plaintiff. In such a duty of care, the defendant will

be responsible for injury caused by negligence whether in cases of things dangerous in themselves or not.

There is a celebrated Ḥadīth which can be related to this discussion. This Ḥadīth is reported by Abū Mūsā who stated that the Prophet said:

> "If anyone of you passed through our mosque or through our market carrying arrows, he should hold the arrowheads," or he said, ".....he should grab (their heads) with his hand lest he should injure one of the Muslims with them".[1]

In another Ḥadīth, Jābir narrated:

> "A man passed through the mosque carrying arrows, the heads of which were exposed. The man was ordered (by the Prophet) to hold the arrowheads so that they might not scratch any Muslim".[2]

In Ṣaḥīḥ Muslim, Abū Mūsā al-Ashᶜarī reported that the Prophet said:

> "When any one of you happens to go to a meeting or the bazaar with an arrow in his hand, he must grasp its pointed head; then (he again said): He must grasp its pointed head. Abū Mūsā said: By Allāh, we did not die before some of us had directed arrows at the faces of each other".[3]

In another Ḥadīth, Jābir reported that the Prophet commanded a person who had been distributing arrows freely in the mosque not to move about in the mosque without taking hold of their iron heads.[4]

Those Ḥadīths are the foundation of the liability for damage and injury done by all dangerous chattels. In the case of articles or chattels dangerous in themselves, such as loaded firearms, poisons, explosives, and other things *ejusdem generis* (of the same kind),

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[1] Ṣaḥīḥ al-Bukhārī, vol.9, p.154. See also vol.1, p.264.

[2] Ṣaḥīḥ al-Bukhārī, vol.9, p.154.

[3] Ṣaḥīḥ Muslim, vol.4, p.1379.

[4] Ṣaḥīḥ Muslim, vol.4, p.1379.

there is a particular duty to take precaution, imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity. The duty of taking precaution does not allow the excuse of saying that the accident would not have happened unless some other agency other than that of the defendant had intervened in the matter. A loaded gun will not go off unless someone pulls the trigger, a poison is innocuous unless someone takes it, gas will not explode unless it is mixed with air and then a light is set to it.

The *fuqahā'* hypothetically adjudged that if an axe accidentally slipped from the hand of a butcher who was cutting bones and injured (*atlafa*) part of another person's body, the butcher is liable even if it happened by mistake (*khatā'*).[5]

It can be inferred from this hypotetical case that the butcher is held liable for his want of proper care and negligence for damage that the slipping of his axe might have caused. On the other hand, if the cause of the danger is not the negligence of the butcher (defendant), but the conscious act of another or any other causation, then he will not be liable.[6]

A distinction was originally drawn between things classed as dangerous in themselves and things dangerous in the particular case or *sub modo*. In other words, the distinction was considered to be a question of law whether a particular object was capable of coming within the category of things dangerous *per se* and a question of fact whether it was dangerous in all circumstances of the case. The following objects were held to be

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[5] Wāqiʿāt al-Muftīn, p.64; Majmā al-Ḍamānāt, p.170; Fawzī Fayḍ Allāh, Naẓariyyat al-Ḍamān, p.187; Wahbah, Naẓariyyat al-Ḍamān, p.263.

[6] Fawzī Fayḍ Allāh, Naẓariyyat al-Ḍamān, p.187.

dangerous: loaded guns, petrol, explosives, noxious hair-dye, earthenware jars containing sulphuric acid and other things *ejusdem generis*. On the other hand, the following were not dangerous *per se*: an oil-can, a domestic boiler, a catapult and an air-gun.[7]

CHATTELS DANGEROUS IN THEMSELVES

The *Sharīᶜah* has classified the cases relating to liability for chattels into two classes. First, chattels dangerous in themselves or a category of things dangerous *per se* (*al-ashyā' al-khaṭrah*) and second, chattels non-dangerous in themselves or in other words, chattels dangerous in particular cases or *sub modo* (*al-ashyā' ghayr al-khaṭrah*). Therefore, both classes of chattels will require a differentiation in rules of *ḍamān* and *taᶜwīḍ* (compensation/damages).[8]

The basis of the liability for damage caused by chattels dangerous *per se* is the Ḥadīths which have been mentioned in the preceding pages. The word "arrow" which is used by the Prophet in those Ḥadīths could be classed as a thing dangerous in itself. The things dangerous in themselves or dangerous *per se* include all objects held to be dangerous. The arrow is regarded as a thing dangerous *per se* in the period of the Prophet, so nowadays, rifles, guns, shot guns, explosives, bombs, noxious hair-dye, electrical instruments and other things *ejusdem generis* are held as articles dangerous in themselves which impose on their owners a duty of reasonable care in keeping them and also in using

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[7] Salmond and Heuston, pp.299-230.

[8] Fawzī Fayḍ Allāh, Naẓariyyat al-Ḍamān, p.186.

them. The particular duty is to take all necessary precautions so that other parties will not come within their proximity. The damage, therefore, through the things in this category will be ascribed to their owners in all circumstances whether the damage occurred at night or in daytime, on the condition that the owners did not take proper or reasonable care (*ittikhādh al-iḥtiyāṭ al-kāfī*). But if the accident happened with the intervention of the other party, the owners will not be held liable.[9]

It should be observed that whoever has under his control things or electrical machinery or automatic equipments, the dangers from which require special care to be taken, shall be liable for the damage caused by those things except for what could not be taken care against, and that shall be without prejudice.[10] The occurrence of injury here is a circumstantial evidence (*qarīnah*) which can be pointed out as due to negligence (*taqṣīr*) in taking proper care of them and precaution while using them. So the basis of the injury is *taᶜaddī* as the basis of *musabbib* is the *sabab*.[11] In brief, the important elements for liability in the case of dangerous chattels *per se* are :

1- Negligence (*al-taqṣīr*).

2- Want of due care (*ᶜadam al-tamakkun wa al-iḥtirāz*).

This discussion will be illustrated by a few examples:

1- If an axe slips from the hand of a butcher who is cutting bones and injures part of another's body, the butcher is liable. This accident happened through negligence and lack of proper care. In other words, the occurrence of injury results from the existence of

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[9] See Fawzī Fayḍ Allāh, Naẓariyyat al-Ḍamān, pp.186-187.

[10] See Fawzī Fayḍ Allāh, Naẓariyyat al-Ḍamān, p.187.

[11] Fawzī Fayḍ Allāh, Naẓariyyat al-Ḍamān, p.187.

taᶜaddī on the part of the butcher.[12]

2- A person is passing through a street driving an animal and in the middle of the street the saddle falls on another person, or anything else like a bridle, the liability will be ascribed to the driver because he is held to be a *mutaᶜaddī* in this *tasbīb* case. He is also deemed negligent in controlling his animal.[13]

3- In the case of tort by poisoning, the *fuqahā'* have unanimously agreed that the tortfeasor who gives a deadly poison to another who dies thereby, will be held liable. However, they have distinguished their opinions in respect of his punishment. The Ḥanafī jurists believe that if someone serves poisoned food to another who dies thereby, the person who has served it is not liable for punishment of *qiṣāṣ* or *diyah*. The reason they give is that the tort is not a direct tort, whereas the *qiṣāṣ* punishment is inflicted just on the direct tortfeasor, not the indirect tortfeasor. But the tortfeasor must be punished with imprisonment and *taᶜzīr*. Further, if a person serves a poisoned drink to another who dies thereby, the person who has served it is also not liable for the murder of the victim so long as the victim had taken the drink voluntarily. The reason they give here is that the victim had a choice in drinking the poisoned drink. The punishment would be the *taᶜzīr* punishment, not the infliction of *qiṣāṣ* or *diyah*. However, if the person compels the

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[12] Wāqiᶜāt al-Muftīn, p.64; Majmá al-Ḍamānāt, p.170; Fawzī Fayḍ Allāh, Naẓariyyat al-Ḍamān, p.187; Wahbah, Naẓariyyat al-Ḍamān, p.263.

[13] Majmaᶜ al-Anhur, vol.2, pp.633-634; Lisān al-Ḥukkām, p.108; Fawzī Fayḍ Allāh, Naẓariyyat al-Ḍamān, p.187.

victim by feeding the poison down his throat, the punishment of *diyah* will be imposed.[14] This case is treated as a case of manslaughter. In a further case, if a person serves a poisoned drink to someone else with the purpose of deceit and a death happened in consequence, the person will be punished with the punishment of *taᶜzīr* and *istighfār* (asking forgiveness from God).[15] However, there is another opinion which opines that whoever causes another person death by poison, he should be punished by *qiṣāṣ* by reason that the poison is considered as the equivalent of fire and knife.[16]

According to the Shāfiᶜī,[17] Ḥanbalī[18] and Mālikī[19] schools, such a person is

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[14] Al-Durr al-Mukhtār, vol.2, p.442; Radd al-Muḥtār, vol.5, p.385; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.440; Tabyīn al-Ḥaqā'iq, vol.6, p.101; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, pp.236-239; ᶜAbd al-Qādir ᶜAwdah, al-Tashrīᶜ al-Jinā'ī, vol.2, p.39, Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.6, p.243.

[15] Al-Durr al-Mukhtār, vol.2, p.442; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.542; Radd al-Muḥtār, vol.6, p.542; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.440.

[16] Radd al-Muḥtār, vol.6, p.542.

[17] Minhāj al-Ṭālibīn in the margin of Mughnī al-Muḥtāj, vol.4, p.7; al-Sirāj al-Wahhāj, pp.478-479; al-Muhadhdhab, vol.3, p.176; Nihāyat al-Muḥtāj, vol.7, pp.254-255; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.6, p.244; Bahnasī, al-Masᶜūliyyah al-Jinā'iyyah, p.143. Al-Nawawī said that if a person gives a deadly poison to a minor or a madman, so that death results, the person will incur a penalty under *qiṣāṣ*; or if the person gives it to a sane major (*bālighan ᶜāqilan*) when the poison is unknown to him, the person who serves it will be liable for *diyah*. According to an opinion, the *qiṣāṣ* (i.e. death) is due, whereas on the other hand, another opinion has maintained that in this case there is no punishable crime. Muḥammad al-Sharbīnī al-Khaṭīb in his elaboration of al-Nawawī's quotation says that the *diyah* is simply due, not the *qiṣāṣ* for the guilty person who has served the deadly poison to a sane major because the victim had taken the food voluntarily (*bi ikhtiyārih*). The opinion that the guilty person will be punished by *qiṣāṣ* is by reason of the fact that the Prophet issued his order to a Jewish woman for *qiṣāṣ*. Another opinion has maintained that there is no punishable crime by reason of the
fact that the victim had taken the poisonous food of his own accord. Further, Muḥammad al-Sharbīnī al-Khaṭīb says that if the victim knows that he is eating the poisoned food, the person who has served it is not liable because the victim is reckoned as the destroyer of himself. See Minhāj al-Ṭālibīn in the margin of Mughnī al-Muḥtāj, vol.4, p.7.

[18] Al-Mughnī, vol.7, p.643; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.5, p.591; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.6, p.244.

[19] Al-Dardīr, al-Sharḥ al-Kabīr, vol.4, p.244; Mukhtaṣar, p.313; al-Khirshī, Fatḥ al-Jalīl ᶜalā Mukhtaṣar Khalīl, vol.8, p.7. Khalīl b. Isḥaq says that whoever wilfully serves poison to another and this poison is unknowingly swallowed and death results, shall be liable for *qiṣāṣ*. Al-Khirshī elaborates this statement by mentioning that if a person unknowingly gives poison to another and death results, he shall not be liable for *qiṣāṣ*, and he is considered as an excused person (*maᶜdhūr*). And if the victim knowingly swallows the poison which is given to him and causes death, he is considered as a killer of himself. See Mukhtaṣar, p.313; al-

subject to *qiṣāṣ* (i.e. death). Ibn Ḥazm believes, however, that neither *qiṣāṣ* nor *diyah* is required of him or of his *ʿāqilah* unless he forced the victim to eat, in which case *qiṣāṣ* is due.[20]

4- If a person places a sword on the highway and the injury or death of another results from it, the person will be liable for *diyah*. And if the injured person breaks the sword up, he is liable for the value of the sword.[21]

5- If a rain pipe (*mīzāb*) falls down and injures a person or destroys a property of another accidentally, there is no liability upon its owner.[22]

6- If, for the purpose of hunting, a person lays a trap (*sharak*), or a net (*shabakah*), or a sickle (*minjal*) on a narrow road, he will be responsible for any injury arising out of that because he is considered as *mutaʿaddīn* whether he is allowed by the authority or not

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Khirshī, Fatḥ al-Jalīl ʿalā Mukhtaṣar Khalīl, vol.7, p.8; al-Dardīr, al-Sharḥ al-Kabīr, vol.4, p.217; Bahnasī, al-Mas'ūliyyah al-Jinā'iyyah, p.144.

[20] Al-Muḥallā, vol.11, p.417. The disagreement is due to what occurred in the Ḥadīth where a Jewish woman poisoned an ewe and offered it to the Prophet hoping to kill him. The Prophet and some of the *ṣaḥābah* ate it and one of his *ṣaḥābah* died. So the Prophet was asked: "Should we not kill her?". He said: "No". This Ḥadīth supports the argument that no punishment is due for a person who poisons another's food.

In another version attributed to Abū Hurayrah, after one of his *ṣaḥābah* died, the Prophet went to the Jewish woman and asked her: "What made you do what you did?". She replied: "If you were a Prophet, it would not have hurt you; if you were a king, I would have relieved the people of you". So the Prophet issued his order and she was executed.

Disagreement among the *fuqahā'* stems from those different versions of the Ḥadīths. See Bahnasī, al-Mas`ūliyyah al-Jinā`iyyah, p.145; al-Mughnī, vol.7, p.643; Mughnī al-Muḥtāj, vol.4, p.7; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.6, p.244. See this Ḥadīth in Ṣaḥīḥ Muslim, vol.3, p.1194; al-Muhadhdhab, vol.3, p.178.

[21] Al-Durr al-Mukhtār, vol.2, p.448.

[22] Mukhtaṣar, p.348.

because the authority cannot permit any injury to the public.[23]

7- If a person puts a knife upon the highway, whether in the middle or on the side of it, the person will be liable for any injury resulting from it because the public highway is for the public. Thus, the using of the highway shoud be maintained on the condition of safety for the public.[24]

8- If a person lights a fire on the highway and causes damage to another's property, he is liable in consequence because he is *mutaᶜaddīn*.[25]

CHATTELS NON-DANGEROUS IN THEMSELVES

In the books of *fiqh*, there are many examples regarding the cases of *ḍamān* for *talaf* (destruction) through this kind of chattels whether consequentially throwing them on the highway or placing them in the wrong place.

The *fuqahā'* have established a few theories dealing with this section. The theories are:

1- The tort due to chattels will not give rise to liability if they are placed in permissible places. For example, if a person places a jar (*jarrah*) on his wall, then the jar falls down or the wind blows it so that it falls down and damages another person's property, the

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[23] Al-Mughnī, vol.7, p.823.

[24] Mughnī al-Muḥtāj, vol.4, p.87.

[25] Al-Ajwibah al-Khafīfah, p.390; al-Mabsūṭ, vol.27, p.8.

person is not liable for the damage because his placing the jar on the wall of his building is a part of his legal rights.[26]

2- The tort due to chattels will give rise to liability if they are placed in illegal places (*lā yajūz*) so long as the chattels remain standing in those places. If the chattels have been removed from the illegal places to other places (and do injury there), no liability will arise.[27] For example, if a person places a thing (a jar or a stone) in a place where he has no legal permission from the authority, then the thing damages something else, he is liable. But, if the thing is carried away by wind or by water to another place and damages a property of another there, the person who placed it is not held liable because his tort action has been removed by the wind or water.[28]

3- Whosoever does an unauthorized action and an injury arises thereby, is liable in consequence. Therefore, if a person shoots an arrow at its target, and the arrow goes beyond the target and destroys something of another, the person is liable, even though the shooting is done in his own property.[29]

4- The use of the public highway is *mubāḥ* (permissible) subject to the safety of others

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[26] Majmaᶜ al-Ḍamānāt, p.149; al-Muhadhdhab, vol.3, p.207.

[27] Jāmiᶜ al-Fuṣūlayn, vol.2, p.88; Fawzī Fayḍ Allāh, Naẓariyyat al-Ḍamān, pp.183-184.

[28] Majmaᶜ al-Ḍamānāt, p.149.

[29] Majmaᶜ al-Ḍamānāt, p.146.

with respect to the matters where an attention to safety is practicable.[30]

5- A *mutasabbib* is liable if he is deemed *mutaᶜaddīn*, otherwise the liability is not upon him, whereas a *mubāshir* is absolutely liable.[31]

A few illustrations from the views of the *fuqahā'* will be set down in respect of this section.

1- If a person puts a jar or a vessel (*inā'*) or a stone or the like on the roof of his house or his wall and the wind blows it down and another person's property is damaged in consequence, the person is not held liable because he has put the thing on property which he owns. He can exercise the use of his property to do whatever he wishes. The liability will not be ascribed to him because he is not held to be *mutaᶜaddīn* and the *talaf* did not result from his action. This case is similar to the case of the collapsing of a wall whether inclining or not in one's own property and a person or another person's property is damaged in consequence.

If, however, the person puts the jar or the vessel or the stone or the like at the outermost point (*mutaṭarrif*) of the roof of the house or the wall over the highway, and it falls down and causes damage, he will be liable by reason of the fact that his action is

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[30] Al-Hidāyah, vol.4, p.198; al-Durr al-Mukhtār, vol.2, p.467; Mughnī al-Muḥtāj, vol.4, pp.85-87 and pp.205-206; al-Ajwibah al-Khafīfah, p.388. Al-Kanawī theorizes: "In relation to any action which is done by *al-mubāshir*, it has priority (*fakānat al-iḍāfah ilā al-mubāshir ūlā*)". See al-Kanawī, al-Nāfiᶜ al-Kabīr printed with al-Jāmiᶜ al-Ṣaghīr, p.515. In the same sense, al-Ḥaṣkafī theorizes: "By reason that regarding (the action which is done) by *al-mubāshir*, it has priority over (the action which is done) by *al-mutasabbib*". See al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.597; al-Durr al-Mukhtār, vol.2, p.464.

[31] Majmaᶜ al-Ḍamānāt, pp.146 and 165; al-Mabsūṭ, vol.27, p.22; Tabyīn al-Ḥaqā'iq, vol.5, p.149; Radd al-Muḥtār, vol.5, p.386; al-Durr al-Mukhtār, vol.2, p.467.

taᶜaddīn and negligence in the same way as occurs when a building which is built leans at the initial construction.[32] It is therefore a trespass *per se*. Al-Nawawī states that when a jar falls accidentally upon someone who cannot protect himself against it without breaking the jar, he is tortiously responsible for damages to the jar. It is the more correct (*aṣaḥḥ*) view. This case is compared with a case of where a person in severe need (*al-muḍṭir*) finds another's food and eats it in order to prevent himself from starving to death, is definitely tortiously liable. However, according to the second opinion, he is not liable because he did that to ward off *ḍarar* from his life.[33]

2- If two persons place two jars on the highway respectively and then both jars roll down onto each other breaking both of them, each person will be responsible for compensation for the jar of the other. But in the case of only one jar rolling down on the other and breaking both of them or only the jar which has rolled down, the liability will be borne by the person whose jar remains standing (*al-qā'imah*). This case is linked to the case of placing a stone on the highway. The owner of the stone will be held liable for any injury, not the owner of property which rolls down to the stone (*al-mutadaḥrijah*). Muḥammad b. al-Ḥasan al-Shaybānī theorizes that "when (a thing) rolls down from its place (to another place), the liability on its owner also rolls down" (*ḥīn tadaḥrajat ᶜan mawḍiᶜihā*

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[32] Al-Mughnī, vol.7, p.831; Jāmiᶜ al-Fuṣūlayn, vol.2, p.88; al-Shaybānī, Kitāb al-Aṣl, vol.4, p.510; Muntahā al-Irādāt, vol.2, p.428; Sharḥ Muntahā al-Irādāt, vol.3, p.306; al-Mabsūṭ, vol.27, p.11; Mughnī al-Muḥtāj, vol.4,p.196; Nihāyat al-Muḥtāj, vol.8, p.26; al-Shibrāmalsī, Hāshiyah printed with Nihāyat al-Muḥtāj, vol.8, p.26; Mūjabāt, vol.1, p.252; Ḍamān al-Mutlifāt, p.457; Fawzī Fayḍ Allāh, Naẓariyyat al-Ḍamān, p.184.

[33] Minhāj al-Ṭālibīn in the margin of Mughnī al-Muḥtāj, vol.4, p.196.

fa tadaḥraja ṣāḥibuhā ᶜan al-ḍamān).[34]

3- If a person places a jar on the highway, then another person comes and also places another one and one of them rolls down onto the other breaking both of them, both persons are liable to each other. This is the opinion of Abū Yūsuf. However, there is an opinion which is also related from him that the person whose jar remains standing in its place is liable. But if the jar is carried away by wind to another place and causes damage there, its owner is not held liable.[35]

4- In case of two persons who are each carrying a jar whilst on the road, and then they collide with each other and one of them causes the jar of the other to break, the person whose jar is not broken is liable for the jar of the other person which is broken. If the each jar is broken, each person will be responsible for the damages of the jar of the other.[36]

5- If a person puts a stone or a heap of soil on the highway or at a meeting-place (*multaqan*) without legal permission which causes damage to another person, the person is liable.[37]

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[34] Jāmiᶜ al-Fuṣūlayn, vol.2, p.88; Majmaᶜ al-Ḍamānāt, p.149; Mūjabāt, vol.1, p.253; Ḍamān al-Mutlifāt, p.458. See also Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.459.

[35] Majmaᶜ al-Ḍamānāt, pp.149-150. See also Radd al-Muḥtār, vol.6, p.89; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.89; al-Durr al-Mukhtār, vol.2, p.304.

[36] Al-Mudawwanah, vol.3, p.499.

[37] Al-Durr al-Mukhtār, vol.2, pp.462-463; al-Hidāyah, vol.4, pp.192-193; Manār al-Sabīl, vol.2, p.334; Munlākhusrū, al-Durar al-Ḥikām fī Sharḥ Ghurar al-Aḥkām, vol.2, p.10; Bahnasī, al-Mas'ūliyyah al-Jinā'iyyah, pp.60-61.

6- If a load drops from a person who is carrying it (or from the back of an animal or from a car) on a passer-by and damage results to his person or to his property, the original person will be held liable for damages.[38]

7- If an act is in the ordinary exercise of a person's right, he will not be liable for the safety of the person or property of others. If a Muslim suspends a chandelier (*qindīl*) or spreads a carpet or strews gravel in a mosque, in a location in which he lives, and a person perishes in consequence, no liability is incurred by him because he has a right as an inhabitant of the locality to enter the mosque and to decorate it if he so desires. Whereas if a stranger did any of these acts, he would be responsible.[39]

8- If one leaves his garbage (or anything else) in the street so that it injures a person, he is liable for the injury because the injury occurs as a result of his intentional placing of the garbage. Muḥammad b. al-Ḥasan al-Shaybānī has suggested that when the man places the garbage at *ṭarīq ghayr nāfidh* on which he lives and which he shares with the residents around, he will not be liable for the injury as he is not *mutaʿaddīn* and because this is a common road (*al-ṭarīq mushtarik*) shared by the residents. Each of the residents has a right to benefit from the road just as they would from a common area if they share

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[38] Al-Hidāyah, vol.4, p.194; al-Durr al-Mukhtār, vol.2, p.463; Majmaʿ al-Anhur, vol.2, p.626; Majallah, article 926; al-Ajwibah al-Khafīfah, p.387; Majmaʿ al-Ḍamānāt, p.149; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.251.

[39] Al-Hidāyah, vol.4, p.194; Mughnī al-Muḥtāj, vol.4, p.85; al-Muhadhdhab, vol.3, p.207; al-Jāmiʿ al-Ṣaghīr, p.515; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, pp.595-596; al-Durr al-Mukhtār, vol.2, p.463; Radd al-Muḥtār, vol.6, p.595.

a house.[40]

9- Responsibility never extends to accidents that are the remote consequences of the fall of the wall on the public road, e.g., if some passers-by stumble against the debris and fall or where the debris affects another's property because the wall has been constructed in one's own property, in a vertical equilibrium and the falling did not result from the owner's act, there is no consideration of whether the owner negligently does not remove his debris or not. This is the more correct (*aṣaḥḥ*) opinion. However, there is another opinion that the owner is liable because he has negligently failed to removed the debris. On the other hand, one is responsible for throwing into the road whether in the middle of it or at its side, sweepings (*qumāmāt*), melon skins, pomegranate skins, stones, knives, or other slippery or dangerous objects that may cause a passer-by to fall and suffer injury. It is because the public is allowed to utilize it under the condition of safety.[41]

The stand of the *fuqahā'* on the injury resulting from dangerous chattels *per se* with their stand on the chattels *sub modo*, in general, are no different in giving rise to the liability for their owners. It seems that the chattels or things that are not dangerous in themselves become dangerous in particular cases or *sub modo* as the chattels which are originally dangerous *per se*.

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[40] Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.279; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.467; Bahnasī, al-Mas'ūliyyah al-Jinā'iyyah, p.61. See also Muᶜīn al-Ḥukkām, p.208; Quṭlūbughā, Kitāb Mūjibāt al-Aḥkām wa Wāqiᶜāt al-Ayyām, p.388.

[41] Minhāj al-Ṭālibīn in the margin of Mughnī al-Muḥtāj, vol.4, pp.86-87; Mughnī al-Muḥtāj, vol.4, pp.86-87; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghah al-Sālik , vol.2, p.356; al-Ābī, Jawāhir al-Iklīl, vol.2, p.257; al-Muhadhdhab, vol.3, p.206; Fatḥ al-Wahhāb, vol.2, p.175; Majmaᶜ al-Ḍamānāt, p.149.

The liability for falling from a higher part or for damage consequentially *transgredi* going beyond the normal utilization of the public highway is a kind of *ḍamān bi al-tasabbub* (liability for indirect cause) whether:

1- Placing chattels in an unauthorized place (*waḍᶜ al-shay' fī ghayr mawḍiᶜih*), or

2- Creating an unwarranted action (*tawallud fiᶜl ghayr ma'dhūn fīh*).

The appearance of the elements above may clearly be seen in cases where a person parks his motor car in a wrong place or on the highway and causes injury to another person. He is liable for he has caused the damage because he is *mutaᶜaddīn* for parking in the wrong place and *mutasabbib* for the *ḍarar*. He is also liable if he chases another person with his motor car as a result of which the latter has a stroke and dies consequently. Likewise, if he infringes the traffic laws (*anẓimat al-murūr*) such as driving his motor car on the right side of the road, not the left, or speeds beyond the authorized limit, if that causes injury to the passers-by or the property of another, he is liable for compensation.[42]

LIABILITY BASED ON FAULT

Under the topic of dangerous chattels, the *fuqahā'* discuss the issue of the collision of ships (*iṣṭidām*) as well as cases of inevitable accident generally. Under the issue of

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[42] Fawzī Fayḍ Allāh, Naẓariyyat al-Ḍamān, p.185; Amīn, al-Mas'ūliyyah al-Taqṣīriyyah ᶜan Fiᶜl al-Ghayr, pp.239-240.

collision the *fuqahā'* assert that there will be no liability[43] where two ships are in collision due to natural causes such as a storm, gale, hurricane, etc., which no human foresight can provide against, and of which human prudence cannot recognize the possibility, God does not place on anyone a burden greater than he can bear. But if the collision happens through negligence (*tafrīṭ*) of both masters, both of them are liable to each other.[44] A Shāfiᶜī jurist, al-Shīrāzī, determines the compensation in his writings by mentioning that both masters of the ships are mutually liable for half the value of the other's ship. If this collision causes destruction to goods belonging to passengers on this ship, each master should pay half the value of the passengers' goods. If the collision has caused the death of any person on either of the ships, both masters of the ships mutually liable for half the *diyah* like the collision which happens between two persons.[45] This judgement can also be applied to the case of collision which does not happen through negligence. However, there is another opinion which opines that no liability would be imposed in the case of a collision which happens without the existence of the element of negligence.[46]

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[43] In the Shāfiᶜī and the Zaydī schools, there is an opinion that both the two masters of the ships are liable for compensation because the ships are under their control like in the case of the collision between two horsemen in the act of damaging each other (*iṣṭadama al-fārisān li ghalabat al-farasayn lahumā*). And it can be theorized that "the destruction by a wind is like the destruction by an animal (*ghalabat al-rīḥ ka ghalabat al-dābbah*). See al-Mughnī, vol.8, p.343; al-Wajīz, vol.2, p.152; al-Baḥr al-Zukhār, vol.5, p.248; Ḍamān al-Mutlifāt, p.545. The *aẓhar* opinion nevertheless of the Shāfiᶜī school is that the master of the ship is not held liable and this case is not similar to the case of collision between animals because the animals may be controlled by their bridles. See Mughnī al-Muḥtāj, vol.4, p.92; al-Muhadhdhab, vol.3, p.209; Fatḥ al-Wahhāb, vol.2, p.176.

[44] Al-Mughnī, vol.8, p.343; al-Umm, vol.6, p.165; al-Futūḥī, Muntahā al-Irādāt, vol.1, p.525; Sharḥ Muntahā al-Irādāt, vol.2, pp.431-432; Muḥammad al-Ṣāwī, Bulghat al-Sālik, vol.2, p.386/vol.2, p.358; al-Mudawwanah , vol.4, p.666 and vol.3, p.499; al-Bājī, al-Muntaqā, vol.7, p.110; Mūjabāt, vol.1, p.211; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, pp.130-132; Majallat al-Aḥkām al-Sharᶜiyyah, article 1453, p.452; al-Wajīz, vol.2, pp.151-152; Fatḥ al-Wahhāb, vol.2, p.176.

[45] For detail about the cases of collision between two persons, etc., see the discussion of "Cases of Collision" in the section on Negligence, pp.355-363.

[46] Al-Shīrāzī, Kitāb al-Tanbīh, p.128; al-Muhadhdhab, vol.3, p.208. See also Fatḥ al-Wahhāb, vol.2, p.176.

In addition, if a collision occurs through negligence on the part of the master (*rubbān*) of one of two ships, he alone is liable. A master is deemed negligent until he is capable of controlling his ship by turning it away from the other. He is also negligent where he could have avoided the collision but deviated from his proper course towards the other ship. Hence, if one of two ships is in transit and the other stationary, the master of the mobile ship will be negligent if he collides with the immobile ship. If, however, he collides without negligence, the master of the mobile ship will not be liable. In other words, the negligence in this circumstance can be shown when the master or captain of one of the two ships is proved to be capable of controlling his ship or averting the accident by avoiding the other ship or diverting the course of his ship, but he refuses to do any one of these to prevent the accident. Similarly, the master or captain of the ship which is found wanting of adequate facilities and crew, will be held liable.[47]

In his chapter on *al-taʿaddī*, the Mālikī jurist Ibn Juzayy relates: "If two ships collide whilst on their respective courses and one of them breaks apart (or sinks), or both of them, there is no liability in that case".[48] This occurs because there has been no negligence or *al-taʿaddī*. Both masters proceeded on their proper courses. Nevertheless, if one of the masters or captains could have avoided the collision, he would have been

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[47] Al-Mughnī, vol.8, pp.342 and 344; al-Mudawwanah, vol.3, p.499; Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ, vol.4, pp.130-131; Majallat al-Aḥkām al-Sharʿiyyah, articles 1453-1454, p.452; Mūjabāt, vol.1, p.211; Mughnī al-Muḥtāj, vol.4, p.92; al-Futūḥī, Muntahā al-Irādāt, vol.1, p.525; Majmaʿ al-Ḍamānāt, p.150. See also Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.444; Sharḥ Muntahā al-Irādāt, vol.2, p.431; Zakariyyā al-Anṣārī, Sharḥ al-Minhaj in the margin of Ḥāshiyat al-Jamal ʿalā Sharḥ al-Minhaj, vol.5, p.89; Sulaymān al-Jamal, Ḥāshiyat al-Jamal ʿalā Sharḥ al-Minhaj, vol.5, p.89.

[48] Al-Qawānīn al-Fiqhiyyah, p.218; al-Kinānī, al-ʿAqd al-Munaẓẓam li al-Ḥukkām in the margin of Tabṣirat al-Ḥukkām, vol.2, p.81. See also Muḥammad al-Ṣāwī, Bulghat al-Sālik, vol.2, p.386. He records that when the collision happened without the intention of the masters of the two ships, it is considered as *al-ʿajz al-ḥaqīqī* (actual incapacity).

liable because of his *al-taʿaddī*[49] in contravention of the universal principle embodied in the Ḥadīth:

> "There should be neither harming, nor reciprocating harm (*lā ḍarar wa lā ḍirār*)".[50]

If the collision happens where both ships are sailing across each other while one is descending (*al-munḥadirah*) and the other one is ascending (*al-muṣāʿidah*), the *fuqahā'* held the liability to be that of the master of the descending ship if he is negligent because the descending ship is deemed as a transit ship while the ascending ship is considered as an immobile one (*al-munḥadirah bi manzilah al-sā'ir wa al-muṣāʿidah bi manzilah al-wāqif*). Nevertheless, if the negligence arises from the ascending ship, not the descending ship, the ascending ship will be liable and the descending ship will be exempt.[51]

Briefly speaking, the Ḥanbalī jurist Ibn Qudāmah appears to recognise the case

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[49] Muḥammad al-Ṣāwī says that if one of the masters or both of them is capable of avoiding the collision but they do not do so lest their ships will sink or etc., causing one or both ships to be damaged, payment of the damaged property will be due from their property and payment of the *diyah* will be due from the *ʿāqilah* of each one of the masters because they cannot do damage to another by means of saving themselves. See Bulghat al-Sālik, vol.2, p.386. In the same sense, Khalīl b. Isḥaq says that there is no civil or criminal responsibility incurred if it is a case of *ʿajz ḥaqīqī* as in the case of the fury of the sea or in the case of violent wind. However, if the collision could have been avoided but it was not done lest the ship would sink, or the collision which happened owing to navigating at night without light, the payment of the legal composition for the blood of the persons killed or wounded will be due from the *ʿāqilah* of each of the masters. See Mukhtaṣar, p.274 and p.314; al-Ābī, Jawāhir al-Iklīl, vol.2, p.258; al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.243; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.243.

[50] Al-Musnad, vol.1, p.313; Sunan Ibn Mājah, vol.2, p.784; al-Muwaṭṭa', p.529; Ibn Rajab, Jāmiʿ al-ʿUlūm wa al-Ḥukm, vol.2, p.207; Mūjabāt, vol.1, pp.166-168; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.593; al-Durr al-Mukhtār, vol.2, p.462; Majallah, article 19. This maxim is the most widely accepted tenet of the *Sharīʿah*. It is unanimously accepted by all schools of Islamic law and is said to be one of four (Ashbāh.S, p.7) or five (al-Zurqānī, Sharḥ al-Zurqānī ʿalā Muwaṭṭa', vol.4, p.430) pillars upon which the entire Islamic legal system is based. See also Shams al-Dīn, "al-Ḥuqūq fī al-Sharīʿah al-Islāmiyyah" (March 1984) p.304, al-ʿArabī 30 where he notes that this maxim is the foundation of the Islamic theory of the abuse of rights.

[51] Al-Mughnī, vol.8, pp.342-343; al-Khiraqī, Mukhtaṣar al-Khiraqī, p.117; Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ, vol.4, p.131; al-Futūḥī, Muntahā al-Irādāt, vol.1, p.525; Sharḥ Muntahā al-Irādāt, vol.2, pp.431-432; al-Dardīr, al-Sharḥ al-Kabīr, vol.7, p.456.

of the collision of two ships and the liability based on fault. The masters of both ships will not be liable in cases of inevitable accident or collision where consequences are not intended and are not caused by themselves and could not have been foreseen by the excercise of reasonable care and skill. According to the *fuqahā'*, like *acts of God*, inevitable accident is a ground of exemption from tortious liability. The illustration which may be referred to is the cases of collision due to natural causes such as fire due to lightning, gale, hurricane, etc.. It must be proved that the accident is not the result of any negligent misconduct by the party applying for relief. But if it could be proved that the collision is caused by the negligence of the parties or one of them, each is liable in proportion to the degree in which he is at fault. The *fuqahā'* have compared the case of the collision of ship with the case of horsemen colliding with each other. Both of them are liable if it could be proved that they failed to observe the standard of care required of them. When it is proved that they lost control over the act there would be no liability. And if one of them is found negligent, he alone would be liable for the tort.[52] However, the case of collision of horsemen will be discussed in the section of "Negligence".

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[52] Al-Mughnī, vol.8, p.343; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, pp.130-132.

NUISANCE

THE NATURE AND SCOPE OF NUISANCE

The concept of ownership of property is that its owner may use and enjoy it as he wishes. His rights in this respect are limited only by similar rights of others and subject to such burdens as may be imposed by the State or authority. Limitations upon an owner's right of use and enjoyment are mostly imposed with reference to land, because the mode in which a man uses his land often affects his neighbours. The general principle is that the owner of land is entitled to use and enjoy it in a manner that suits him best, even if it causes inconvenience or injury to his neighbours, provided he does not destroy the neighbour's property or make it useless for him. For instance, if a man sets up a shop next door to his neighbour's and sells the same class of goods, he may cause him considerable injury but nevertheless this is not such a loss as the law would attempt to prevent. But suppose he sets up a factory next to a man's residence and the mode in which the business is carried on in the factory causes such a nuisance that his neighbour cannot live in ordinary comfort or carry on his ordinary occupation, the law will intervene. In another case, if in a place a certain business or trade causing a nuisance is already establised, a new-comer must put up with the inconvenience. What is or is not nuisance is determined on the principle of whether an act or the manner of doing an act causes manifest and grave injury (*ḍarar fāḥish*) to the neighbouring property, having regard to the use to

which it is devoted. If the act threatens the very existence of the neighbouring property, as when a man so collects water in his own land or so digs in it as to weaken the support of the adjacent land or building, the injury would undoubtedly be regarded as manifest and grave. Similarly, if a man so builds on his land as to obstruct altogether the light and air of his neighbour's house, this will also be regarded as a nuisance.[1]

There are Ḥadīths which can be connected to nuisance:

1- "While a man was on the way, he found a thorny branch of a tree on the way and removed it. God thanked him for that deed and forgave him".[2]

2- "Abū Hurayrah reported the Prophet said that there was a tree which caused inconvenience to the Muslims; a person came there and cut that tree down and thus entered Paradise".[3]

Much of the confusion around the word "nuisance" in the law of tort is caused by the fact that the term covers two concepts, those of private and public nuisance which, while not totally dissimilar, are not too closely related.

In this section there are a few sub-topics which will be discussed. Some of them are: private nuisance, public nuisance, right of way, obstruction of air, sunlight or light and others.

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[1] Sharḥ Fatḥ al-Qadīr, vol.6, pp.414-415; Majallah, article 1201. The disturbance which takes the form of physical damage to the land, or more usually, of the imposition of discomfort upon the occupier, has been dealt with clearly by Fatḥī al-Durayni in his writing. He used the word "*al-taʿassuf*" to show the unlawful interference with a person's use or enjoyment of land or of some rights over or in connection with it. In brief, the word *al-taʿassuf* can be translated "the abuse of rights" in English and "de l'abus des droits" in France. See Fatḥī al-Durayni, Naẓariyyat al-Taʿassuf fī Istʿmāl al-Ḥaqq fī al-Fiqh al-Islāmī, pp.45-47. Muḥammad Aḥmad Sirāj also said that the Western tort law books discussed the rules (*ahkām*) of *al-taʿassuf* under the topic of nuisance. See Muḥammad Aḥmad Sirāj, Ḍamān al-ʿUdwān fī al-Fiqh al-Islāmī, p.297.

[2] Ṣaḥīḥ al-Bukhārī, vol.3, p.393; Ṣaḥīḥ Muslim, vol.4, p.1380.

[3] Ṣaḥīḥ Muslim, vol.4, p.1380; Sunan al-Nasā'ī, vol.2, p.1214. In Sunan al-Nasā'ī, the word "*al-nās*" was used instead of the word "Muslims" in Ṣaḥīḥ Muslim.

PRIVATE NUISANCE

In private nuisance, the central idea is that of interference with the enjoyment of the plaintiff's land generally speaking by the defendant's causing some sort of deleterious invasion of it, for example, by noise, smell, smoke, fumes, gas, vibration, water, or chattels. Wrongful interference with the exercise of an easement, profit, or other similar right affecting the use and enjoyment of land also come within the rubric of private nuisance. The basis of the law of nuisance is the maxim *sic utere tuo ut alienum non laedas*: a man must not make such use of his property as unreasonably and unnecessarily to cause inconvenience to his neighbour.[4]

This maxim can be connected to a Ḥadīth. When the Prophet was confronted with a case brought by a man of the Anṣār from Madīnah against Samurah b. Jundab. The plaintiff was claiming injury from a date tree of the defendant which extended to the plaintiff's land and caused injury to him and his family. The Prophet decided that the tree should be removed.[5] This Ḥadīth is usually correlated with the legal maxim: "Severe injury is removed by lesser injury".[6] The removing of the tree is deemed a lesser matter

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[4] C.D. Baker, Tort, p.246; Salmond And Heuston, p.57.

[5] Sunan Abī Dāwud, vol.3, p.315; al-Māwardī, al-Aḥkām al-Sulṭāniyyah, p.285; Ashbāh.S, p.92; Ibn Qayyim, al-Ṭuruq al-Ḥukmiyyah, p.264; Fatḥī al-Durayni, Naẓariyyat al-Taʿassuf, p.46.

[6] Majallah, article 27. *Al-Ḍarar al-ashadd yuzāl bi al-ḍarar al-akhaff.* However, if no injury is caused to the owner's land, it is not considered nuisance. In the case of al-Ḍaḥḥāk *v.* Muḥammad b. Maslamah, the plaintiff wanted to reach water by digging a canal passing through the defendant's land. The defendant refused. When the case was brought to ʿUmar b. al-Khaṭṭāb he asked the defendant, "Why do you prevent your brother from something beneficial to him, and of benefit to you without impairment". ʿUmar decided in favour of the plaintiff notwithstanding the refusal of the owner of the land. See al-Muwaṭṭa', p.346. ʿUmar in this decision has formulated two principles for the exercise of the right of ownership.
1- Prevention of injury to others.
2- Benefit to others if no impairment or injury is caused to the owner.
From the two legal principles, "there should be neither harming nor reciprocating harm", and " in the

than the severe injury sustained by the plaintiff.

The Right of Enjoyment of Land

The essence of private nuisance is interference with the enjoyment of land. There are two ways in which land may be enjoyed. They are firstly occupying land and secondly by exercising some rights over land occupied by another. A right over the land of another is known as a servitude and the most important type of servitude is an easement. It follows that there are two types of private nuisance, (1) some interference with the beneficial use of the premises occupied by the plaintiff, or (2) some physical injury to those premises, or to the property of the plaintiff situated thereon. Thus smells emanating from a pig-farm, or noise causing deprivation of sleep might come within the former category. Indeed any substantial interference with the comfort or convenience of persons occupying or using the premises is a sufficient interference with the beneficial use of them within the meaning of this rule. Damage to the land by causing sewage or flood water to collect upon it, or vibrations from powerful engines causing structural damage might come within the latter category.

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presence of two evils, the greater is avoided by the commission of the lesser", and in consideration that the welfare of the community takes precedence over the welfare of the individual. See Aḥmad Zaki Yamani, Islamic Law and Contemporary Issues, pp.22-23.

(1) Interference with the beneficial use

The governing principle here is expressed by the *fuqahā'* in some examples as follows:

Smell and smoke

In the Ḥanafī school, al-Kāsānī in his manual mentions that any person may exercise the use of his property which is in his absolute ownership by any building he wishes whether such a construction may cause injury (*yataᶜaddī ḍarar*) to another or not. For example, he can construct in property under his ownership a lavatory (*mirḥāḍ*) or warm bath (*ḥammām*) or quern (*raḥan*) or oven (*tanawwuran*) or hardware shop or laundry, etc. even though it can cause injury to his neighbour. The neighbour has absolutely no right to prevent the person from exercising his right and has no right to request him to move his construction to another place, and also the person cannot definitely be compelled to do so. It is because he has used property which he owns under his absolute ownership. But, if the right of any other person is concerned therein, he could be prevented. Otherwise, he could not be prevented unless the prevention is performed on the basis of a religious sense (*diyānah*) which is based on a Ḥādith:

> "He will not enter Paradise whose neighbour is not secure from his wrongful conducts."[7]

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[7] Ṣaḥīḥ Muslim, vol.1, p.32. See also in Badā'iᶜ al-Ṣanā'iᶜ, vol.6, p.264; al-Mughnī, vol.4, p.518; Fatḥī al-Durayni, Naẓariyyat al-Taᶜassuf, pp.278-279. In another Ḥadīth, the Prophet said: "By Allāh, he does not believe! By Allāh, he does not believe! By Allāh, he does not believe!". It was said (*qīl*), "Who is that, O Allāh's Apostle?" He said: "That person whose neighbour does not feel safe from his wrongful conducts". See

The Ḥanafī view which regards the owner of property as being able to use property which he owns under absolute ownership as he wishes, is based on the principle of *qiyās*.[8] But, in accordance with *istiḥsān*, the owner can deal with his property as he wishes so long as it does not cause his neighbour any injury thereby. This principle has been held by the majority of the Ḥanafī jurists (*mashā'ikh*) and they give their *fatwā* according to it.[9] Al-Zaylaᶜī, consequently, says:

> "A person may exercise the use of his property as he wishes providing that he does not cause another (his neighbour) any manifest *ḍarar* (*ḍararan ẓāhiran*)".[10]

Therefore, he can erect a *ḥammām* by reason that it does not cause any harm to his neighbour and whatever inconvenience which may arise from it like dampness (*al-nadāwah*) can be taken care of by erecting a wall between his land and the neighbour's land.[11] It is reported that Abū Yūsuf follows and holds the principle of *istiḥsān*. He says that if the neighbour is disturbed by a quantity of smoke given off by a *ḥammām* (which is erected in close proximity thereto), he must be prevented from that unless the quantity of smoke given off by a *ḥammām* belonging to the neighbour is tantamount to the

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Ṣaḥīḥ al-Bukhārī, vol.8, p.28. There are many Ḥadīths concerning exhortation to accord honour and respect to the neighbour. See Ṣaḥīḥ Muslim, vol.1, p.32.

[8] Al-Shalabī, Ḥāshiyat al-Shalabī in the margin of Tabyīn al-Ḥaqā'iq, vol.4, p.196; Radd al-Muḥtār, vol.5, p.237. See also al-Mughnī which also indicates that some Ḥanafī jurists do not prevent one from using his property which he owns under absolute ownership. This is also the opinion of al-Shāfiᶜī and another view of Aḥmad b. Ḥanbal. see Al-Mughnī, vol.5, p.518.

[9] Al-Shalabī, Ḥāshiyat al-Shalabī in the margin of Tabyīn al-Ḥaqā'iq, vol.4, p.196; Radd al-Muḥtār, vol.5, p.237.

[10] Tabyīn al-Ḥaqā'iq, vol.4, p.196. See also Fatḥī al-Durayni, Naẓariyyat al-Taᶜassuf, pp.278-279.

[11] Tabyīn al-Ḥaqā'iq, vol.4, p.196; Radd al-Muḥtār, vol.5, p.448; Salīm Rustam, Sharḥ al-Majallah, vol.1, p.659; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.10, p.226.

quantity of smoke emanating from the property belonging to the other.[12]

A person cannot erect an oven in his house for a bakery, or a quern, or a pounder for a fuller's work because it may cause grave injury to his neighbour and he cannot be able to prevent it from interfering with his neighbour. However, he can erect it in accordance with *qiyās*, but he cannot in accordance with *istiḥsān*.[13]

In the contemporary application, the rule of *istiḥsān* has been applied. It is as enacted in the Majallah, when a forge or a mill is erected adjacent to a house and it becomes impossible for the owner of such a house to dwell therein by reason of the great quantity of smoke given off by a furnace, or the bad smell made by a linseed oil factory, they must be removed in any way possible.[14] Similarly, if a person tans the animal's skin in his house and thereby causes continuously (*ʿalā al-dawām*) a bad smell to his neighbour, it should be prevented. Otherwise, if it rarely (*ʿalā al-nadrah*) causes a bad smell, it should not be removed.[15]

A Shāfiʿī jurist, Ibn al-Ukhuwwah said in his book Maʿālim al-Qurbah in the chapter on bakers and bread makers, that the roofs of bake-houses must be high and have wide vents for smoke. The *muḥtasib* (the Islamic inspector of the market) must order that

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[12] Tabyīn al-Ḥaqā'iq, vol.4, p.196; Radd al-Muḥtār, vol.5, p.237.

[13] Tabyīn al-Ḥaqā'iq, vol.4, p.196; Sharḥ Fatḥ al-Qadīr, vol.6, p.414; al-Fatāwā al-Mahdiyyah, vol.5, p.472; Radd al-Muḥtār, vol.5, p.448.

[14] Majallah, article 1200; Radd al-Muḥtār, vol.5, p.237; ʿAlī Ḥaydar, Durar al-Ḥukkām, vol.10, pp.225-226. See also Qadrī Bashā, Murshid al-Ḥayrān, article 57, who chiefly follows and applies the rule of *istiḥsān* in his treatise.

[15] Al-Durr al-Mukhtār, vol.2, p.107; Radd al-Muḥtār, vol.5, p.237; Salīm Rustam, Sharḥ al-Majallah, vol.1, p.659.

ovens shall be kept swept, kneading-troughs washed and covered with straw mats.[16] The chimney of the bake-houses must be high so the smoke and dust coming up it do not interfere with the premises adjoining which are occupied by others. Likewise Ibn Ḥazm supports this: a Muslim is not allowed to annoy his neighbour by letting the smoke of his chimney bother him.[17]

The Mālikī and Ḥanbalī jurists also maintain that any nuisance to the neighbour's life should be removed. Therefore, all interferences which might be a nuisance to the neighbourhood, either owing to smoke, as from a chimney or a warm bath (*ḥammām*) or baking oven (*furn*); or owing to their smell, as, for example, that of a tannery (*dibāgh*) or toilet (*kanīf*), are prohibited.[18] They must be eliminated in any way possible.[19] However, smoke given off by a kitchen or a bakery is not considered as a nuisance because cooking or baking is a necessary activity so long as it does not cause grave injury to another (*ḍarar fāḥish*).[20] This means that if a great quantity of smoke is given off by it and causes

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[16] Ibn al-Ukhuwwah, Maʿālim al-Qurbah, p.91.

[17] Al-Muḥallā, vol.8, p.242. Many examples of smoke and smell are elucidated by ʿAlī Ḥaydar in his book Durar al-Ḥukkām, vol.10, pp.225-226.

[18] Mukhtaṣar, p.215; al-Bājī, Fuṣūl al-Aḥkām, p.209 and p.210; Majallat al-Aḥkām al-Sharʿiyyah, article 1675, p.507. See also al-Muqniʿ wa Ḥāshiyatuh, vol.2, p.129; Sharḥ Muntahā al-Irādāt, vol.2, p.270; Manār al-Sabīl, vol.1, p.373; al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.637; al-Tāwadī, Sharḥ Arjūzah Tuḥfat al-Ḥukkām printed with
al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.637 and p.643; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.164; al-Ābī, Jawāhir al-Iklīl, vol.2, p.122; al-Mughnī, vol.5, p.518; Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ, vol.3, pp.339-340; al-Kinānī, alʿ Aqd al-Munaẓẓam li al-Ḥukkām in the margin of Tabṣirat al-Ḥukkām, vol.2, p.91; Tabṣirat al-Ḥukkām, vol.2, p.261; al-Dusūqī, Ḥāshiyah ʿalā al-Sharḥ al-Kabīr, vol.3, p.369. See also Muḥammad Aḥmad Sirāj, Ḍamān al-ʿUdwān, pp.311-312.

[19] Majallat al-Aḥkām al-Sharʿiyyah, article 1675, p.507. See also al-Muqniʿ wa Ḥāshiyatuh, vol.2, p.129; Sharḥ Muntahā al-Irādāt, vol.2, p.270.

[20] Sharḥ Muntahā al-Irādāt, vol.2, p.270; Manār al-Sabīl, vol.1, p.373; al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.637; al-Tāwadī, Sharḥ Arjūzah Tuḥfat al-Ḥukkām printed with al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.637; al-Bājī, Fuṣūl al-Aḥkām, p.210; al-Mughnī, vol.4, p.518.

injury to the neighbour, it must be removed.

Dust

When a person constructs a threshing floor (*ṭāḥūn/baydar*) near to another's house or garden and the dust therefrom makes it impossible to dwell therein, the person who owns that threshing floor must remove the injury thereof;[21] likewise nuisance owing to the dust raised by depositing straw (*tibn*) or corn in front of a house must be removed.[22]

Noise

No one can ordinarily be prevented from using his own property as he wishes. However, if from its use, grave injury results to another, then he must be prevented. Therefore, if a defendant acts maliciously like blowing whistles, beating trays or drums, etc., shrieking, hammering on the wall, etc., causing a plaintiff inconvenience by reason of noise, the interference arising from the acts of defendant should be restrained because of the way in which the nuisance arose. If a smithy is built close to a house and it becomes impossible by reason of noise from the forge to occupy the house, this noise

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[21] Majallah, article 1200; ʿAlī Ḥaydar, Durar al-Ḥukkām, vol.10, p.227. See also al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.638.

[22] Mukhtaṣar, p.215; al-Kinānī, al-ʿAqd al-Munaẓẓam li al-Ḥukkām in the margin of Tabṣirat al-Ḥukkām, vol.2, p.92; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.164; al-Ābī, Jawāhir al-Iklīl, vol.2, p.122.

must be removed.[23] This case is supported by Ibn Qudāmah who provides a special rule concerning this case. He says: "A person (neighbour), indeed, is restrained in the right of disposal over his ownership when injury can be caused to his neighbour (*anna al-jār yumnaᶜ min al-taṣarruf fī milkih bimā yaḍurr bijārih*). Therefore, the noise of pounding and hammering emanating from the fuller's shop or smith's shop, should be stopped.[24] Also, if a cotton ginner (*ḥallāj*) is erected near another house and its occupier cannot dwell therein by reason of the noise arising from it, it must be removed and eliminated.[25]

It is clear in the Mālikī school with regard to the noise where Ibn ᶜUttāb mentions:

> "Teachers (*al-shuyūkh*) in our country contradict each other in case of a person doing something in his house which may cause nuisance and produce noise for his neighbour like a blacksmith working in his smithy. Some of them say: The blacksmith should be prevented from continuing his work whether such noise occurs at night or in daylight. Others say: He should not be prevented. Ibn Saᶜīd says: There is unanimity among our teachers that the blacksmith should be prevented from doing his work at night if the noise therefrom can interfere with his neighbour, otherwise he should not be prevented from doing his work in day time".[26]

However, Ibn Rushd gives a general view by mentioning that the noise arising from the blacksmith's work or fuller's work in beating the garment (*al-kammād*) or cotton carder's work (*al-naddāf*) is not required to be stopped.[27] It is clearly similar to the notification by

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[23] This case is based on the analogy from the case which is enacted in Majallah, article 1200.

[24] Al-Muqniᶜ wa Ḥāshiyatuh, vol.2, p.129. See also Sharḥ Muntahā al-Irādāt, vol.2, p.270; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.3, pp.339-340; Fatḥī al-Durayni, Naẓariyyat al-Taᶜassuf, p.275.

[25] ᶜAlīsh Ḥaydar, Durar al-Ḥukkām, vol.10, p.225.

[26] Tabṣirat al-Ḥukkām, vol.2, p.261; al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.641. See also al-Bājī, Fuṣūl al-Aḥkām, p.208.

[27] Tabṣirat al-Ḥukkām, vol.2, p.261; al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.641.

Khalīl b. Isḥaq that the law does not prohibit the intervention in the case of noises produced by many voices, or those caused by workmen in the exercise of their profession, as, for example, fullers when fulling cloth.[28] This is also the view of Maṭraf and Ibn al-Mājishūn.[29] It is not prevented because the noises produced by the fuller do not normally cause a great injury and a continuous nuisance to the neighbour. However, if it causes a great injury as well as a continuous nuisance like noises emanating from workers who are working in a brass factory (*al-ṣaffār*), or who are fulling cloth (*al-kammād*), or noises emanating from a quern, it should be interdicted as in the case of bad smell.[30] Ibn al-Qāsim briefly highlights this kind of nuisance by mentioning that the noise resulting from a quern which causes interference for a neighbour, should be terminated.[31]

Furthermore, the *fuqahā'* of this school also discuss the noise arising from voices of pupils who are studying in school. It is clear that this case might not be considered as a nuisance to the neighbourhood unless such voices or noises emanate from their activities at play (*laᶜb*).[32] Other cases might also be a nuisance to the neighbourhood such as noises produced by a teacher of music (*muᶜallim al-anghām*), or by a partridge (*al-karwān*) which is crying (*ṣiyāḥ*), or by a pigeon which is reared for the purpose of cooing

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[28] Mukhtaṣar, p.215. See also al-Ābī, Jawāhir al-Iklīl, vol.2, p.123; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.165; al-Dusūqī, Ḥāshiyah ᶜalā al-Sharḥ al-Kabīr, vol.3, p.370.

[29] Al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.165.

[30] Al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.165. See also al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.641.

[31] Al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.165. See also al-Kinānī, al-ᶜAqd al-Munaẓẓam li al-Ḥukkām in the margin of Tabṣirat al-Ḥukkām, vol.2, p.91; Tabṣirat al-Ḥukkām, vol.2, p.256; cf., al-Bājī, Fuṣūl al-Aḥkām, p.209.

[32] Al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.637; al-Dusūqī, Ḥāshiyah ᶜalā al-Sharḥ al-Kabīr, vol.3, p.370. See also Muḥammad Aḥmad Sirāj, Ḍamān al-ᶜUdwān, pp.314-315.

(*hadīr*).[33]

In addition, it is considered as a nuisance of noise if a person constructs a stable close to his neighbour's house which causes the neighbour to feel discomfort in sleeping, owing to the motion of the animals in the stable as well as the bad smell from their dung and urine.[34]

From the explanation above, the following points can be made:

1- No action will lie for nuisance in respect of noise which is due solely to a normal activity like the voice of pupils in the school and the like.

2- Any activity which may cause inconvenience or discomfort in effect amounts to a nuisance.

3- Any noise causing deprivation of sleep or continuously interfering with the plaintiff at an improper time like at night, can be considered as nuisance to the beneficial use of the premises occupied by him thereon.

All cases aforesaid are in conformity with a legal maxim: "The repelling of a mischief is preferred to the acquisition of benefits".[35] The Prophet, in general, prohibited any harm to neighbours in his Ḥadīth narrated on the authority of Abū Hurayrah:

> "He will not enter Paradise whose neighbour is not secure from his wrongful conducts".[36]

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[33] Al-Dusūqī, Ḥāshiyah ʿalā al-Sharḥ al-Kabīr, vol.3, p.370. See also Muḥammad Aḥmad Sirāj, Ḍamān al-ʿUdwān, p.315.

[34] Tabṣirat al-Ḥukkām, vol.2, p.256; al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.639; al-Dusūqī, Ḥāshiyah ʿalā al-Sharḥ al-Kabīr, vol.3, p.369. See also Muḥammad Aḥmad Sirāj, Ḍamān al-ʿUdwān, p.315.

[35] Majallah, article 30. *Dar' al-mafāsid muqaddam ʿalā jalb al-maṣāliḥ.* See also Fatḥī al-Durayni, Naẓariyyat al-Taʿassuf, pp.67-68.

[36] Ṣaḥīḥ Muslim, vol.1, p.32.

"Wrongful conduct" here can be construed as including all wrongful deeds including noises produced by the neighbours.

(2) Interference with property

The rule that the standard is determined by the locality where the nuisance is created is limited to those cases where the nuisance complained of produces sensible personal discomfort. The nuisance in this section will be discussed as follows:

No right over neighbouring land

No person may extend the eaves of a room which he has constructed in his house over his neighbour's house. If he does so, the amount which so extends over his neighbour's house must be removed[37] because the extension of the eaves over the neighbour's house is regarded as a nuisance.

Trees affecting a neighbour's land

If the branches of trees in a person's garden extend into the house or garden of his neighbour, the owner may be made by the neighbour to tie up such branches and thus bring them back into his own garden, or cut them down and thus obtain a clear current

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[37] Majallah, article 1195.

of air.[38] He may not, however, cut down the tree on the grounds that the shadow of such a tree is injurious to the cultivation in his garden.[39]

Al-Baghdādī also gives the same standpoint if a person cuts the branches of a tree owned by his neighbour which extended over his house, he is liable if the branches can be pulled back by their owner. If they cannot because they are too heavy, the person who has cut them is not liable.[40] This case is also supported by the Hanbalī jurist Ibn Qudāmah, who says that if the owner of the tree was prevented (*imtanaᶜa*) from removing the branches, he should not be compelled to do so, since it is not of his doing. And if anything is destroyed by the branches, then he is not liable.[41] This example shows that any nuisance in respect of the inconvenience or discomfort which solely causes injury to the plaintiff must be removed if possible. If the defendant is unable to solve it or is unwilling to stop it, the plaintiff is entitled to take action.

Protection of a well from sewage

If any person constructs a cesspit or a sewer near a well belonging to another, and

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[38] Sharḥ Muntahā al-Irādāt, vol.2, p.268; al-Mughnī, vol.4, p.487; al-Muqniᶜ wa Ḥāshiyatuh, vol.2, pp.127-128; Mughnī al-Muḥtāj, vol.4, p.86; Majallat al-Aḥkām al-Sharᶜiyyah, article 1673, p.507; Majallah, article 1196. This is also the opinions of Ibn Ḥabīb, Maṭraf and Aṣbagh of the Mālikī school. This opinion is considered as the approved view (*al-muᶜtamad*). However, this opinion is contrary to the opinion of Ibn al-Mājishūn. See al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.648; al-Tāwadī, Sharḥ Arjūzah Tuḥfat al-Ḥukkām printed with al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.648; al-Bājī, Fuṣūl al-Aḥkām, pp.212-213.

[39] Majallah, article 1196.

[40] Majmaᶜ al-Ḍamānāt, p.153. Ibn Qudāmah said: "If a person cuts the branches of a tree owned by his neighbour which extend into his house, he is liable if the branches can be removed without being cut, even though their owner refuses to remove them. See al-Muqniᶜ wa Ḥāshiyatuh, vol.2, p.128.

[41] Al-Muqniᶜ wa Ḥāshiyatuh, vol.2, p.128.

contaminates the water thereof, he may be made to remove the injury. If it is impossible to remove the injury, he may be made to close up the cesspit or sewer.[42]

Structural weakness

When a forge or mill or laundry is erected adjacent to a house or a wall and the house or the wall is weakened by the hammering from the forge or the laundary, or the turning of the mill wheel, the injury caused in any way whatsoever must be removed.[43] Again, if someone on a building site adjoining the house of another, makes a new water channel and weakens the wall of the house by taking water to his mill, or if someone makes a dust heap at the foot of the neighbour's wall and as a result of him throwing his sweepings there, the wall becomes weak, or water flows on his site but the water trespasses to the wall of another and it becomes weak thereby, the owner of the wall can cause the damage to be removed.[44] In the same sense, the author of Mukhtaṣar remarks that no one may do any danger against his neighbour's wall, nor may he build a stable (*iṣṭabl*) against that wall because it might weaken or knock the wall down.[45] This view

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[42] Majallah, article 1212.

[43] Majallah, article 1200. See also al-Durr al-Mukhtār, vol.2, p.289; Radd al-Muḥtār, vol.5, p.448; al-Mughnī, vol.4, pp.518-519; Sharḥ Muntahā al-Irādāt, vol.2, p.270; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.3, pp.339-340; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.10, p.225; Qadrī Bashā, Murshid al-Ḥayrān, article 59; Fatḥī al-Durayni, Naẓariyyat al-Taᶜassuf, p.275.

[44] Majallah, article 1200; al-Mughnī, vol.4, p.518. See also al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.639.

[45] Mukhtaṣar, p.215. See also al-Ābī, Jawāhir al-Iklīl, vol.2, p.122; al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, pp.638-639; al-Tāwadī, Sharḥ Arjūzah Tuḥfat al-Ḥukkām printed with al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, pp.638-639.

is also held by al-Bājī.[46]

(3) Interference with services

Although most of the law concerning private nuisance deals with interference with the enjoyment of land occupied by the plaintiff, it should be borne in mind that interference with any of the following services constitutes a private nuisance: interference with the use of a private right of way, interference with a right to light coming through a window, etc.,.

A passage cannot be made into a private lane

If there is a long lane, parallel to which, either on the right or left, runs another long lane, not a thoroughfare (that is *ghayr nāfidhah*), it is not permitted for any of the inhabitants of the first lane to make a door to open into the second lane because the object of making a door is to obtain passage to and from, and the second lane is not free to the inhabitants of the first as it is not a thoroughfare. The right of passage through it belongs only to the inhabitants of it. Contrary to the *al-ṭarīq al-nāfidhah* that it is perfectly lawful for any of the inhabitants.[47]

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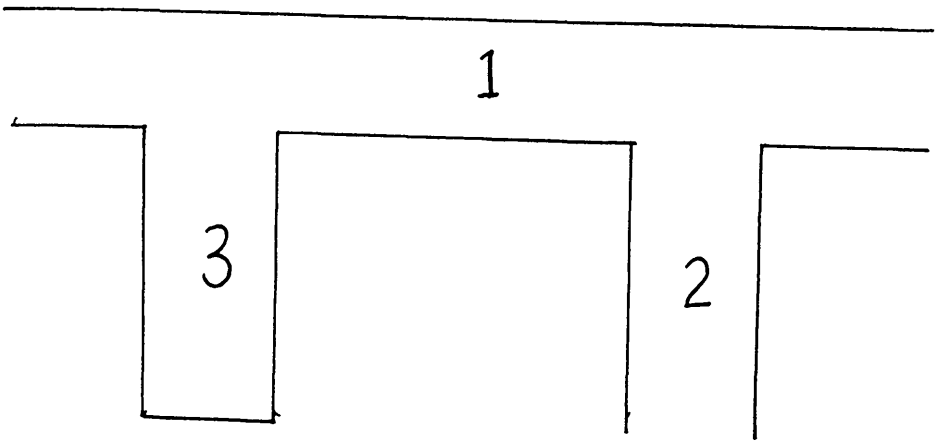
[46] See al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.165; al-Bājī, Fuṣūl al-Aḥkām, p.206.

[47] Al-Hidāyah, vol.3, p.109.



Ṭarīq nāfidhah [1] and [2]:[48]

a- People have a right of passage through it and have a right to construct a door or doors giving onto it.

b- This *ṭarīq* is not granted to a specific person only.

c- Anybody can do anything thereon [on condition that it] does not cause injury to others.

Ṭarīq ghayr nāfidhah [3]:[49]

a- No person who is not the owner or inhabitant of this *ṭarīq* has a right to construct a door looking out onto it.

b- If he does not have the permission of the other inhabitants, one of the owners of this *ṭariq* cannot make any construction on it whether it causes damage or not.

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[48] Majallah, article 1218, cf., ʿAlī Ḥaydar, Durar al-Ḥukkām, vol.10, p.246; al-Ajwibah al-Khafīfah, p.384. See also al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.276. See also al-Bājī, Fuṣūl al-Aḥkām, p.207.

[49] Majallah, articles 1219 and 1220; al-Hidāyah, vol.3, p.109; al-Durr al-Mukhtār, vol.2, p.154; ʿAlī Ḥaydar, Durar al-Ḥukkām, vol.10, p.246; al-Ajwibah al-Khafīfah, p.384; al-Muqniʿ wa Ḥāshiyatuh, vol.2, p.128; al-Mughnī, vol.4, p.500; Sharḥ Muntahā al-Irādāt, vol.2, p.269. See also al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.276; al-Bājī, Fuṣūl al-Aḥkām, p.208.

Neighbours of lower and upper storeys

In a house of which the upper storey belongs to one man and the lower storey to another, the proprietor (*ṣāḥib*) of the lower storey is not entitled to hammer in a nail or a pin (*watdan*), or to make a window without the permission of the proprietor of the upper storey. This is the opinion of Abū Ḥanīfah. According to his two disciples (Abū Yūsuf and Muḥammad b. al-Ḥasan al-Shaybānī) the proprietor of the lower storey may do any act whatever with respect to it, so long as injury does not result to the upper storey.[50]

FIVE DIFFERENT CASES

1- *The harm may be due to the act of a trespasser.*

A trespasser lets water flows into his neighbour's land or water flows in his own land and he fails to take any reasonable steps to control the water flowing to his neighbour's land and causing injury, he is liable.[51] An occupier of land is liable because he "continues" a nuisance if, with knowledge or presumed knowledge of its existence, he fails to take any reasonable steps to bring it to an end though he is given ample time to do so. Because of that, Muḥammad al-Sharbīnī al-Khaṭīb concludes that the defendant

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[50] Al-Hidāyah, vol.3, p.109; al-Durr al-Mukhtār, vol.2, p.154; Majallah, article 1192; al-Ajwibah al-Khafīfah, p.384.

[51] Mughnī al-Muḥtāj, vol.4, p.83; Abū Yūsuf, Kitāb al-Kharāj, p.197; al-Ajwibah al-Khafīfah, p.390.

is liable because he is negligent (*taqṣīr*).[52] That constitutes the nuisance.

2- *The occupier may have caused the nuisance by obstructing the plaintiff's benefits.*

Instances of this are the cases of an occupier of a house which obstructs the plaintiff's light, sun and wind. Basically, any interference with benefit such as cutting off the air or the view of a house, or preventing the entrance of sunlight does not amount to grave injury. However, if the light is entirely cut off, this amounts to grave injury. Consequently, if A erects a building and cuts off the light from the window of a room belonging to B, his neighbour, the room being darkened to such an extent that it is impossible to read anything written therein, the act amounts to grave injury and may be stopped.[53] Likewise, if A erects a high building near a threshing floor belonging to B and thereby cuts off the flow of air to the threshing floor, A may be asked to stop the nuisance.[54] According to the Mālikī jurists, the law does not prohibit the interception of a neighbour's light by new buildings or works, nor again the interception of the sun or wind unless the intended site is to be used for threshing corn or by the interception so that the neighbour or the plaintiff will suffer *ḍarar*.[55]

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[52] Mughnī al-Muḥtāj, vol.4, p.83.

[53] Majallah, article 1201.

[54] Majallah, article 1200.

[55] Mukhtaṣar, p.197; Tabṣirat al-Ḥukkām, vol.2, p.257; al-Qawānīn al-Fiqhiyyah, p.224. Ibn Juzayy says that in the case of intervention of light and sunlight, the *mashhūr* opinion is that it will not be stopped, and another opinion says that it should be stopped. Whereas in the case of intervention of wind used for threshing corn or floor, the *mashhūr* opinion is that it should be stopped.

3- *The nuisance may be due to a defect.*

Here the occupier is not liable when he exercises an act in his own property. The occupier of land is not held liable when the branch of a tree growing on his land suddenly broke off and damaged the plaintiff.[56] But if such a branch spread to a highway or mosque or another's property, its owner is liable when it damages the plaintiff. This case is similar to a case of constructing an inclining wall or a building projecting onto the highway or mosque or other property. The Mālikī jurist Khalīl Ibn Isḥāq adds that anyone is entitled to claim that his neighbour should cut down branches which have a deteriorating effect upon his wall unless, according to a view, the branches existed before the wall was put up.[57] This case is similar to the Ḥanbalī jurists' opinion. They maintain that the owner or occupier of land has a right to ask the owner of the branches to pull them up or cut them down. If he refuses, the occupier has a right to cut them down himself. Damage due to want of repair of the branches after request (*ṭalab*) is borne upon him. This is also the opinion of the Ḥanafī jurists.[58]

4- *Things naturally on the land.*

We can say that there may be liability in nuisance for the escape of things

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[56] Mughnī al-Muḥtāj, vol.4, p.86; Nihāyat al-Muḥtāj, vol.7, p.358.

[57] Mukhtaṣar, p.197. See also Tabṣirat al-Ḥukkām, vol.2, p.266.

[58] Sharḥ Muntahā al-Irādāt, vol.2, p.268; al-Mughnī, vol.4, p.487; Majallat al-Aḥkām al-Sharʿiyyah, article 1673, p.507; Majallah, article 1196.

naturally on the land if the occupier has failed to take reasonable care. Therefore, an occupier is held liable when a steep natural hill collapses as a result of earth movements as he is well aware of the hazard. Analogously, it is similar to the cases of the escape of things such as water, fire, stones, wreckage, fragments, etc.[59] Therefore, if a sewer in A's house is broken and the sewage flows into his neighbour's house, the neighbour can take action, and A must repair the sewer and put it in order.[60]

5- *Premises on the highway.*

Where premises on a highway became dangerous and constitute a nuisance, so that the premises collapse and injure a passer-by or an adjoining owner, if he has undertaken the duty to repair, the occupier or owner of the premises is answerable as to whether he knew or ought to have known of the danger or not. Positive action and neglect of duty are thus placed on the same footing. A duty to prevent his house from becoming dangerous from want of repair connotes a duty to inspect and examine it. The owner or occupier should not be allowed to rely upon his lack of knowledge. And also, the owner of a tree adjoining a highway should be in no different position from the owner of a house adjoining the highway.[61]

In general, nuisance is contrasted with trespass on land as follows:

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[59] See Mukhtaṣar, p.348; al-Qawānīn al-Fiqhiyyah, p.218; Majmaᶜ al-Ḍamānāt, pp.164-165.

[60] Majallah, article 1200.

[61] For detail about the cases of premises, see the topic of "Liability for Premises", pp.156-187. See also al-Mughnī, vol.4, p.500.

Nuisance

1- A tort against enjoyment of land.

2- The injury done may be indirect.

Trespass on land

1- A tort against possession of land.

2- The injury done may be direct.

PUBLIC NUISANCE

Public nuisance in the law of tort lies in the fact that any member of the public can show that a public nuisance exists, and that he has suffered injury beyond the discomfort or inconvenience suffered by the public at large. It does not require the invasion of private land, but the annoyance of the public by such acts as the obstruction of the highway, the pollution of the public water supply, etc.

There are Ḥadīths which can be related to public nuisance:

> "To remove harmful things from the roads is a *ṣadaqah* (a charitable act)".[62]

> "Abū Barzah al-Aslamī reported: "I said: O God's Messenger! teach me something so that I may derive benefit from it. He said: "Remove the troublesome things from the road of the Muslims".[63]

So, if a person constructs a bath, or erects a water-spout, or erects a wall, or sets out timbers from his wall to build upon, or sets up a shop or booth in the public road, every

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[62] Ṣaḥīḥ al-Bukhārī, vol.3, p.386; Sunan Abī Dāwud, vo.4, p.362.

[63] Ṣaḥīḥ Muslim, vol.4, p.1380; Sunan al-Nasā'ī, vol.2, p.1214.

other person, irrespective of his status, has a right to require it to be removed. The reason lies in the fact that all persons are entitled to free passage along such a road. The same is the case of one who occasions destruction by digging a well in the highway. If it happens to kill anyone, *diyah* is due from the *ᶜāqilah* of the defendant because he is the occasion of the destruction and is guilty of *al-taᶜaddī* in having erected such an erection in such a situation. A person is responsible for any accident occasioned by his throwing water on the highway unless the person who sustained the damage had wilfully passed over such water. The same rule holds with respect to timbers, or other nuisances set up in the highway. If a person lays a stone in the highway and a second person removes the stone to another part of the highway, and a man is thereby injured, the liability of nuisance rests upon the remover of the stone because the act of the original tortfeasor is abrogated in its effect by the place in which he had put the stone being cleared, and it being in another place through the act of the remover, who is, therefore, responsible for the consequence.[64]

It is related in the al-Jāmiᶜ al-Ṣaghīr that if a person constructs a common sewer in the public highway by the order or compulsion of the authority, he is not responsible for the consequences because, in constructing the sewer he has not been *mutaᶜaddīn*, for in so doing he acted by order of the authority who possesses a sovereign power (*al-wilāyah*) with respect to public rights. It is otherwise where a person does so without such an order, for in that case he is responsible as having been *mutaᶜaddīn* in presuming to

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[64] Al-Hidāyah, vol.4, pp.192-193; Manār al-Sabīl, vol.2, p.334; Abū Yūsuf, Kitāb al-Kharāj, p.322; Majallah, articles 1192-1233.

encroach upon the public rights without a sufficient authority.[65] Besides, acts with respect to the highway are permitted under condition of safety, that is under the condition that the public would not be injured. It is to be observed that this distinction holds in all cases of acts with respect to the highway, as the same reasoning equally applies to every other instance.[66]

Right of Way

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.[67] In the following Ḥadīth, the Prophet allocates a provision for nuisance on the highway:

> "Abū Saᶜīd al-Khudrī reported that the Prophet said: "Avoid sitting on the roads". The Companions said: "There is no way out of it as these are our sitting places where we have talks". The Prophet said: "If you must sit there, then give the right of way". They asked: "What are the rights of way?". He said: "Lowering your gaze (on seeing what is illegal to look at), refraining from harming people, returning *salām*, advocating good and forbidding evil".[68]

A highway (including in that term any public way) is a piece of land over which

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[65] Al-Jāmiᶜ al-Ṣaghīr in the margin of Kitāb al-Kharāj, p.119. See also al-Hidāyah, vol.4, p.193.

[66] Al-Hidāyah, vol.4, p.193; al-Durr al-Mukhtār, vol.2, pp.463-464. See also Minhāj al-Ṭālibīn wa ᶜUmdah al-Muftīn, p.284; Mughnī al-Muḥtāj, vol.4, pp.85-87 and pp.205-206. Joseph Schacht also discussed the Islamic law of public nuisance indirectly. He said that if someone digs a well and another falls into it, he is not liable if he did it on his own property, or on the property of another with the permission of the owner, or on public property with the permission of the *imām*. That means if that person has not had any permission in so doing, he is liable. See Joseph Schacht, An Introduction to Islamic Law, p.182.

[67] Majallah, article 926; al-Hidāyah, vol.4, p.191; Mughnī al-Muḥtāj, vol.4, pp.85-87 and pp.205-206.

[68] Ṣaḥīḥ al-Bukhārī, vol.3, p.385; Sunan Abī Dāwud, vol.4, p.256.

the public at large possesses a right of way. A highway extends to the whole width of the space between the fences or hedges on either side.[69]

If any person has a right of way over the land of another, the owner of the land cannot prevent him from passing and crossing over the land.[70] In the case of a person who has no right of way over the land belonging to another and exercises a right of way thereover for a certain period with the permission of the owner of such land, the owner if he wishes can prevent him from passing.[71] Likewise in another case where a person has a right of way over a fixed pathway (*mamarr mu'ayyan*) on the building site of another and with his permission and the owner of the building site erects a building on such a pathway, the person loses his right of way and has no right to sue the owner of the building site.[72]

According to al-Nawawī, it is forbidden to make use of a public way (*al-ṭarīq al-nāfidh/al-shāri'*) serving as communication between two places in such a manner as to obstruct the passage. Thus it is forbidden to construct at one's house a *janāḥ* opening upon the road, or to make a *sābāṭ* between two houses because it is dangerous to passer-by. In brief, it is forbidden:

1- To condone the projecting of a *janāḥ* to any public way (*wa yaḥrum al-ṣulḥ 'alā ishrāʿ al-janāḥ*).

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[69] Salmond and Heuston, p.85.

[70] Majallah, article 1225.

[71] Majallah, article 1226.

[72] Majallah, article 1227.

2- To construct a bench upon the public road, or plant a tree on it.[73]

Al-Nawawī further remarks that:

> "By enjoyment of the public road is understood the right of each person to go along it, to sit down and rest, to speak of one's business, etc., without in any way annoying the passers-by. One has no need to get any permission of the *imām* in order to rest upon the public road. And one may even shade the place where he sits with a *bārriyah* (a kind of mat), which would not be dangerous to passers-by. If two persons want to occupy the same spot on the public road at the same time, chance should decide between them, or, according to another opinion, it should be raised before the *imām*. If anyone who sits on the public road to sell his goods, then leaves his place, either because he wishes to discontinue or to occupy another place, he loses all his rights to the first place. But if he goes intending to return, his rights remain intact unless his absence is so prolonged that his customers go to someone else".[74]

In brief, any person is permitted to sit on the public road for the purpose of buying and selling so long as he does not do injury to others, otherwise he is not permitted.[75]

Special Cases of Right of Way and Public Nuisance

1-*Obstruction of the highway.*

This is the most common type of public nuisance. The public have the right of passage along the highway. Interference with this right by obstructing the highway is a

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[73] Minhāj al-Ṭālibīn in the margin of Mughnī al-Muḥtāj, vol.2, pp.182-183; al-Sirāj al-Wahhāj, p.235. According to other authorities (*qīl*), however, that construction is not prohibited if it is not dangerous to the public.

[74] Minhāj al-Ṭālibīn in the margin of Mughnī al-Muḥtāj, vol.2, pp.369-370.

[75] Munlākhusrū, Durar al-Ḥikām fī Sharḥ Ghurar al-Aḥkām, vol.2, p.109; Majmaᶜ al-Anhur, vol.2, p.651; Badr al-Muttaqā in the margin of Majmaᶜ al-Anhur, vol.2, p.651; al-Zurqānī, Sharḥ al-Zurqānī ᶜalā Muwaṭṭa', vol.4, p.199; Ibn Rajab, al-Qawāᶜid fī al-Fiqh al-Islāmī, p.216; al-Ajwibah al-Khafīfah, p.386.

public nuisance. Examples of this are stopping or narrowing a highway by erecting a fence, scaffolding or hoarding, or building which projects beyond the boundary line, infringing the passage of animals or motor vehicles, etc.

Therefore, if someone piles up wood or stones on the public highway and another person's animal treads thereon, slips and is destroyed, that person is liable.[76]

The nuisance by throwing dirt or earth on the highway, or leaning a piece of wood on a wall near the highway is the same as placing a stone or a log of wood there.[77] But if a person places a stone with clay on it on the highway to facilitate the passage of people, he is not liable for any injury it may occasion because he is not regarded as *mutaʿaddīn*.[78]

2-*Building, projections and other dangers on or over the highway.*

These may be caused either by something done in the highway itself or by something done on the land which adjoins it. It is now clear that the fact that a vehicle has broken down on the highway in the dark and its lights have gone out without any negligence on the part of the driver does not constitute nuisance (or negligence). The driver may, however, be liable if he allows the unlighted vehicle to obstruct the highway without taking reasonable steps to light it or remove it or give warning of its existence. Other examples are keeping on or over the highway defective and dangerous wall, or

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[76] Majallah, article 927; al-Hidāyah, vol.4, pp.192-193; Manār al-Sabīl, vol.1, p.438; al-Mabsūṭ, vol.27, p.6; al-Ajwibah al-Khafīfah, p.386.

[77] Al-Futūḥī, Muntahā al-Irādāt, vol.1, p.21; Manār al-Sabīl, vol.1, p.438; al-Hidāyah, vol.4, p.193; Tabyīn al-Ḥaqā'iq, vol.6, p.144; al-Mabsūṭ, vol.27, p.7.

[78] Manār al-Sabīl, vol.1, p.438.

janāḥ, or *sābāṭ*, or *rawshan*, or *jurṣun*, or *mīzāb*, etc.; leaving on the highway or adjacent thereto matter on which passengers are likely to slip; allowing a house, fence, or other structure immediately adjoining the highway to become ruinous and dangerous. There is responsibility for accidents occasioned by the defendant who constructed such nuisance on or over the highway.[79]

3-*Failure to maintain the highway or liability for the non-repair of roads.*

In this case, no action lies against any authority entrusted with the care of highways for damage suffered in consequence of the omission by the defendants to perform their statutory duty of keeping the highways in repair because, logically, a nuisance to the highway is committed by the defendant, not by the authority. In the case of debris or rubble on the highway which have not been removed by its owner, the *fuqahā'* adjudge that the owner of the ruinous building which has fallen on the highway is liable if he failed to remove the debris until a person stumbles and is injured by it. The public are not asked to make any new request to the owner of the building for the removal of the debris if he has before been requested to avert the danger of his ruinous building but he did not take action until it fell down. His action, therefore, is considered as *al-taᶜaddī* by which the highway is rendered dangerous. However, Abū Yūsuf takes an

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[79] For the cases of construction of a *janāḥ* or *sābāṭ* or *jurṣun* or *rawshan*, etc., see the discussions in the section of "Liability for Premises", pp.174-182. For the case of slippery substances, see al-Mughnī, vol.7, p.822; Ibn Rajab, al-Qawāᶜid fī al-Fiqh al-Islāmī, p.217; al-Qarāfī, al-Furūq, vol.2, p.206; Muḥammad ᶜAlī, Tahdhīb al-Furūq, vol.2, p.204; Jāmiᶜ al-Fuṣūlayn, vol.2, p.88; Majallah, article 927; al-Wajīz, vol.2, p.150; Mughnī al-Muḥtāj, vol.4, p.87; al-Hidāyah, vol.4, p.192; Majmaᶜ al-Ḍamānāt, p.164; Abū Yūsuf, Kitāb al-Kharāj, p.323; al-Mabsūṭ, vol.27, p.7.

exceptional view by requesting the public to make another request for the removal of the debris from the highway to the owner of the property of the collapsed building.[80]

OBSTRUCTION OF AIR, SUNLIGHT OR LIGHT

A species of nuisance which has become prominent in the law of tort, by reason of the increased closeness and height of building in towns, is the obstruction of light: often the phrase "light and air" is used. There is a wrongful disturbance if the building in respect of which it exists is so far deprived of access to light as to render it materially less fit for comfortable or beneficial use or enjoyment in its existing condition; if a dwelling-house for ordinary habitation; if a warehouse or shop for the conduct of business. The action is for nuisance and not for the infringement of a right to a specific quantity of light.[81]

In relation to this nuisance, two Islamic schools of law clearly discuss it, viz the Ḥanafī and Mālikī schools. According to the Ḥanafī school, the Majallah enacted that any interference or nuisance with benefits which are not fundamental necessities, such as cutting off the air or obstructing the entrance of sunlight does not amount to grave injury (*ḍarar fāḥish*). However, if light is entirely cut off, it amounts to grave injury. Consequently, if a person erects a building and thereby obstructs the light from the window of a room belonging to his neighbour, the room being darkened by such an

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[80] For detail, see this discussion in the topic of "Liability for Premises", in sub-topic "Liability for Failing to Remove the Wreckage of Building", pp.182-184.

[81] P.A. Landon, Pollock's Law of Tort, pp.330-331.

erection so that it is impossible to read anything written therein, the act amounts to grave injury and must be stopped. It may not be argued that the light can come in through the door since the door must be kept closed at the time of cold and so on. If the room has two windows, however, and a building is erected and one of the two windows is obstructed from the light as mentioned above, such obstruction by that erection does not amount to grave injury.[82] Similarly, if a person erects a high building near a threshing floor (*al-andar*) belonging to another person and thereby obstructs the flow of air to that threshing floor, it must be stopped by reason of its being a grave injury.[83] Decisions and dicta which lay down that the right acquired is to all the light and air, or what has been called an average maximum of the light and air coming through a particular window or space. Obstruction of the entire entrance of light and air is a grave injury and is a wrongful act which must be removed according to this school.

In the same sense, one of the Ḥanafī jurists Muḥammad Qadrī Bāshā legislated in his Murshid al-Ḥayrān that obstructing the whole light to the disadvantage of his neighbour is deemed a grave injury. Therefore, no one is permitted to construct a building which darkens his neighbour's window. If such an injury happened, the obstruction should be removed.[84]

It should be remarked that the original opinion of Abū Ḥanīfah is "a person is free to exercise anything in his ownership and no one can hinder him even though there is a

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[82] Majallah, article 1201.

[83] Majallah, article 1200; ʿAlī Ḥaydar, Durar al-Ḥukkām, vol.10, p.227.

[84] Qadrī Bāshā, Murshid al-Ḥayrān, article 61.

probability that his neighbour may suffer injury".[85] This view is in accordance with *qiyās*. Therefore, the act of obstructing the light or sunlight or air by a person to his neighbour whether by enlarging his building, re-building or altering it so that his neighbour can claim nothing because the person did within his own ownership and legal right. However, this original opinion has been contradicted by Abū Yūsuf, Muḥammad b. al-Ḥasan al-Shaybānī, some of the *muta'akhkhirīn* and the Majallah who maintain that when a person who obstructs another from getting the benefits of light, sun, air and so on so that he feels uncomfortable to dwell in his house for ordinary habitation, that person should be asked to remove that obstruction because it is regarded as a grave injury. This opinion is based on *istiḥsān* and *maṣlaḥah*.[86] In brief, according to views which are based on *istiḥsān* and *maṣlaḥah*, any person can exercise use of his legal property and may do anything he desires in it providing that he does not cause his neighbour any grave injury thereby.

In the Mālikī school, Saḥnūn discusses this matter briefly when Mālik b. Anas is asked whether a person who erects a building on his land which causes an obstruction of sunlight or free access of air to another's house or building, should be asked to remove

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[85] Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.2, p.284; al-Mabsūṭ, vol.27, p.23; Sharḥ Fatḥ al-Qadīr, vol.5, p.506; Badā'iᶜ al-Ṣanā'iᶜ, vol.6, p.264. There is a case which may be related to this section. In a place, a person possesses a house and another person possesses a courtyard. Later, the latter builds a house in his courtyard and obstructs the flow of air and sunlight in consequence to the former's house. Therefore, according to literal meaning of the narration (*ẓāhir al-riwāyah*), the former has no right to prevent the latter from constructing his house. But, there is an opinion which opines that the former has right to do so. However, the *fatwā* has followed the *ẓāhir al-riwāyah*. This case can be applied to any cases like constructing a stable or fire-place or toilet. See Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, pp.116-117.

[86] Al-Durr al-Mukhtār, vol.2, p.154; Tabyīn al-Ḥaqā'iq, vol.4, p.196; Jāmiᶜ al-Fuṣūlayn, vol.2, p.266; Mūjabāt, vol.1, p.46; Radd al-Muḥtār, vol.5, p.448; al-Durayn ī, Naẓariyyat al-Taᶜassuf, p.276; Ḍamān al-Mutlifāt, pp.316-317; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.5, p.611; Wahbah, Naẓariyyat al-Ḍamān, p.22. The discussion of the exercise of the use of legal rights has been touched in the topic of "The Concept of *Ḍamān* in Islamic Law of Tort", pp.43-47.

that building. Mālik replies that the person is not to be asked to remove his building because he exercises his rights in his own property. This is also the opinion of Maṭraf, Ibn Mājishūn, Aṣbagh and Ibn Nājī.[87] On the other hand, Ibn Nāfiᶜ disagreed with them by stating that any disturbance (*ḍarar*) with one's enjoyment of his land with regard to light, air and sunlight should be removed.[88] However, according to Ibn ᶜUttāb, a person is not prevented from erecting a building if he gains advantage or benefit by such erection, otherwise, he will be barred from doing it for any other purpose.[89]

However, other *ᶜulamā'* of this school attempt to elaborate this case according to their opinions. As stated by Ibn Juzayy and Khalīl b. Isḥāq, the law does not prohibit the interception of a neighbour's light and sunlight by new buildings and works; nor again the interception of the wind unless the intended site is to be used for threshing corn. This is, on the report of the *mashhūr* opinion. This is also the opinion of Ibn al-Qāsim and Ibn Nāfiᶜ. They say that no person can do anything in the proximity of his neighbour's threshing floor (*al-andar*) because it is in conformity to a Ḥadīth: "There is neither harming, nor reciprocating harm". Ibn al-Qāsim try to recognize this case by the way of differentiating the erection of building closely to the *andar* and to a house. That erection is not prevented if it is set out closely to the house because it does not interfere with the

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[87] Al-Mudawwanah al-Kubrā, vol.4, p.475; Tabṣirat al-Ḥukkām, vol.2, p.256; al-Kinānī, al-ᶜAqd al-Munaẓẓam li al-Ḥukkām in the margin of Tabṣirat al-Ḥukkām, vol.2, p.92; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.165; al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.165; al-Ābī, Jawāhir al-Iklīl, vol.2, p.123; al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, pp.652-653; al-Tāwadī, Sharḥ Arjūzah Tuḥfat al-Ḥukkām printed with al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, pp.652-653; Ibn Rajab, Jāmiᶜ al-ᶜUlūm wa al-Ḥukm, vol.2, p.217.

[88] Al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.165; al-Tāwadī, Sharḥ Arjūzah Tuḥfat al-Ḥukkām printed with al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.653.

[89] Al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.653.

passage of a large amount of air or light or sun to the house. The house still receives access of light and so on at any angle. Unlike the erection which is set out closely to the *andar* because the obstruction of the sun and the wind flowing to the *andar* will absolutely stop the benefit of the *andar* (*manfaᶜah tabṭul*).[90] It means that the owner of the *andar* will be prevented from carrying on business as beneficially as before. Whereas the obstruction of the light which flows to a window or to a house will not be considered a nuisance if the light which remains can still flow to the window or to the house at any angle and direction. However, Ibn Rushd disagreed with the opinion mentioned above. He, in brief, does not put the liability (upon anybody) for removing anything which interferes the passage of air.[91]

According to Ibn ᶜUttāb's opinion, a person can exercise use of his property in the course of exercising his legal right so long as he does not intend to harm his adjoining land. So if any person erects buildings on his land which cause a substantial privation of light, sun or wind which is sufficient to render the neighbour or the occupation of the house uncomfortable, that person commits no tort unless he intends to interrupt their passage.[92] If the wrongful intent can be proved, an injunction from the court can be granted to remove that nuisance. In the light of Ibn ᶜAbdūs who reported from some of his companions that if the *andar* which has been seen in existence from time immemorial

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[90] Mukhtaṣar, p.215; al-Qawānīn al-Fiqhiyyah, p.224; al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.640; al-Kinānī, al-ᶜAqd al-Munaẓẓam li al-Ḥukkām in the margin of Tabṣirat al-Ḥukkām, vol.2, p.92; al-Bājī, al-Muntaqā, vol.6, p.41; al-ᶜAlīsh, Manh al-Jalīl, vol.3, p.333; al-Ābī, Jawāhir al-Iklīl, vol.2, p.123. See also Ḍamān al-Mutlifāt, p.311.

[91] Al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.640.

[92] Tabṣirat al-Ḥukkām, vol.2, p.257.

(*qadīman*), any nuisance or interuption which is coming afterthat should be removed because the *andar* should be left as it was.[93]

Based on the Ḥanafī and Mālikī schools, the disturbance of right to light, sun and air of others by erecting buildings would not be prevented unless two situations arise: first, when the element of *al-qaṣd* can be proved, second, when the obstruction of that benefits is entirely cut off.

[93] Tabṣirat al-Ḥukkām, vol.2, pp.256-257.

CHAPTER FIVE

LIABILITY FOR FIRE

INTRODUCTION

Fire is a dangerous thing and obviously a thing which, if not kept within bounds, may do great mischief, and the *Sharīʿah* rules that a person lights a fire on his land or in his house at his liability. However, he is not liable for damage done by a fire which begins accidentally (i.e., without negligence) or is lit by a third person, except where the damage results from the spreading of the fire and he is negligent or he is *mutaʿaddīn* in permitting it to spread. Moreover, the cases of escaping fires can be applied to all other things likely to catch fire and kept under conditions involving a substantial risk of spreading to neighbours, for example: flammable material in a store. In Western law, the danger from fire is usually discussed under the principle of *Rylands* v. *Fletcher* (Strict Liability) even though liability for damage done by the spread of fire was establised many centuries before the rule in *Rylands* v. *Fletcher* was formulated.[1]

In this section there are a few sub-topics which will be discussed, viz: Ḥadīths on fire, danger and liability, fire on the highway, sparks from blacksmith's shop, fire caused by intention or negligence, and liability of occupier and vicarious liability.

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[1] Salmond and Heuston, p.330.

ḤADĪTHS ON FIRE

There are a few Ḥadīths that can directly be connected to the liability and dangerous fire.

[1] Fire should not be kept lit in the house at bedtime.

The Prophet said:

"Do not leave the fire lit in your houses when you sleep".[2]

Abū Mūsā reported that a house was burnt down with its occupants in al-Madīnah during the night. When this matter was reported to the Prophet, he said: "This fire is indeed your enemy, so whenever you go to sleep, put it out to protect yourselves".[3]

In another Ḥadīth, Jābir b. ᶜAbd Allāh reported that the Prophet said: "(At bedtime) cover the utensils, close the doors and put out the lights, lest the evil creature (the rat) should pull out the wick and thus burn the people of the house".[4]

From these Ḥadīths, there is evidence for an important matter which one needs to be vigilant of and prudent, particularly, a duty of care in using it so as to prevent any occurrence of harm to others. And if a man does not take special care of that fire which is under his control, then he has been negligent and is responsible for what resulted from the harm.

[2] The injury caused by fire which will be overlooked.

Muḥammad b. al-Mutawakkil al-ᶜAsqalānī narrated from ᶜAbd al-Razzāq from

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[2] Ṣaḥīḥ al-Bukhārī, vol.8, p.206; Ṣaḥīḥ Muslim, vol.3, p.1114.

[3] Ṣaḥīḥ al-Bukhārī, vol.8, p.206; Ṣaḥīḥ Muslim, vol.3, p.1114.

[4] Ṣaḥīḥ al-Bukhārī, vol.8, p.206.

Jaᶜfar b. Musāfir al-Tunīsī from Zayd b. al-Mubārak from ᶜAbd al-Malik al-Ṣanᶜānī from Maᶜmar from Hammām b. Munabbih from Abū Hurayrah that he reported: The Prophet said:

> "Injury caused by fire is not actionable".[5]

In another report, Aḥmad b. al-Azhar narrated from ᶜAbd al-Razzāq from Maᶜmar from Hammām from Abū Hurayrah that he reported: The Prophet said:

> "Injury caused by fire is not actionable, and injury caused by a well is not actionable".[6]

The *ᶜulamā'* have expressed their views on what is narrated by Abū Hurayrah above.

Al-Khaṭṭābī says: "I have always heard the men of Ḥadīth (*aṣḥāb al-Ḥadīth*) saying: ᶜAbd al-Razzāq has erred in quoting Ḥadīth. In fact, it is *al-bi'r jubār* (not *al-nār jubār*) until I found it in the collection of Abū Dāwud reported from ᶜAbd al-Malik al-Ṣanᶜānī from Maᶜmar, which indicated that the Ḥadīth is not narrated by ᶜAbd al-Razzāq alone. Al-Mundhirī stated that the narration of ᶜAbd al-Malik al-Ṣanᶜānī is weak (*ḍaᶜīf*). ᶜAbd al-Razzāq is alleged to have mispronounced *al-bi'r* (*taṣḥīf al-bi'r*). To adduce that allegation saying that the people of Yaman speak the word *al-nār* as *al-nīr*, and then the narrators transferred such a word by misspelling. Al-Sunadī said: "The word *al-bi'r*, indeed, was mispronounced from the word *al-nār*. The original word is *al-nār*, not *al-bi'r*".[7]

And Ibn al-ᶜArabī says: "The famous *riwāyāt* agreed on the word *al-bi'r*, whereas

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[5] Sunan Abī Dāwud, vol.4, p.197. *Al-Nār jubār*.

[6] Sunan Ibn Mājah, vol.2, p.892. *Al-Nār jubār wa al-bi'r jubār*.

[7] Al-Khaṭṭābī, Maᶜālim al-Sunan, vol.4, p.37; Sunan Ibn Mājah, vol.2, p.892.

in a rare *riwāyah* (*riwāyah shādhdhah*) the Ḥadīth has come in the words *al-nār jubār"*. Further, Ibn al-ᶜArabī says that some of them say: "Some of them misspelled *al-bi'r* because the people of Yaman write the word *al-nār* with *al-yā'* not with *al-alif* (it becomes *al-nīr*). So some of them suppose that the word *al-bi'r* with a diacritical point underneath, should be *al-nār* with a diacritical point above, and they narrated it like that". This *ta'wīl* is narrated from Ibn ᶜAbd al-Barr and others from Yaḥyā b. Muʿīn who asserted that Maᶜmar misrepresented it (*al-nār jubār*) as he narrated from Hammām from Abū Hurayrah, and Yaḥyā b. Muᶜīn supported his view saying: *"Al-Ḥuffāẓ* among the companions of Abū Hurayrah agreed on stating *al-bi'r*, not *al-nār*". However, Ibn al-Barr said: "Yaḥyā b. Muᶜīn did not bring any proof to support his view".[8] According to the opinion expressed by Aḥmad b. Ḥanbal in respect of the Ḥadīth of ᶜAbd al-Razzāq: the Ḥadīth of Abū Hurayrah *al-nār jubār* - is worthless (*laysa bi shay'*); it was not in his *kitāb*; it was baseless; it was not *ṣaḥīḥ* (*lam yakun fī al-kitāb bāṭil laysa huwa bi ṣaḥīḥ*). He, further, said: "The people of Yaman write *al-nār* as *al-nīr* and (*al-bi'r*) as *al-bīr*. So ᶜAbd al-Razzāq misread the text".[9]

If the Ḥadīth is valid according to what is narrated, then its meaning in the view of a group who agree with it will be as follows: In case a fire is set by a person in his own land according to normal practice (*bi ṭarīqah muᶜtādah*) for a certain purpose, then the wind suddenly carried it away and set fire to a building or property of another in so far as he is incapable to resist it, it will be overlooked and there will be no liability for the

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[8] Ibn Ḥajar, Fatḥ al-Bārī, vol.12, pp.266-267. See also al-Qurṭubī, al-Jāmiᶜ li Aḥkām al-Qur'ān, vol.11, p.319.

[9] Al-Qurṭubī, al-Jāmiᶜ li Aḥkām al-Qur'ān, vol.11, p.319.

person who set it.[10]

Ibn Ḥazm holds, indeed, this Ḥadīth and opines that the injury due to fire is overlooked, no liability for compensation will be due unless a person intentionally throws fire to harm another or the property of another. He is liable because he is regarded as a direct tortfeasor for *itlāf* (*mubāshir al-itlāf*). So, in his opinion, if a person sets a fire to keep warm or to cook something, or for lighting a lamp (*sirājan*), then he sleeps and the fire spreads to burn the rest of the house (*amtiᶜah wa nāsan*), he is not responsible for such damage.[11]

According to Ibn Ḥazm, in authenticating (*taṣḥīḥ*) this Ḥadīth, this Ḥadīth came in two ways:

[1] first way, from ᶜAbd al-Razzāq from Maᶜmar from Hammām from Abū Hurayrah.

[2] second way, from ᶜAbd al-Malik al-Ṣanᶜānī from Maᶜmar from Hammām from Abū Hurayrah.

And this is the valid report (*khabar ṣaḥīḥ*) and the proof (*al-ḥujjah*) is with it and it is unlawful to act contrary to it.[12]

Further, he builds his opinion and position by saying: "It is to be obligatory (*fa wajaba*) that any damage caused by fire is overlooked unless a person intentionally casts it onto a person or property of another to destroy and damage it. He is regarded as *mubāshir mutaᶜaddīn*. The person is liable to retribution in the case of intentional murder and *diyah* is due by his *ᶜāqilah* in the case of unintentional murder. Therefore, the fire

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[10] Al-Khaṭṭābī, Maᶜālim al-Sunan, vol.4, p.37; Ibn Ḥajar, Fatḥ al-Bārī, vol.12, p.266.

[11] Al-Muḥallā, issue 2117, vol.11, p.19.

[12] Al-Muḥallā, issue 2117, vol.11, p.20.

which is set without *taᶜaddīn*, it is *jubār* as the Prophet said: "*Al-Nār jubār*".[13] It can be said that no liability for compensation will be due when there is no *taᶜaddīn*.

DANGER AND LIABILITY

The concept of liability for fire undoubtedly concerns Muslim jurists, and hence, the subject will be dealt with by examining the doctrins of all the Islamic schools of law.

The Ḥanafī treatise al-Mabsūṭ provides the rules for this discussion. Where a person ignites a fire to burn grass (*ḥashīsh*), harvest fields (*ḥaṣā'id*), thicket (*ajmah*) and so forth in his land and the fire goes across to another's land and burns something there, the person is not liable for injury because he excercises his right of ownership which is absolutely permissible to him. According to some of the later *fuqahā'* (*baᶜḍ al-muta'akhkhirīn*), the person is not liable if he lights the fire in calm wind, but if he lights the fire during high wind and he knows that the wind will blow the fire to his neighbour's land, he is liable. This liability is in accordance with *istiḥsān*.[14]

Abū Yūsuf also gives his opinion which concurs with the rules provided in al-Mabsūṭ apparently noting that if a man burns fodder (*kalā'*) in his land and the fire spreads and burns the property of someone else, the owner of the land will not be liable because he lights the fire in land of his own ownership. Similarly in the case of a harvest

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[13] Al-Muḥallā, issue 2117, vol.11, p.20.

[14] Al-Mabsūṭ, vol.27, p.23. See also Majmaᶜ al-Ḍamānāt, p.161; al-Ajwibah al-Khafīfah, p.390; Majmaᶜ al-Anhur, vol.2, p.402; Badr al-Muttaqā in the margin of Majmaᶜ al-Anhur, vol.2, p.402; al-Jāmiᶜ al-Ṣaghīr, p.450; al-Hidāyah, vol.3, p.252; al-Durr al-Mukhtār, vol.2, pp.303-304; Radd al-Muḥtār, vol.6, p.88; al-Jāmiᶜ al-Ṣaghīr in the margin of Kitāb al-Kharāj, p.105; Muᶜīn al-Ḥukkām, pp.207-208; Lisān al-Ḥukkām, p.281.

if a man lights a fire in his land, and similarly in the case of the owner of a grove who burns reeds and the fire burns the property of others; there is no liability on him. However, Abū Yūsuf adds that a Muslim is not permitted to intend (*yataᶜammad*) any harm towards his neighbour, or to burn his crop intentionally to the injury of the neighbour's land.[15] In Fatāwā Qāḍīkhān, its author decided this case upon the element of intention and knowledge. It means that the tortfeasor will bear liability if he burns his field while knowing that the fire will trespass to another's farm. Likewise, if a man lit a fire and then put firewood (*al-ḥaṭab*) on it so that the fire broke out to burn his premises, and went across (*taᶜaddā*) to his neighbour's premises, the man is liable.[16] Similarly if a person burns something in his land in a normal way (*muᶜtād*), then the fire trespasses to another's land and does damage, he is not liable. Otherwise, if he exceeds the *muᶜtād* (*tajāwaz al-muᶜtād*) in igniting the fire, he is liable.[17]

In another case, when a person has cotton (*quṭn*) on his own land and the owner of an adjoining land lights a fire and it spreads and burns the cotton, the owner who has lit the fire is liable by reason that he intentionally or wilfully lit the fire, and also knew that the fire would spread to that person's cotton.[18]

The jurists of this school also discuss the distance of the position of the neigbour's land whether it is far or not. If, consequently, a person lighting a fire to burn thorny grass

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[15] Abū Yūsuf, Kitāb al-Kharāj, p.59.

[16] Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, pp.250-251. See also Majmaᶜ al-Ḍamānāt, p.161; Jāmiᶜ al-Fuṣūlayn, vol.2, p.89; Lisān al-Ḥukkām, p.281; Mūjabāt, vol.1, p.203.

[17] Al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.3, p.79. See also Ḍamān al-Mutlifāt, p.424.

[18] Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.250.

(*shawkan*) or straw (*tibnan*) in his land in the belief that his neighbour's land would likely be safe from sparks in a normal way because it is far away, but unfortunately the wind blows the spark to his neighbour's land and it burns the plantation there, the person who lit the fire is not held liable. Otherwise, he should be responsible if the boundary of his neighbour's land is close and its likely the spark may move to it and do damage. He is, in exercising his right of ownership, bound by the condition of safety.[19]

In another case, if a person burns herbage (*kalā'*) or a harvest field in his own land and the fire moves right and left and then burns something belonging to someone else, the person is not absolutely liable. Further, it is reported from Fatāwā al-Nasafī, if a person ignites a fire in another's land without the permission of the latter and the fire moves across to a heap of wheat or something else and does damage there, the former is not held liable. On the other hand, if the fire burns something in the place where it is, he is liable.[20]

Some *ʿulamā'* say that if a person brings fire along with him on a place in which he is entitled to walk and a spark from the fire causes damage to another's property, the person is not liable. Contrariwise, if the damage which happened in a place which he has no right of way, he is liable. However, if the damage results from a spark which is blown by the wind, he is not liable.[21]

As noted in al-Mudawwanah al-Kubrā, Mālik b. Anas recognizes that if a person

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[19] Radd al-Muḥtār, vol.6, p.88.

[20] Muʿīn al-Ḥukkām, p.207; Lisān al-Ḥukkām, p.281.

[21] Muʿīn al-Ḥukkām, p.207; Lisān al-Ḥukkām, pp.281-282; Qaṭlūbaghā, Kitāb Mūjabāt al-Aḥkām wa Wāqiʿāt al-Ayyām, pp.387-388.

starts a fire in his own land far from his neighbour's land which is safe from that fire, and suddenly the wind blows the fire to the neighbour's land destroying it, the former should not make good the damage.[22] However, if that person lights the fire in dangerous proximity to another's land and knows that the neighbour's land will not be safe from the escape of fire, the liability is due.[23] In the same manner pecuniary responsibility rests on the person who lights the fire during a high wind thereby causing damage to another.[24] But, there is no liability due when persons or things have been accidentally injured or destroyed by a fire that has been blown by a sudden wind.[25]

In relation to the case of fire, the Shāfiᶜī jurists agreed that if this case comes up in some unusual manner (*khilāf al-ᶜādah/khālif al-ᶜādah*) the defendant's action of setting a fire on a windy day, or lighting it in a large quantity, or omitting to prevent it from spreading to the plaintiff's land and the fire is blown by wind after it had been lit, the defendant is held liable and he is considered as *mutaᶜaddin* unless the wind blows the fire after it had been lit. In this case he is free from bearing any liability because he is not

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[22] Al-Mudawwanah al-Kubrā, vol.4, p.472. See also Tabṣirat al-Ḥukkām, vol.2, p.243; al-Kinānī, Kitāb al-ᶜAqd al-Munaẓẓam li al-Ḥukkām in the margin of Tabṣirat al-Ḥukkām, vol.2, p.80; Zarrūq, Sharḥ Zarrūq ᶜalā Matn al-Risālah, vol.2, p.245; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.321; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, p.408.

[23] Al-Mudawwanah al-Kubrā, vol.4, p.472. See also Tabṣirat al-Ḥukkām, vol.2, pp.242-243; al-Kinānī, Kitāb al-ᶜAqd al-Munāẓẓam li al-Ḥukkām in the margin of Tabṣirat al-Ḥukkām, vol.2, p.80; al-Furūq, vol.4, p.27; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.321; Zarrūq, Sharḥ Zarrūq ᶜalā Matn al-Risālah, vol.2, p.245. In the same sense, the Ḥanafī jurists also touched this case in Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.250.

[24] Mukhtaṣar, p.291. See also al-Qawānīn al-Fiqhiyyah, p.218; al-Khirshī, Fatḥ al-Jalīl ᶜalā Mukhtaṣar Khalīl, vol.8, p.111; al-Ābī, Jawāhir al-Iklīl, vol.2, pp.296-297; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.321; al-Dardīr, Aqrab al-Masālik, p.190; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, p.408.

[25] Mukhtaṣar, p.292; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.322; al-Ābī, Jawāhir al-Iklīl, vol.2, p.297; al-Dardīr, al-Sharḥ al-Ṣaghīr, vol.2, p.440. See also Ḍamān al-Mutlifāt, p.424.

mutaᶜaddin.[26]

However, in the case mentioned above when there is a failure to prevent a fire from spreading to the plaintiff's land and the fire is blown by wind after it had been lit, there is an opinion which opines that the defendant is free from liability. This opinion, analogously, considers that this case is the same as the case of a constructed wall in vertical equilibrium at the initial stage of construction, which later leans onto the highway or another's property and causes damage to any person or property. This opinion is the view of al-Adhraᶜī. This is by reason that the owner (or the defendant) of the property may exercise use of his property in whatever way he wants.[27]

The Ḥanbalī jurists clearly indicate that the liability will not be borne by the defendant if a fire spreads and damages another's land while he makes the fire in land of his own ownership in the normal way (*al-ᶜādah/mu'tādah*) and without negligence (*tafrīṭ*). The defendant in this case is not a *mutaᶜaddīn* because his action is according to legal practice (*mubāḥ*). Negligence consisted in lighting the fire in the state of high wind, or in lighting the fire in a manner in which it is not normal to light a fire in a large quantity (*tasarrā fī al-ᶜādah li khaṭratihā/bi ta'jīj nār khaṭīrah taᶜa addī ādah*), or negligently lets the fire burns itself without proper guard to keep it from doing damage to others, he is bound to make good the loss. Likewise, he is bound to make good the loss

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[26] Mughnī al-Muḥtāj, vol.4, p.83 and vol.2, p.278; Nihāyat al-Muḥtāj, vol.7, p.355. See also al-Shibrāmalsī, Ḥāshiyah in the margin of Nihāyat al-Muḥtāj, vol.7, p.355. In this Ḥāshiyah,its author has compared the case of lighting a fire on a windy day with the case of lighting it directly towards another's land. In both cases, the person who has lit the fire will be liable for compensation upon damage in consequence. See also this discussion in al-Shīrāzī, Kitāb al-Tanbīh, p.72; al-Muhadhdhab, vol.2, p.210; Sulaymān al-Jamal, Ḥāshiyat al-Jamal ᶜalā Sharḥ al-Minhaj, vol.5, p.83; Tuḥfat al-Muḥtāj in the margin of Ḥawāshī al-Sharwānī wa Ibn Qāsim, vol.9, p.11; al-Sharwānī, Ḥāshiyat al-Sharwānī, vol.9, p.11; Ibn Qāsim, Ḥāshiyat Ibn Qāsim printed with Ḥāshiyat al-Sharwānī, vol.9, pp.11-12.

[27] Mughnī al-Muḥtāj, vol.4, p.83; Sulaymān al-Jamal, Ḥāshiyat al-Jamal ᶜalā Sharḥ al-Minhaj, vol.5, p.83.

if he, after igniting a fire, negligently lets it continues to burn and he goes to sleep, and then the fire burns the property of another. In another case, if the defendant lights the fire in accordance with *ʿādah* and suddenly the wind blows it into adjoining land and does damage there, the liability is not ascribed to him because it does not result from his action and by his negligence.[28] The defendant is absolutely liable if he lighting fire in someone's house (or land) and it damages something there and also even though the fire moves across to another's house (or land) and does damage there because he has committed negligence and exceeding the normal manner. This is also the opinion of the Shāfiʿī school.[29] This case is quite different in its decision held in Fatāwā al-Nasafī of the Ḥanafī school which is reported in Muʿīn al-Ḥukkām and Lisān al-Ḥukkām mentioned above.

In another situation, if a person sets fire to his land and thereby causes the plantation in his neighbour's land to become dry, the person will be held liable because that damage will not occur unless the fire has been set in a large quantity. However, he will not be held liable if that damage happens to branches of the plantation belonging to the neighbour which have extended to his land because the extension of such branches is illegal (*ghayr mustaḥiqq*) and the person is free to exercise the right of his ownership.

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[28] Al-Mughnī wa al-Sharḥ al-Kabīr, vol.5, p.453; Sharḥ Muntahā al-Irādāt, vol.2, pp.426-427; Manār al-Sabīl, vol.1, p.438; Majallah al-Aḥkām al-Sharʿiyyah, article 1431, p.445; Ibn Rajab, al-Qawāʿid fī al-Fiqh al-Islāmī, p.218; Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ, vol.2, p.367; Ibn Qudāmah, al-Sharḥ al-Kabīr printed with al-Mughnī, vol.5, pp.446-447; al-Muqniʿ, p.150; al-Muqniʿ wa Ḥāshiyatuh, vol.2, p.253.

[29] Ibn Qudāmah, Al-Sharḥ al-Kabīr printed with al-Mughnī, vol.5, p.447; al-Mughnī wa al-Sharḥ al-Kabīr, vol.5, p.453; al-Sharwānī, Ḥāshiyat al-Sharwānī, vol.9, p.11-12; Sulaymān al-Jamal, Ḥāshiyat al-Jamal ʿalā Sharḥ al-Minhaj, vol.5, p.83.

This is also the opinion of the Shāfiᶜī school.[30]

It is obvious that from the discussion by the *fuqahā'* of the *madhāhib* above, the treatises from both *madhāhib*, viz the Shāfiᶜī and the Ḥanbalī schools, are directly and concurrently similar in their views on this topic. In general, all *sunnī madhāhib* agreed on the duty to keep fire from doing mischief, and some elements are present:

[1] Intention. If a person **intentionally** makes a fire on his land, he must see that it does no harm to others and answer for the damage if it does.[31]

[2] Negligence. If a person **by his negligence** allows a fire to arise on his land he is liable if it spreads to his neighbour's land and does damage.[32]

[3] Accident. If a fire **accidentally** arises on a person's land and spreads **without negligence** or **any act that is not normal on his part**, he is not answerable.[33]

FIRE ON THE HIGHWAY

The Ḥanafī jurists recognize this case mentioning that if a person lays burning coal (*jamr*) in the highway and it burns anything there, the person is liable for the damage because he is *mutaᶜaddīn* in laying the *jamr* in the highway. If, however, after the fire is laid in the highway, the wind comes up and blows it to another place and anything is

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[30] Ibn Qudāmah, Al-Sharḥ al-Kabīr printed with al-Mughnī, vol.5, p.447; al-Mughnī wa al-Sharḥ al-Kabīr, vol.5, p.453.

[31] This element has mostly been discussed by the *fuqahā'* of the Ḥanafī and Mālikī schools.

[32] This element has been touched on by the Shāfiᶜī and Ḥanbalī jurists in their writings.

[33] This element has been unanimously agreed upon by all jurists of the *madhāhib*.

burnt in consequence, he is not responsible as the fact that the wind carried off the fire abrogates his act (*li naskh al-rīḥ fiᶜlah/ḥukm fiᶜlih qad untusikh*). Some jurists, indeed, say that if the fire is laid in the highway at a time when the wind is high, the man who laid the fire is responsible because he laid the fire with the knowledge of the probable consequence; and therefore the act of the wind in carrying it off, is in effect the same as if he had himself carried it to the place which was burnt.[34]

SPARKS FROM A BLACKSMITH'S SHOP

When a person works in his own shop without using ordinary skill and care in his own conduct, he is under the obligation of a duty to use ordinary care and skill to avoid danger or injury to the person or property of another.

Consequently, a blacksmith who has a shop close to the highway, has to take a certain standard of affirmative conduct so as no harm is caused to the public. If a fire is lit intentionally, and the blacksmith knows (*al-ᶜilm*) that the fire will burn anything on the highway, he is liable. Likewise, if a spark jumps out from the pounding of a blacksmith on iron put on a mixer (*qallāb*) or on an anvil (*midaqqah*) and it causes damage to public, he is liable. If an eye of a person is injured in consequence, a *diyah* is due from his *ᶜāqilah*, whereas in the case of destroying the clothes of another, the compensation is due

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[34] Al-Hidāyah, vol.4, p.192; al-Shaybānī, Kitāb al-Aṣl, vol.4, p.508; al-Fatāwā al-Hindiyyah, vol.6, p.42; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.251; al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.6, p.406; al-Mabsūṭ, vol.27, p.8; Majmaᶜ al-Ḍamānāt, p.161; Majmaᶜ al-Anhur, vol.2, p.653; Badr al-Muttaqā in the margin of Majmaᶜ al-Anhur, vol.2, p.653; al-Ajwibah al-Khafīfah, p.390; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.5, p.46; Tabyīn al-Ḥaqā'iq, vol.5, pp.143-144; al-Shalabī, Ḥāshiyat al-Shalabī in the margin of Tabyīn al-Ḥaqā'iq, vol.5, p.144; al-Durr al-Mukhtār, vol.2, p.304.

from the blacksmith's property. Otherwise, if the sparks which are emitted from the blacksmith's shop are due to the wind, not from the pounding of the blacksmith with his hammer (*miṭraqah*) during his work, injury is overlooked.[35]

The Majallah has enacted in a section entitled "Matters Occurring In The Public Highway" that 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 or in which precaution could be taken to stop it (*bimā yumkin al-taḥarruz minh*). If, therefore, sparks fly from a blacksmith's shop while he is working on iron and set fire to the clothes of a passer-by in the public highway, the blacksmith must make good the loss.[36]

Contrariwise, the Shāfiᶜī jurist al-Ramlī says that if sparks jump out of an ordinary practice (*ᶜalā al-ᶜādah*) while the blacksmith is burning a furnace (*al-kūr*) and they damage something belonging to another, he is not liable. Otherwise, if the sparks fly and damage anything of another resulting from an extra ordinary deed (*lā ᶜalā al-ᶜādah*), he is certainly liable. The Shāfiᶜī jurist al-Ramlī does not ascribe any liability to the blacksmith unless the element of *lā ᶜalā al-ᶜādah* existed.[37] The Ḥanafī jurists do not discuss whether this element exists or not. They put the burden of liability upon the blacksmith when sparks fly and do damage to others except in a case cited in al-Fatāwā

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[35] Al-Fatāwā al-Hindiyyah, vol.6, p.42; al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.6, p.406; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.251; Majmaᶜ al-Anhur, vol.2, p.402; al-Durr al-Mukhtār, vol.2, p.304; Muᶜīn al-Ḥukkām, p.206; Lisān al-Ḥukkām, p.282; Majmūa al-Ḍamānāt, p.161. See also Salīm Rustam, Sharḥ al-Majallah, vol.1, p.519; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.8, pp.553-554.

[36] Majallah, article 926.

[37] Nihāyat al-Muḥtaj, vol.5, p.148.

al-Hindiyyah where the blacksmith will bear liability if the element of knowledge (*al-ᶜilm*) could be proved.[38]

The opinion of the Ḥanafī and Shāfiᶜī schools is similar in respect to the case of a person who enters the blacksmith's shop while he is working and the sparks fly and burn the clothes of the person. However, according to the Shāfiᶜī jurists, the blacksmith will not be liable even though the person entered his shop with his permission. The Ḥanafī jurists attempt to compare this case with the case of a person who digs a well in his land owned by him. So, any injury suffered by a person who enters the blacksmith's shop is not ascribed to the blacksmith because the latter has done his work in a place which he owns and the element of *al-taᶜaddī* does not appear.[39]

FIRE CAUSED BY INTENTION OR NEGLIGENCE

If the occupier of a house or land starts a fire either intentionally or by negligence, he is bound to prevent it from doing damage to others. He is liable, not only for his own act or omission but also for those of his servants, agents and contractors.

Negligence

When the element of negligence has been proved, the defendant will have no

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[38] See al-Fatāwā al-Hindiyyah, vol.6, p.42.

[39] Mughnī al-Muḥtāj, vol.2, p.278; Nihāyat al-Muḥtāj, vol.5, p.148; Salīm Rustam, Sharḥ al-Majallah, vol.1, p.519.

defence with which to deny it. Furthermore, the fact that the fire began accidentally and is allowed to spread through negligence does not make the defendant blameless. The Ḥanbalī jurists appear to discuss the liability for fire relating to the element of negligence (*tafrīṭ*). They describe the tortfeasor as liable for any loss or damage if he is negligent in:

[1] lighting the fire in a large quantity;

[2] lighting the fire during the windy time;

[3] lighting the fire and then leaving it to sleep; etc.[40]

The Shāfiᶜī jurists concur with the Ḥanbalī jurists in this case that if the fire is lit during a high wind, or by igniting it in a large quantity, or omitting to guard it, the tortfeasor is liable. It is also agreed by the Mālikī jurists.[41] According to the law of tort, the cases above occur through negligence on the part of the defendant. Likewise the defendant will be negligent when he burns the fodder in his land near the neighbour's land and knows that the fire will spread to such land. He is liable for any loss or damage unless the neighbour's site is far from the fire and the defendant believes that the fire will not spread there.[42]

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[40] Al-Mughnī wa al-Sharḥ al-Kabīr, vol.5, p.403; al-Muqniᶜ, p.150; al-Muqniᶜ wa Ḥāshiyatuh, vol.2, p.253; Ibn Qudāmah, al-Sharḥ al-Kabīr printed with al-Mughnī, vol.5, pp.446-447; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.2, p.367; Majallat al-Aḥkām al-Sharᶜiyyah, article 1431, p.445; Ibn Rajab, al-Qawāᶜid fī al-Fiqh al-Islāmī, p.218; Sharḥ Muntahā al-Irādāt, vol.2, p.426; Manār al-Sabīl, vol.1, p.438. See also Mūjabāt, vol.1, p.203.

[41] Mughnī al-Muḥtāj, vol.4, p.83; Nihāyat al-Muḥtāj, vol.7, p.355; al-Wajīz, vol.2, p.149; Mukhtaṣar, p.219; al-Qawānīn al-Fiqhiyyah, p.218; al-Khirshī, Fatḥ al-Jalīl ᶜalā Mukhtaṣar Khalīl, vol.8, p.111; al-Dardīr, al-Sharḥ al-Kabīr, vol.4, pp.355-357; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik, vol.2, p.440. See also Mūjabāt, vol.1, p.203; Ḍamān al-Mutlifāt, p.424.

[42] Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.250; al-Mudawwanah al-Kubrā, vol.4, p.472; Tabṣirat al-Ḥukkām, vol.2, pp.242-243; al-Kinānī, Kitāb al-ᶜAqd al-Munaẓẓam li al-Ḥukkām in the margin of Tabṣirat al-Ḥukkām, vol.2, p.80.

LIABILITY OF OCCUPIER AND VICARIOUS LIABILITY

Apart from liability for fire caused by a servant (*ajīr*) or a child or a commanded person (*ma'mūr*), an occupier of land or a master (*ustādh*) or a father or a commander (*amīr*) is liable for a fire caused by any person lawfully on his land with his consent or any person under his control, if he authorized the fire, but otherwise not. He is not liable for fire caused by a trespasser or stranger unless, by his negligence, he allowed it to continue.

An occupier of land who authorizes, expressly or by implication, persons to enter on his land for the purposes of carrying on a dangerous operation which involves or may involve the creation of fire or of an act likely to cause fire on the land, he is liable for the damage caused to other persons or third parties. On the other hand, he is not liable for fire caused by a dangerous operation carried out by persons lawfully on his land purely for their own purposes and outside any authority given to them.

The person liable for damage caused by fire is he who starts the fire or causes it to be started by his servants, wards, commanded persons, private agents or workers. In a case, a defendant commanded a *ṣabī* to bring a fire. The fire was brought but unfortunately fell down on the hay of another (*ḥashīsh*) and moved (*taᶜaddat*) to a heap of it and did damage. The *ṣabī* was held liable, however, that liability is returned (*yurjaᶜ*) to the *amīr*.[43] He is vicariously liable, perhaps, on the ground that the bringing of a fire on open hayland was an operation attended with great danger and it imposed a duty on

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[43] Majmaᶜ al-Ḍamānāt, p.162. See examples in the topic "Vicarious Liability" on the sub-topic: "Liability of guardian for the act of his ward" and "*ajīr khāṣṣ*".

the person ordering the operation to be carried out to see that all proper precautions were taken.

To sum up, the liability will be imposed in the case where the existence of the elements of *tafrīṭ* or *taqṣīr* or *mujāwazat al-muᶜtād* (exceeding of normal practice) or *qillat taḥarruz* (want duty of care) in using fire to cause the destruction of another's property,[44] and it apparently falls under "*iᶜ tidā*" (transgression); whereas God strictly prohibits it. God says:

"Do not transgress the limits; for God loveth not transgressors"[45]

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[44] See Mūjabāt, vol.1, p.203.

[45] Al-Qur'ān, 2:190; and 5:90.

LIABILITY FOR WATER

INTRODUCTION

Natural rights are regarded as part and parcel of every land owner's interests in his land. Natural rights include rights to the support of land in its natural state and certain water rights. Let us take rights in respect of water running on or under the land as an example for further discussion. Where water runs in a clearly-defined channel, a person may take as much water from that stream as he needs for his domestic purposes, but if he wants to take water for other uses, e.g., spraying his crops, his conduct will cause an actionable nuisance if it affects the stream's flow as it runs through other properties.

A man may have no right in a property but may have rights connected with it, such as a right of way (*ḥaqq al-marūr*), a right to the flow of water (*ḥaqq al-majrā*), and a right to discharge rain water over another's land (*ḥaqq al-masīl*).[1] These rights have also been laid down in the Majallah.[2] These rights correspond to easements in English law. An easement is to be enjoyed as in the past and cannot be altered or enlarged. It is lost by disuse.[3]

As far as this topic is concerned, the researcher will attempt to study the liability

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[1] ᶜAlī al-Khafīf has elaborately discussed these three types of *ḥaqq* in his book Aḥkām al-Muᶜāmalāt al-Sharᶜiyyah, pp.53-56. Besides that, he also puts in his discussions the rights of *shurb*, *shufah*, *taᶜlī*, *jiwār*, etc. See also the discussion of these rights in Aḥmad Maḥmūd al-Shāfiᶜī, al-Milkiyyah wa al-ᶜAqd fī al-Fiqh al-Islāmī, pp.61-80; Murshid al-Ḥayrān, articles 48-56.

[2] See Majallah, article 1225 (right of way over a building site), article 1230 (right to have rain water run away), article 1232 (right to flow water). See also in Mukhtaṣar, pp.255-258 (translated by F.H. Ruxton) which discusses the use and distribution of water.

[3] Philip S. James, Introduction to English Law, p.348; Sim and Scott, "A" Level English Law, p.136.

in respect of water according to the opinion of the *fuqahā'* of the *madhāhib*. This issue, in fact, has been analysed by them whether, implicitly or explicitly, in their writings. Thus, the researcher will discuss it in a few sub-topics, namely: bringing water on to the land, escape of water (*al-taᶜaddī*) and the case of sprinkling water on the road.

Generally speaking, when a person in exercising his use of something in his own property without negligence causing injury to another, he is not held liable. But, if the element of negligence or the want of the duty of care existed, or he did something the contrary of a normal practice (*mukhālifan li al-muᶜtād*), he is liable for loss or damage resulting from his deeds. For example, if A lets water overflow into the garden of B and swamps B's crops, causing them to be destroyed, A must make good the loss.[4]

In English law, the liability for water is usually related to the rule in *Rylands* v. *Fletcher*.[5] *Rylands* v. *Fletcher* lays down a rule of Strict Liability for harm caused by exceptionally hazardous activities on land. Although historically it seems to have been an offshoot of the law of nuisance, it is sometimes said to differ from nuisance in that its concern is with escapes **from** land rather than interference **with** land.[6] From this case there are two essential ingredients [of *Rylands* v. *Fletcher*] liability: first, the bringing of water on to one's land (treated under the heading non-natural use of land); secondly, the escape of that thing. These two elements will be elucidated according to the cases written by the *fuqahā'*.

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[4] Majallah, article 922. See also al-Mabsūṭ, vol.27, p.23; al-Qawānīn al-Fiqhiyyah, p.224; Jāmiᶜ al-Fuṣūlayn, vol.2, pp.123-125; al-Wajīz, vol.2, p.150; al-Ajwibah al-Khafīfah, p.390; al-Muḥallā, issue 2116, vol.11, p.19; Majmaᶜ al-Ḍamānāt, p.162; al-Mughnī wa al-Sharḥ al-Kabīr, vol.5, p.453; Mūjabāt, vol.1, p.203.

[5] (1866) LR 1 Exch 265; (1868) LR 3 HL 330. Cited in Mullis and Oliphant, Torts, p.195.

[6] Mullis and Oliphant, Torts, p.195.

BRINGING WATER ON TO THE LAND

A person who accumulates water by way of non-natural use of land or or in an extra ordinary manner is bound to keep it from doing damage at his peril. The manner in which the water is accumulated whether it is collected in a reservoir, a pipe, a canal, a drain, or a mound of earth, the person collecting it is liable for its escape and damage to another's property.

According to the Islamic law of tort, a person who brings water on to his land is not liable for any loss or damage unless he has been negligent or has committed *al-taʿaddī* (a wrongful act) e.g., in doing something contrary of usual practice (*ʿādah*). It is obvious that the element of *al-taʿaddī* is an important matter in this case to prove someone committed tort. The concept of *al-taʿaddī* is not restricted to the doctrine of liability, but applies to torts in general.

According to the Ḥanbalī school, if a person drains water onto his land and the water flows into the plaintiff's site and causes damage, the defendant is not held liable on the grounds that he did it in the ordinary manner and there has been no *tafrīṭ* (negligence). He is not *mutaʿaddīn* because his deed is permitted (*mubāḥ*). Nevertheless the defendant is liable if he transgresses (*yataʿaddā*) by draining a lot of water onto his land and it appears that the water is caused to flow in a more concentrated form onto the plaintiff's land which affects the quantity of the water in a way injurious to the plaintiff's property.[7] The view of this school seems to us that the element of negligence (*farraṭa---*

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[7] Al-Mughnī wa al-Sharḥ al-Kabīr, vol.5, p.453. See also Manār al-Sabīl, vol.1, p.438; Sharḥ Muntahā al-Irādāt, vol.2, p.270 and p.426; Majallat al-Aḥkām al-Sharʿiyyah, article 1675, p.507; al-Rawḍ al-Murbiʿ, p.300.

>*tafrīṭ*) or excessive manner (*asrafa--->isrāf*) or *al-taᶜaddī* are important matters in this case. If, therefore, the element aforesaid cannot be proved, no recompense shall be made for any damage suffered thereby.[8]

The MālikĪ jurists unanimously agreed in the matter of preventing any person from exercising the use of water in his land which may flow or he knows that the water will flow to his neighbour's site or he drains water onto his land and his neighbour's wall is caused harm (*ḍarar*).They theorized that: "One who does harm should be urged to stop it" (*man aḥdath ḍararan umir biqaṭᶜih*) because the Prophet said: "There should be neither harming nor reciprocating harm" (*lā ḍarar wa lā ḍirār*).[9] On the other hand, if the harm did not occur, a person should not prevent the activity of his neighbour. In addition, if two injuries may occur, the lesser injury removes consideration of the severe one.[10]

Ibn Farḥūn also theorized: "Indeed, someone who does injury to the neighbour is to be prevented".[11] Further he maintains that "it is not permitted for someone to do something harmful to his neighbour".[12] Consequently, no person is permitted to bring and keep upon his land anything likely to do damage. If it escapes to his neighbour's land, he is bound to take care of it and to prevent its escape. In the case of water, the author of Tabṣirat al-Ḥukkām indicates that one who brings water in dams (*jusūr*) without a wall surrounding them, is liable for any injury which occurs. Likewise if he surrounded the

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[8] Al-Muqniᶜ wa Ḥāshiyatuh, vol.2, p.253; al-Muqniᶜ, p.150.

[9] Al-Qawānīn al-Fiqhiyyah, pp.223-224. See also al-Mudawwanah al-Kubrā, vol.15, p.194.

[10] Al-BājĪ, Fuṣūl al-Aḥkām, p.208. *Idhā ijtamaᶜa ḍararān, asqaṭ al-aṣghar al-akbar.*

[11] Tabṣirat al-Ḥukkām, vol.2, p.257. *An aḥdath ḍarar al-jār fa innah yumnaᶜ minh.*

[12] Tabṣirat al-Ḥukkām, vol.2, p.258. *Lā yajūz an yaḥdath ᶜalā jārih mā yaḍurruh.*

dams, then he neglects them and the water moves and demolishes the dams and flows to the neighbour's land, he is liable for injury. If the injury does not result from his negligence (*tafrīṭ*) but from an act of God (*amr min Allāh*), he is not liable.[13]

According to the Mālikī jurists opinions as for the matter concerned above, we may safely say that the damage resulting from an extraneous cause with which the owner has nothing to do like the act of God (*amr min Allāh*), misfortune from heaven (*āfah samāwiyah*), sudden accident (*ḥādith fujā'ī*), *force majeure* or *cas fortuit* (*quwwah qāhirah*), the act of others and the act of neighbour himself, the owner of the water shall not be liable for damages.

The jurists of this school also discuss the distance of the position of the neighbour's land whether it is far or not. If, therefore, a person causes water to flow on to his land and believes that his neighbour's land would be likely to be safe because it is far away, he is not held liable if in that case that the water flows directly and trespasses on to his neighbour's land and causes damage to the plantation there. Otherwise, he should be responsible if the boundary of his neighbour's land is very near and it is likely the water may flow and trespass on it and do damage.[14]

In the Shāfi'ī school, Muḥammad al-Sharbīnī al-Khaṭīb briefly discusses the liability for water saying that if a man irrigates water naturally onto his land and the water so irrigated flows into the adjoining land through a hole (*juḥr*) and causes damage, the man is not held liable. The liability will be borne if he irrigates contrary to usual practice

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[13] Tabṣirat al-Ḥukkām, vol.2, p.244.

[14] Al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.321.

(*fawq al-ᶜādah*) or he knows that there is a hole but neglects to take reasonable foresight. He is regarded as a defendant who has been careless or negligent in breach of a specific legal duty to take care (*taqṣīr*),[15] or he is, according to al-Shīrāzī, regarded as *mutaᶜaddin* if he uses water for irrigation contrary to the usual practice.[16]

The Ḥanafī jurists relate that if a person irrigates his land and water flows into the land of someone else and causes damage there, he, in accordance with *qiyās*, is not liable because he is free to use his land which means he exercises his ownership with legal rights (*al-taṣarruf fī milkih mubāḥ lah muṭlaqan*) and the flowing water is considered as its natural attribute. But, if he knows that the water will flow into his neighbour's land, in accordance with *istiḥsān* he will be liable for injury.[17] In other words, the liability is due from the person who irrigates his land contrary to the usual practice (*ghayr muᶜtād*) and the water transgresses (*al-tᶜaddī*) to another's land.[18] Likewise, if another's goods are placed under a *mīzāb* and the owner of the *mīzāb* flows water through it and causes damage to the goods, he is liable.[19] Abū Yūsuf maintains the view of the Ḥanafī school by mentioning that if a man who has a canal specifically for him and

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[15] Mughnī al-Muḥtāj, vol.4, p.83. See also al-Shīrāzī, Kitāb al-Tanbīh, p.72. This case is also discussed by the Ḥanafī jurists Maḥmūd b. Mawdūd in his book al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.3, p.79 and also the author of Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.461.

[16] Al-Muhadhdhab, vol.2, p.210. See also this discussion in Sulaymān al-Jamal, Ḥāshiyat al-Jamal ᶜalā Sharḥ al-Minhaj, vol.5, p.83.

[17] Al-Mabsūṭ, vol.27, p.23; Qāsim b. Quṭlūbughā, Kitāb Mūjabāt al-Aḥkām wa Wāqiᶜāt al-Ayyām, p.368; Radd al-Muḥtār, vol.6, p.88; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, pp.460-461; al-Fatāwā al-Hindiyyah, vol.6, p.47; Majmaᶜ al-Ḍamānāt, pp.162-163. See also al-Shaybānī, Kitāb al-Aṣl, vol.4, p.527. His opinion could be said that he prefers to follow the rule of *qiyās*.

[18] Qāsim b. Quṭlūbughā, Kitāb Mujibāt al-Aḥkām wa Waqiᶜāt al-Ayyām, p.367; Radd al-Muḥtār, vol.6, p.89; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.3, p.79; Murshid al-Ḥayrān, article 46.

[19] Al-Mabsūṭ, vol.27, p.23; Majmaᶜ al-Ḍamānāt, p.162; al-Shaybānī, Kitāb al-Aṣl, vol.4, p.528; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.461.

he irrigates his field, orchard and tree; the water from the canal flows into his land and the water floods out from his land towards the land of someone else and causes a flood, there is no responsibility on the owner of the canal because he excercises his rights on land that belongs to him.[20] Similarly if a canal or a well is dug in the land and water over-flowed and spoilt the adjoining land, the owner of the first land would not be held responsible. The owner of the land which has been flooded should protect his land.[21] The owner of the canal or the well will not be requested to level or to transform it because it is dug with the owner's legal right unless the canal or the well continues to cause injury to the adjoining land.[22] It is not lawful for a Muslim to intend to flood the land belonging to a Muslim or a *dhimmī* because the Prophet forbade harming others. If it is known that the owner of the canal intends to let water flow in his land to harm his neighbours and to sweep away their crops, he should be barred from harming them.[23] In another case, if a person causes water to flow in his land which is unable to contain the water, causing it to overflow and trespass onto another's land, the former is liable. However, there is no liability for the person if he believed that his land can contain the overflow.[24] Similarly, if the land is surrounded by a stony barrier round the boundary of it and the owner of the

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[20] Abū Yūsuf, Kitāb al-Kharāj, p.56.

[21] Abū Yūsuf, Kitāb al-Kharāj, p.56. See also al-Mabsūṭ, vol.27, p.23; al-Shaybānī, Kitāb al-Aṣl, vol.4, p.528.

[22] Al-Mabsūṭ, vol.27, p.23. In this case the original *ḥukm* is that the owner of the canal or well is not to be asked to remove it unless he wishes to do that. See al-Shaybānī, Kitāb al-Aṣl, vol.4, p.528.

[23] Abū Yūsuf, Kitāb al-Kharāj, p.56.

[24] Fatāwā Qaḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.251; Majmaᶜ al-Ḍamānāt, p.165; al-Ajwibah al-Khafīfah, p.390. See also al-Durr al-Mukhtār, vol.2, p.304; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.89; Radd al-Muḥtār, vol.6, p.89; Lisān al-Ḥukkām, p.281; Majmaᶜ al-Anhur, vol.2, p.402; Badr al-Muttaqā in the margin of Majmaᶜ al-Anhur, vol.2, p.402.

land knows that the stony barrier is unable to block the water when it has been flooded, he is liable for damage suffered thereby. Otherwise, he is not liable if he has not known that the damage will occur.[25] In another case, if the water is used for irrigation by a person in his land and it directly flows into his neighbour's land and remains there (not in his own land), the person is also liable.[26] Therefore, a person who for his own purpose brings or accumulates on his land, or collects water likely to do mischief if it escapes, must be responsible for it. If the neighbour has made *taqaddum* to the owner of the water to take care of it and control (*al-sakr wa al-aḥkām*) it, and he does not do so, he is *prima facie* answerable for all the damage which is the natural consequence of its escape. The liability here is ruled in accordance with *istiḥsān*. Otherwise, if the *taqaddum* has not been made, he is not liable.[27]

Generally, liability in respect of water depends on whether the water is naturally on the land or whether it is artificially accumulated or interfered with in some way. The owner of land on a lower level (*habṭah*) cannot complain of water naturally flowing into his land from a higher level (*ṣaᶜdah*). Nevertheless, the proprietor of the higher land is liable if he knows that if he drains his land, the water will trespass (*yataᶜaddī*) onto his lower neighbour's land. The proprietor of the higher level should be requested to set up a dam (*al-musannāh*) to block water which flows to the lower level and he is prevented

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[25] Qāsim b. Quṭlūbughā, Kitāb Mujabāt al-Aḥkām wa Wāqiᶜāt al-Ayyām, p.369.

[26] Qāsim b. Quṭlūbughā, Kitāb Mūjabāt al-Aḥkām wa Wāqiᶜāt al-Ayyām, p.368.

[27] Majmaᶜ al-Ḍamānāt, p.163; Qāsim b. Quṭlūbughā, Kitāb Mūjabāt al-Aḥkām wa Wāqiᶜāt al-Ayyām, p.368.

from draining his land until the dam is erected.[28]

With regard to the liability for water, Ibn Ḥazm also rules that if someone opens up a river dam and a group of people drown, and if the act is performed with the intention to cause drowning to them, the person is liable for *qiṣāṣ* and *diyāt* for the killing of a group. If the opening up of the river dam is done for some benefit or for no benefit, if the person has not realized that it will injure any of those who died, then this is a case of homicide by *khaṭā'*. *Diyāt* are to be paid by his clan: penance is upon him for each soul that died; and in all this, he is liable for all damage to property that he caused. If one channels water onto a wall and the water, in destroying the wall, causes death, as stated above, the same rule applies equally without any distinction because in each case the person is the physical cause of the injury.[29]

ESCAPE OF WATER (*AL-TA'ADDĪ*)

Cases from the Ḥanbalī, Mālikī, Shāfi'ī, Ḥanafī and Ẓāhirī texts demonstrate that the element of "escape" is an important factor with regard to the liability. It can be said that the principle of liability for water mentioned by the *fuqahā'* provides that where an escape of water is caused by the way of *al-ta'addī* or by exceeding normal practice and others suffer loss and damage, then the defendants are strictly liable. In brief, the word "escape" can be found in the manual texts of the *fuqahā'* which is considered as "*al-*

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[28] Majma' al-Ḍamānāt, p.163; Radd al-Muḥtār, vol.6, p.89; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.461.

[29] Al-Muḥallā, issue 2116, vol.11, p.19.

taᶜaddī". This word may be considered, in its sense, the equivalent of the word "escape" in this section. However, there are some *fuqahā'* use the word "*kharaja*" other than "*taᶜaddā/al-taᶜaddī*" which can also be translated as "escape".[30] Other than both of those words above, the word "*sāla/yasīlu*" or "*nazala/yanzilu*" is occasionally used by the *fuqahā'* in their writings in discussing this topic.[31]

It also, explicitly or implicitly, can be held that the cases above do not apply where the water which escapes has accumulated on the defendant's land by natural causes, and the defendant has done nothing to cause it to accumulate, and has taken no active means to direct its escape on to his neighbour's land. But if flood water is collected on his land artificially and it escapes by malicious intent or lack of duty in taking care of the water or ignoring the warning (*taqaddum*) which is given to him, he is liable for damage which results from such an escape. Here, he is deemed a *mutaᶜaddīn* and negligent.[32] Otherwise, he is not liable.

THE CASE OF SPRINKLING WATER ON THE ROAD

The *fuqahā'* of the *madhāhib* have a similar opinion in the case of a man slipping on watery surface where another man has poured water on the road thereby causing

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[30] Al-Shaybānī, Kitāb al-Aṣl, vol.4, p.527 and p.528; al-Mabsūṭ, vol.27, p.23.

[31] Al-Mabsūṭ, vol.27, p.23; al-Muhadhdhab, vol.2, p.210.

[32] Mughnī al-Muḥtāj, volo.4, p.83; al-Shaybānī, Kitāb al-Aṣl, vol.4, p.528; al-Durr al-Mukhtār, vol.2, p.304; Radd al-Muḥtār, vol.6, p.89; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.89.

injury, the man who pours the water will be held liable.[33]

In the view of the Ḥanafī jurists, the liability is upon the person who spills water on the road, either deliberately or by performing his ablutions there, and a man or animal is injured in consequence, a *diyah* for the man is due from the former's *ᶜāqilah*, or a compensation for the animal from the person himself. The person is deemed a *mutaᶜaddīn* because he has been guilty of causing an injury to passers-by on the road. However, if the man knowingly and wilfully (*taᶜammadā*) passes over the road in which water has been spilled as above, and suffers injury in consequence of falling in it, nothing whatever is incurred by the person who spilt the water since the man is injured because of his wilfulness. Some *fuqahā'* remark that this rule is applied only where the water is spilled over a part of the road, whereas if it extends over the whole road, the person is liable. Further, if the water is spilled in large quantities that commonly renders the footing insecure, the person is liable but that if the water is spilled in a small quantity to clear a spot of dust or it is spilled without exceeding normal practice (*lam yujāwiz al-muᶜtād*) and not in that quantity to endanger the passers-by, there is no liability. In another case, if a shopkeeper orders a worker to sprinkle water in front of his shop and another person falls there and is injured in consequence, the liability rests upon the shopkeeper (in accordance with *istiḥsān*), not the worker because the order given is valid and the benefit of sprinkled

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[33] Al-Mabsūṭ, vol.27, p.7; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.598; al-Muhadhdhab, vol.2, p.210; al-Wajīz, vol.2, p.150; Mughnī al-Muḥtāj, vol.4, p.87; Sulaymān al-Jamal, Ḥāshiyat al-Jamal ᶜalā Sharḥ al-Minhaj, vol.5, p.83; Kifāyat al-Akhyār, p.613; Badr al-Muttaqā in the margin of Majmaᶜ al-Anhur, vol.2, p.655; al-Hidāyah, vol.4, p.192; Tabyīn al-Ḥaqā'iq, vol.5, p.145; Mukhtaṣar, p.273; Abū Yūsuf, Kitāb al-Kharāj, p.97; al-Fatāwā al-Hindiyyah, vol.6, p.41; Majmaᶜ al-Ḍamānāt, p.164; al-Shaybānī, Kitāb al-Aṣl, vol.4, p.506; al-Shīrāzī, Kitāb al-Tanbīh, p.127; al-Ajwibah al-Khafīfāh, p.387; Jāmiᶜ al-Fuṣūlayn, vol.2, p.90; Majmaᶜ al-Anhur, vol.2, p.655; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.5, p.46; Zarrūq, Sharḥ Zarrūq ᶜalā Matn al-Risālah, vol.2, p.245; al-Durr al-Mukhtār, vol.2, p.464; Ibn Rajab, al-Qawāᶜid fī al-Fiqh al-Islāmī, p.217; al-Mughnī, vol.7, p.822.

water goes to the shopkeeper who ordered it; and therefore the act of the person whom he commanded must be referred to him. Otherwise, in the cases of being commanded to make ablution on the road or to erect an edifice in the middle of the road, the liability rests upon one who obeyed the order. The liability for the first case is by reason that the benefit of ablution is derived for one's ownself, and for the second case because the order is invalid, the person who gave the order had no right to obstruct the highway.[34] In the case of a person who spills ice or water, or performs the ablution on a sidestreet or lane (*sikkah*) and as a result of it becoming icy or slippery and a man or an animal of another is injured there, Muḥammad b. al-Ḥasan al-Shaybānī is reported as giving the judgement that this case depended on the kind of lane whether it is *ghayr nāfidhah* or not. If the injury happens in the lane which is *ghayr nāfidhah* (to one who is not inhabitant there), the person is not liable. Otherwise, he is liable if it happens in the lane which is *nāfidhah* on the grounds that this kind of lane is for the public.[35] Nobody may make any trouble about it.

The Mālikī school exemplify the case of sprinkling water on the road by the case of a person, who, when he sprinkles water on his compound (or road) to cool or clean it and another person slips and is injured thereby, is not liable. In another situation, if the

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[34] Al-Hidāyah, vol.4, p.192. See also al-Durr al-Mukhtār, vol.2, p.464; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.5, p.46; Abū Yūsuf, Kitāb al-Kharāj, p.96; al-Ajwibah al-Khafīfah, p.387; Jāmiᶜ al-Fuṣūlayn, vol.2, p.90; Majmaᶜ al-Anhur, vol.2, p.655; Majmaᶜ al-Ḍamānāt, p.164; Radd al-Muḥtār, vol.6, p.594; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.594; al-Fatāwā al-Hindiyyah, vol.6, p.41; Tabyīn al-Ḥaqā'iq, vol.5, p.145; Badr al-Muttaqā in the margin of Majmaᶜ al-Anhur, vol.2, pp.655-656; al-Shaybānī, Kitāb al-Aṣl, vol.4, p.506; al-Mabsūṭ, vol.27, p.7; Muᶜīn al-Ḥukkām, p.212; Lisān al-Ḥukkām, p.282; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.458.

[35] Qāsim b. Quṭlūbughā, Kitāb Mūjibāt al-Aḥkām wa Wāqiᶜāt al-Ayyām, p.388. See also Majmaᶜ al-Anhūr, vol.2, p.655; Badr al-Muttaqā in the margin of Majmaᶜ al-Anhūr, vol.2, p.655; Radd al-Muḥtār, vol.6, p.594; Muᶜīn al-Ḥukkām, p.211; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.458; al-Fatāwā al-Hindiyyah, vol.6, p.42.

person sprinkles water on the public road, he shall definitely be liable for any damage when another person or his property have been injured or destroyed.[36]

In the opinion of the Ḥanbalī school, Ibn Qudāmah and Ibn Rajab confirm the case of sprinkling water on the road mentioning that if a person sprinkles water on the road and causes injury to others, he is liable. They put the position of water similar to stone or iron or soil or watermelon skin placed there and an injury occurs in consequence. The person who puts it there is liable.[37]

Likewise, al-Ghazālī and Muḥammad al-Sharbīnī al-Khaṭīb in the Shāfiᶜī school maintain that the liability will be ascribed to a person who sprinkles water on the road for his own benefit (*li maṣlaḥah nafsih*) that causes a passer-by to fall. However, he is not liable when:

[1] he sprinkles water for the benefit of the public (*li maṣlaḥah al-Muslimīn*), e.g., to prevent the pollution of dust, or

[2] the person who has fallen or slipped, intentionally (*qaṣdan*) passes over the part where the water has been spilled, or

[3] his action does not exceed normal practice (*lam yujāwiz al-ᶜādah*) or he did it in the course of natural use of his right, or

[4] his action is permitted by the *imām* (authority).[38]

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[36] Zarrūq, Sharḥ Zarrūq ᶜalā Matn al-Risālah, vol.2, p.245; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.241.

[37] Al-Mughnī, vol.7, p.822; Ibn Rajab, al-Qawāᶜid fī al-Fiqh al-Islāmī, p.217. See also al-ᶜUddah Sharḥ al-ᶜUmdah, p.449.

[38] Mughnī al-Muḥtāj, vol.4, p.87; al-Wajīz, vol.2, p.150. See also Sulaymān al-Jamal, Ḥāshiyat al-Jamal ᶜalā Sharḥ al-Minhaj, vol.5, p.83; Kifāyat al-Akhyār, p.613.

Summing the discussion up, based on the points of view of the *fuqahā'* about the liability for water is that the tortfeasor will be liable for his deeds when the element of *al-taʿaddī* can be proved. It is clear that the Ḥanafī and Shāfiʿī schools concurrently agree to exempt him if a victim slips as a result of his own volition to pass over the place where the water has been spilled. We could also say that this discussion is a clear indication of the rule of the water as applied by the Islamic law of tort to avoid injury to the public.

LIABILITY OF MEDICAL PRACTITIONERS

INTRODUCTION

In the foregoing discussions, we have examined several topics of liability: liability for premises, liability for animals, liability for chattels and the like. Further, under Islamic law of tort, there is another topic of liability, that is, the liability of medical practitioners.

The purpose of this study is to demonstrate the potential of Islamic law in theory and practice to protect a patient's rights, especially in cases of mistake and negligence based on the failure of the medical practitioner to take proper reasonable care and skill in his treatment of the patient.

The present study has a few sub-topics: the basis of the liability, the category of the doctors and their liability, breach of duty (*al-taᶜaddī*) in treatment, exemption of the doctor from liability according to the opinions of the *fuqahā'*, necessity of consent in medical treatment, good intent, medical negligence, conditions of non-liability of the doctor and liability for para-medical staff.

By reason of the size of this topic, the researcher will try to create a systematic study based on books of the *sunnī madhāhib*. However, the books of other *madhāhib* would also be referred if necessary. Further, this task would be impossible without making reference to contemporary books by the *fuqahā'*. Consequently, this topic will be studied from classical and contemporary textbooks of Islamic jurisprudence.

All the *fuqahā'* agree that medical treatment is a collective duty (*farḍ al-kifāyah*)-

when it is carried out by a sufficient number of individuals, others are necessarily excused from fulfilling it.[1] It has been imposed as a duty because it is a social necessity. If the aim of a person who studies medical practice is to treat the people, his study becomes obligatory for him. This means that the medical practice is a duty of the doctor which must (*lā mafarra lah*) be carried out. The treatment is considered as a collective duty if there is more than one doctor in a town. Otherwise it will be an individual duty if there is no other doctor except him and thus it would be obligatory and not amenable to exemption. The axiomatic result (*al-natijah al-badīhiyyah*) from declaring medical treatment as a duty is that the doctor will not be responsible for the consequences of performing it; it is on the principle that the performance of a duty is not bound by conditions of safety (*anna al-wājib lā yataqayyad bi sharṭ al-salāmah*). This is because the choice of the method of treatment depends entirely on the discretion of the doctor, his knowledge and practical ingenuity.[2]

THE BASIS OF THE LIABILITY

In the Islamic law of tort, the foundation of the liability for medical practitioners is a celebrated Ḥadīth narrated by Abū Dāwud, al-Nasā'ī and Ibn Mājah reported from ᶜAmr b. Shuᶜayb on his father's authority from his grandfather who reported that the Prophet said:

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[1] Ibn Ukhuwwah, Maᶜālim al-Qurbah, p.166; ᶜAbd al-Qādir ᶜAwdah, al-Tashrīᶜ al-Jinā'ī, vol.1, p.520.

[2] ᶜAbd al-Qādir ᶜAwdah, al-Tashrīᶜ al-Jinā'ī, vol.1, p.520.

> "Whosoever gives medical treatment (to someone) and he is not known as a practitioner before that, will be held liable".[3]

In a report by Abū Dāwud which was narrated by ᶜAbd al-ᶜAzīz b. ᶜUmar b. ᶜAbd al-ᶜAzīz who said: Some people of the deputation which came to my father reported the Prophet as saying: "Any physician who practises medicine to a group of people when he has not been known as a practitioner before that and he harms (the patients), will be liable". ᶜAbd al-ᶜAzīz, further, said: "This also applies in the case of physician who does not have a qualification for medical treatment for opening a vein, incision and cauterization".[4]

In another version, this Ḥadīth was reported as:

> "Anyone who practises medicine when he is not known as a practitioner and kills a life or inflicts bodily harm on it, will be liable".[5]

From the above mentioned Ḥadīths, it is settled that Islamic law decided primarily the liability of tort might occur when physician does any harmful act to his patients including: infringement, felony, deception and endangering their lives.

Unqualified practitioners or doctors, therefore, are prohibited from practising medicine because of the potential danger which they might cause. On account of that, Ibn Qayyim remarks in his al-Ṭibb al-Nabawī:

> "An ignorant physician is liable for his medical practice. If he treats a person without knowing the correct practice and causes harm to the

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[3] Sunan Abī Dāwud, vol.4, p.195; Sunan Ibn Mājah, vol.2, p.1148. However, there are no words "before that" (*qabl dhālik*) in the report by Abū Dāwud. See also in Ibn Qayyim, Zād al-Maᶜād, vol.3, p.108; Ibn Qayyim, al-Ṭibb al-Nabawī, p.132; Nihāyat al-Muḥtāj, vol.8, p.35; Bidāyat al-Mujtahid, vol.2, p.313; al-Muqniᶜ wa Ḥāshiyatuh, vol.2, p.217.

[4] Sunan Abī Dāwud, vol.4, p.195.

[5] Ibn Ḥajar, Bulūgh al-Marām, p.522.

person, he will be liable. This is the consensus of Muslim scholars".[6]

Al-Khaṭṭābī adds:

> "I do not know of a precedent concerning a different view for a physician when he transgresses (*taᶜaddā*) causing injury to his patient, definitely he will be liable. The liability is *diyah*, not retaliation (*qawad*) because permission to act is given to him by the patient, and he would not have been able to operate without such permission. The tort of the physician, according to the vast majority of the *fuqahā'*, is borne by his *ᶜāqilah*".[7]

The Majallah has also enacted an article regarding the restriction of unqualified doctors.

> "Persons who cause injury to the public such as an ignorant physician (*al-ṭabīb al-jāhil*) are interdicted....".[8]

Abdur Rahim says:

> "The 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. Thus, an unqualified doctor may be prevented from practising medicine".[9]

THE CATEGORY OF THE DOCTORS AND THEIR LIABILITIES

In their writings, the *fuqahā'* have clearly set forth the category of the doctor and simultaneously his liability in their writings. The liability, arising as a result of mistake or negligence in carrying out treatment to the patient by the doctor, is the most important

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[6] Ibn Qayyim, al-Ṭibb al-Nabawī, pp.134-135.

[7] Al-Khaṭṭābī, Maᶜālim al-Sunan in the margin of Mukhtaṣar Sunan Abī Dāwud, vol.6, p.378; Shams al-Dīn al-Dhahabī, al-Ṭibb al-Nabawī, pp.306-307; Ibn Qayyim, al-Ṭibb al-Nabawī, p.135; Ibn Ḥajar, Bulūgh al-Marām, p.524.

[8] Majallah, article 964.

[9] Abdur Rahim, The Principles of Muhammadan Jurisprudence, p.246.

matter laid down in their discussions. However, the liability is more easily discussed if it is divided in accordance with the category of the doctor. Thus, the category of the doctor or physician may be classified in five categories:

(1) A doctor who is highly trained (*ṭabīb ḥādhiq*). This doctor adheres to the ethics of his profession and performs his services according to the rules. If the patient as a result of such treatment requires an injury to his organ or limb or it results in the loss of a ordinary natural ability, or perhaps health complications could have led to his death, the doctor is not liable for reparation according to all Muslim scholars because consent to his action has been given to him by the patient. The same verdict is given in the case of circumcision (phosthetomy). For example, if a qualified doctor applies his expertise and performs the operation on a child at a suitable age and time, and if after the surgical operation, the child suffers injury (either to his organ or body), the doctor is still exempted from bearing any liability. Similarly in the case of lancination (*baṭṭ*), if a doctor lances a patient who maybe mentally sound or not with a surgical instrument in an appropriate treatment and at suitable time and the patient suffers injury in consequence, still, according to Islamic law, the expert doctor is not liable.[10]

According to the discussions of the Ḥanafī jurists, if a phlebotomist (*faṣṣād*) performs the operation of phlebotomy without exceeding normal practice, he is not responsible in the case of his patient being injured in consequence of such an operation.

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[10] Ibn Qayyim, Zād al-Maʿād, vol.3, p.109; Ibn Qayyim, al-Ṭibb al-Nabawī, p.135. See also al-Rawḍ al-Murbiʿ, p.324; al-Mughnī, vol.5, p.490; ʿUmdat al-Fiqh, p.60; alʿ Uddah Sharḥ alʿ Umdah, p.229; Manār al-Sabīl, vol.1, p.422; al-Muqniʿ, p.141; al-Muqniʿ wa Ḥāshiyatuh, vol.2, p.216; Majallat al-Aḥkām al-Sharʿiyyah, article 713, p.262; Abū Zahrah, Uṣūl al-Fiqh, p.355.

Similarly, if a cupper (*ḥajjām*) practises cupping his patient in the usual manner without exceeding normal practice, he is not liable for any liability.[11] In al-Jāmf al-Ṣaghīr, Muḥammad b. al-Ḥasan al-Shaybānī maintains that if a farrier (*bayṭār*) bleeds a man's animal at his request and the animal dies in consequence, or if a cupper performs the cupping on a slave at the direction of his master and the slave dies in consequence, no liability is incurred by the farrier or cupper.[12] Ibn Rushd, one of the Mālikī jurists states:

> ".... and there is no difference of opinions (among the *fuqahā'*) that if a person who practises medicine is not among the expert doctors, he is liable (for any injury which happens) because he is regarded *mutaᶜaddin*".[13]

That means, if an expert doctor who is highly trained performs the operation on his patient without making a mistake and the patient sustains injury, the doctor is not liable. In the same sense, al-Mawāq upholds the view of Ibn Rushd saying that a doctor who gives medicine to his patient or practises circumcision and cupping, or performs dental surgery to extract his patient's molar tooth (*ḍarsan*), he is not liable for injury resulting from his hands if no element of mistake existed.[14] Al-Qarāfī says that the responsibility will not be borne by the expert doctor or veterinary unless it is known that he committed a transgression (*taᶜaddā*) in his course of treatment.[15] With regard to the expert doctor being free from liability, al-Dusūqī has stated:

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[11] Al-Hidāyah, vol.3, p.245; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.68; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.305. See also Tabyīn al-Ḥaqā'iq, vol.6, p.137; al-Durr al-Mukhtār, vol.2, p.296; Majmaᶜ al-Ḍamānāt, p.47.

[12] Al-Jāmiᶜ al-Ṣaghīr, p.449. See also al-Hidāyah, vol.3, p.245.

[13] Bidāyat al-Mujtahid, vol.2, p.313.

[14] Al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.321.

[15] Al-Qarāfī, al-Furūq, vol.4, p.29.

> "In the case of a doctor and a cupper who is expert in the circumcision. When the cupper perfoms a circumcision and the doctor gives a medicine to the patient or bleeds his vein or cauterizes him and such a patient dies as a result, there is no responsibility on the part of the cupper and the doctor. The liability is exempted on the condition that they are knowledgeable and have made no mistake in what they did. None of them is liable for *diyah*, nor is the *ʿāqilah* liable for the *diyah*".[16]

Al-Shāfiʿī says that if a person asks a doctor to treat diseases for him by blood-letting through cupping or to circumcise his son or .... and he has suffered injury in consequence of the doctor's treatment, the doctor is not liable. This is because he has carried out appropriate medical treatment as an expert doctor and exercised due care and skill in his treatment of his patient.[17] Ibn Surayj directly exempts the liability of the doctor if he is an expert doctor.[18] Al-Shibrāmalsī in his Ḥāshiyah remarks that the expert physician (*ʿārifan*) is not liable[19] for bleeding or performing a venesection of a patient (*faṣd*) or for cupping him even though he dies on account of that. This case should be provided that the doctor does not overstep the limits, that is, he carries normal legal treatment (*jāʾiz*).[20] Conversely, when a doctor is not highly trained, he is liable for any accident which happens due to his treatment based on the Ḥadīth: "Whosoever gives

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[16] Al-Dusūqī, Ḥāshiyah ʿalā al-Sharḥ al-Kabīr, vol.4, pp.24-25. See also al-Bājī, al-Muntaqā, vol.7, p.76.

[17] Al-Umm, vol.6, p.239 and p.244.

[18] Tuḥfat al-Muḥtāj in the margin of Ḥāwāshī al-Sharwānī wa Ibn Qāsim, vol.9, p.197.

[19] Al-Shibrāmalsī, Ḥāshiyah printed with Nihāyat al-Muḥtāj, vol.8, p.35. See also al-Sharwānī, Ḥāwāshī al-Sharwānī ʿalā Tuḥfat al-Muḥtāj, vol.9, p.197; Ibn Qāsim, Ḥāshiyat Ibn Qāsim ʿalā Tuḥfat al-Muḥtāj, vol.9, pp.197-198.

[20] Minhāj al-Ṭālibīn wa ʿUmdat al-Muftīn, p.305; Minhāj al-Ṭālibīn in the margin of Mughnī al-Muḥtāj, vol.4, p.301; Nihāyat al-Muḥtāj, vol.8, p.33. See also Tuḥfat al-Muḥtāj in the margin of Ḥāwāshī al-Sharwānī wa Ibn Qāsim, vol.9, p.195; al-Sirāj al-Wahhāj,p.538; Zakariyyā al-Anṣārī, Minhaj al-Ṭullāb printed with Minhāj al-Ṭālibīn wa ʿUmdat al-Muftīn, p.305; Zakariyyā al-Anṣārī, Sharḥ al-Minhaj in the margin of Ḥāshiyat al-Jamal ʿalā Sharḥ al-Minhaj, vol.5, p.172.

medical treatment and is not known as a practitioner, is liable".[21] Ibn al-Mundhir theorizes: "A practitioner who does not transgress in his practices, is not liable for any liability".[22]

(2) The second category of the doctor is the ignorant quack (*mutaṭabbib jāhil*). This quack, in his treatment, is one who deceptively convinces his patient of his ability to cure him. As a result, the patient suffers injury. In this case, if the patient knows that this quack is not a real doctor and yet, permits him to carry out the treatment, then the quack is free from bearing any liability.[23] Ibn Qayyim assesses this case and says:

> "This determination does not contradict the meaning of the Ḥadīth mentioned ealier".[24]

This is because the patient has got knowledge that the quack is not a real doctor and thus the injury which happened to the patient results from the permission given voluntarily by him to the suggested treatment by the quack. That means the injury does not result from the deceit of the quack.

Likewise, the quack or the doctor will not be responsible for whatever injury

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[21] Al-Shibrāmalsī, Ḥāshiyah printed with Nihāyat al-Muḥtāj, vol.8, p.35. See also al-Sharwānī, Ḥāshiyat al-Sharwānī ʿalā Tuḥfat al-Muḥtāj, vol.9, p.197; Ibn Qāsim, Ḥāshiyat Ibn Qāsimʿ alā Tuḥfat al-Muḥtāj, vol.9, p.198.

[22] Mughnī al-Muḥtāj, vol.4, p.202; al-Sharwānī, Ḥāshiyat al-Sharwānī ʿalā Tuḥfat al-Muḥtāj, vol.9, p.197. *Ann al-ṭabīb idhā lam yataʿadd lam yaḍman.*

[23] Ibn Qayyim, Zād al-Maʿād, vol.3, p.109; Ibn Qayyim, al-Ṭibb al-Nabawī, p.136. See also al-Rawḍ al-Murbiʿ, p.324; al-Mughnī, vol.5, p.490.

[24] Ibn Qayyim, Zād al-Maʿād, vol.3, p.109; Ibn Qayyim, al-Ṭibb al-Nabawī, p.136. The Ḥadīth is: "Whosoever gives medical treatment (to someone) and he is not known as a practitioner before that, will be held liable".

occurs as a result of taking medicine which is determined by the patient himself.[25]

However, if the patient presumes that the quack offering his services is a real doctor and he permits the quack to treat him medically, believing that he is knowledgeable about a remedy, and the patient suffers injury, then the quack is liable. Likewise, if the quack convinces a patient that he knows about medicines and then prescribes a specific medicine to be used. When the patient assumes that he is knowledgeable and skilfull in the matter, but the patient suffers injury because of such medicine, the quack is liable.[26] Ibn Ḥajar was asked about the liability which arises from the medicine which is given by the doctor and others (meaning his assistants). He replied: "If the medicine is given by a person who has no knowledge of medicament or remedy and an injury results in consequence, the person is liable.[27] According to Ibn Surayj, the doctor (or the quack) who convinces his patient deceitfully that he knows about medicament and remedy, and then an injury happens as a result of his deceit, he will be liable for *qawad* (retaliation) on account of his deceit (*taghrīr*).[28]

(3) The third category of the doctor is the doctor who is highly trained, learned and

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[25] Tuḥfat al-Muḥtāj in the margin of Ḥāwāshī al-Sharwānī wa Ibn Qāsim, vol.9, p.197; al-Sharwānī, Ḥāshiyat al-Sharwānī ʿalā Tuḥfat al-Muḥtāj, vol.9, p.197; Ibn Qāsim, Ḥāshiyat Ibn Qāsim ʿalā Tuḥfat al-Muḥtāj, vol.9, p.197.

[26] Ibn Qayyim, Zād al-Maʿād, vol.3, p.109; Ibn Qayyim, al-Ṭibb al-Nabawī, p.136; Tuḥfat al-Muḥtāj in the margin of Ḥāwāshī al-Sharwānī wa Ibn Qāsim, vol.9, p.197. See also Majallah al-Aḥkām al-Sharʿiyyah, article 711, p.262.

[27] Ibn Ḥajar, Fatāwā Ibn Ḥajar cited in Bahnasī, al-Mas'ūliyyah al-Jinā'iyyah, p.190; Bahnasī, al-Mawsūʿah al-Jinā'iyyah fī al-Fiqh al-Islāmī, vol.4, p.42. According to Ibn Ḥajar, the wrong medicine which is given by one who lack knowledgeable about it should be confirmed by two doctors of good reputation (*ʿadalayn*).

[28] Tuḥfat al-Muḥtāj in the margin of Ḥāwāshī al-Sharwānī wa Ibn Qāsim, vol.9, p.197.

experienced in his field. He performs his services according to the required rules and with permission to do so. But, if his hands transgress (*taᶜaddad*) to a healthy part of the patient's body and he damages it by mistake (*akhṭa'at*), he will be liable. For example, if the circumciser, in the case of circumcision, by mistake causes harm to his patient (either to the urethra or scrotum or testes), he will be held liable for damages. This is because he has committed a tort by misadventure (*jināyah khaṭā'*).[29]

Regarding the liability of this category of doctor, the Ḥanafī jurists make him liable if he performs medical treatment which exceeds normal practice (*mujāwaz al-muᶜtād*) or by mistake. They refer to a case when a circumciser performs the operation of circumcision and inflicts a cut in the glans, he will be liable for a full *diyah* (*diyah kāmilah*).[30] This case could be connected to the Ḥadīth:

"And for the penis (which was cut) should be paid a *diyah*".[31]

It is similar to a case of a phlebotomist (*faṣṣād*) who performs by mistake the operation of phlebotomy and the patient dies in consequence. He is liable for *diyah* and the *diyah* is due from his *ᶜāqilah*.[32] Ibn ᶜĀbidīn elaborates this case mentioning that if a part of the

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[29] Ibn Qayyim, Zād al-Maᶜād, vol.3, p.109; Ibn Qayyim, al-Ṭibb al-Nabawī, p.136. See also al-Rawḍ al-Murbiᶜ, p.324; al-Mughnī, vol.5, p.491; al-ᶜUddah Sharḥ al-ᶜUmdah, p.229; Manār al-Sabīl, vol.1, p.422; al-Muqniᶜ wa Ḥāshiyatuh, vol.2, p.217.

[30] Al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.69; al-Mabsūṭ, vol.16, p.13; Tabyīn al-Ḥaqā'iq, vol.6, p.137; Majmaᶜ al-Ḍamānāt, p.48. See also al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.5, p.89.

[31] Al-Dārimī, Sunan al-Dārimī, vol.2, p.193; Ibn Ḥajar, Bulūgh al-Marām, p.265; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.311; al-Mughnī, vol.8, p.33; al-Mughnī wa al-Sharḥ al-Kabīr, vol.9, p.627.

[32] Al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.69; Majmaᶜ al-Ḍamānāt, p.48. If the phlebotomist performs the operation to one who is sleeping and leaves him alone and he dies on account of bleeding in that operation, the phlebotomist is liable for *qiṣāṣ*. See al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.69; Majmaᶜ al-Ḍamānāt, p.48. In the above case, the phlebotomist is considered as guilty of direct murder. See Radd al-Muḥtār, vol.6, p.69.

glans has been cut accidentally, the doctor will be liable to compensation (*ḥukūmah*).[33] In the Mālikī school, Mālik himself rules down:

> "Every employee (*ajīr*) or shepherd or worker who performs a job for you in your house, and a veterinary (*bayṭār*) or doctor and others like them, ..., each of these is liable if they have committed a transgression (*taᶜaddū*).....".[34]

Khalīl b. Isḥaq lays down a general principle that a doctor will be held pecuniarily liable for any injury that he may have caused either through ignorance or through neglecting the precepts of his art.[35] Al-Dusūqī supports the above mentioned ruling of Khalīl b. Isḥaq, stating that if a doctor performs a circumcision or gives medicine to his patient or bleeds his vein or cauterizes him and the patient dies as a result of that, the doctor should pay a *diyah* because he has made a mistake in what he has done when he knows it (*min ahl al-maᶜrifah*). However, the *diyah* is due from his *ᶜāqilah*. If he is not knowledgeable, he will be punished.[36] The kinds of punishment according to al-Mawāq and al-Qarāfī in

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[33] Radd al-Muḥtār, vol.6, p.69. *Ḥukūmah* is the compensation for injuries which is no percentage prescribed but leave it to be estimated by the *ḥākim*. For detail see Badā'iᶜ al-Ṣanā'ᶜ, vol.6, p.323; al-Qawānīn al-Fiqhiyyah, p.300; ᶜAbd al-Qādir ᶜAwdah, al-Tashrīᶜ al-Jinā'ī, vol.2, p.285; Wahbah, al-Fiqh al-Islāmī Wa Adillatuh, vol.6, p.358; Joseph Schacht, An Introduction to Islamic Law, p.186. For more detailed, see Bahnasī, al-Mawsūᶜah al-Jinā'iyyah fī al-Fiqh al-Islāmī, vol.2, pp.138-144.
In another case, if a person commits a wrongful act to the penis or the glans of another and causes displacement, the person should pay a *diyah* even though the penis belongs to a child or an old man. However, according to the Ḥanafī and Ḥanbalī schools, an injurious act to a penis, which has already been castrated (*khaṣī*) or is impotent (*ᶜinnīn*), will only render the person who performed it liable for *ḥukūmah*, not *diyah*. Whereas according to the Mālikis in the more preferable view and the Shāfiᶜīs, the full *diyah* should be imposed. See al-Mīdānī, al-Lubāb fī Sharḥ al-Kitāb, vol.3, p.154; al-Dardīr, al-Sharḥ al-Kabīr ᶜalā Mukhtaṣar Khalīl in the margin of al-Dusūqī, Ḥāshiyah, vol.4, p.273; Mughnī al-Muḥtāj, vol.4, p.67; al-Mughnī, vol.8, p.33; Kashshāf al-Qināᶜ ᶜan Matn al-Iqnā, vol.6, p.47; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.6, p.343; Muḥammad al-Khaḍrawī, al-Mas'ūliyyah al-Jinā'iyyah, p.282.

[34] Al-Mudawwanah, vol.3, p.502.

[35] Mukhtaṣar, p.291. See also al-Ābī, Jawāhir al-Iklīl, vol.2, p.296.

[36] Al-Dusūqī, Ḥāshiyah ᶜalā al-Sharḥ al-Kabīr, vol.4, pp.25-26. See also al-Bājī, al-Muntaqā, vol.7, p.76; al-Qarāfī, al-Furūq, vol.4, p.29.

their books are flogging and imprisonment.[37] The injury resulting from a mistake by a doctor in his practice is also mentioned by Ibn Rushd and al-Mawāq. They state that if the doctor, by mistake, inflicts a cut in the glans of a patient during a circumcision or gives a wrong prescription or extracts a wrong molar tooth, when he is a skilled and experienced practitioner, he would be liable to pay *diyah*. The *diyah* will be ascribed to his *ʿāqilah*.[38] Further, Ibn Rushd points out that if the doctor is unskilled and not knowledgeable, the *diyah* is due from his own property, not from his *ʿāqilah*.[39] This is also pointed out by al-Dusūqī and al-Mawāq. They say according to the more preferable view (*al-rājiḥ*), the *diyah* is not due on the *ʿāqilah* because the tort committed by such unknowledgeable doctor is considered as an intentional tort. As a result, the *ʿāqilah* does not bear any *diyah* resulting from such kind of tort.[40]

Al-Shāfiʿī himself says that if a cupper or a circumciser has practised inappropriate treatment on his patient when he is an expert and experienced practitioner (*ʿāliman*), he is liable for injury.[41] The Shāfiʿī jurists also deal with this matter. The expert practitioner is liable, by his mistake, for an injury which occurs in practising a bleeding or performing a venesection or a cupping on his patients. He is liable for *diyah*

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[37] Al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.321; al-Qarāfī, al-Furūq, vol.4, p.29.

[38] Bidāyat al-Mujtahid, vol.2, p.313; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.321. Al-Qarāfī reports that the *diyah* will be borne by the *ʿāqilah* if the amount of the *diyah* is over one-third, otherwise, it will be ascribed to the doctor's property. See al-Qarāfī, al-Furūq, vol.4, p.29.

[39] Bidāyat al-Mujtahid, vol.2, p.313. See also al-Qarāfī, al-Furūq, vol.4, p.29.

[40] Al-Dusūqī, Ḥāshiyah ʿalā al-Sharḥ al-Kabīr, vol.4, pp.25-26; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.321. See also al-Bājī, al-Muntaqā, vol.7, p.76; Bahnasī, al-Mawsūʿah al-Jināʾiyyah fī al-Fiqh al-Islāmī, vol.4, p.40.

[41] Al-Umm, vol.6, p.239.

which is ascribed to his *ᶜāqilah*.[42]

(4) The fourth category of the doctor is the skilful and well-trained doctor. He attempts to give the best treatment, and still makes an incorrect diagnosis or prescribes a wrong medicine by mistake. As a result of his mistake, the patient dies. The doctor will be liable for *diyah*. However, according to Aḥmad b. Ḥanbal, the *diyah* will be paid either:

i- By the Muslim treasury (*bayt al-māl*), or

ii- By the *ᶜāqilah* of the doctor.[43]

(5) The fifth category of the doctor is also the skilful doctor. In this category, the doctor performs his services according to the prescribed and required rules, but fails to obtain consent from the patient or from his family. For example, in the case of operating on a part of the body (*silᶜah*) or in the case of the circumcision of a man (a major) or a minor or a lunatic without their consent or without the consent of their guardian and injury is suffered, the doctor is definitely liable. This is because the injury arises from his act which has been performed without any permission being given.[44]

However, if a major (*bāligh*) or the guardian of the minor or of the lunatic gives

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[42] Mughnī al-Muḥtāj, vol.4, p.202; Nihāyat al-Muḥtāj, vol.8, p.35. See also al-Sharwānī, Ḥāshiyat al-Sharwānī ᶜalā Tuḥfat al-Muḥtāj, vol.9, p.197; Ibn Qāsim, Ḥāshiyat Ibn Qāsim alā Tuḥfat al-Muḥtāj, vol.9, p.197; Sulaymān al-Jamal, Ḥāshiyat al-Jamal ᶜalā Sharḥ al-Minhaj, vol.5, p.173. However, Ibn Surayj opines that whoever knows about medical treatment would not be liable for any mistake. See Ibn Ḥajar, Fatāwā Ibn Ḥajar cited in Bahnasī, al-Mas'ūliyyah al-Jinā'iyyah, p.190; Bahnasī, al-Mawsūᶜah al-Jinā'iyyah fī al-Fiqh al-Islāmī, vol.4, p.42.

[43] Ibn Qayyim, Zād al-Maᶜād, vol.3, p.109; Ibn Qayyim, al-Ṭibb al-Nabawī, p.137.

[44] Ibn Qayyim, Zād al-Maᶜād, vol.3, p.109; Ibn Qayyim, al-Ṭibb al-Nabawī, p.137. See also Manār al-Sabīl, vol.1, p.422; al-Mughnī, vol.5, p.491; Majallat al-Aḥkām al-Sharᶜiyyah, article 712, p.262.

permission for the doctor to operate on him, the doctor will not be liable for injury occurring as a result of that.[45]

In the light of this case, will the doctor be liable or not, if he performs his service with the permission of the patient or of his guardian, when he has been a *mutaᶜaddin* (transgressor) in such service? Ibn Qayyim says in his book that he, of course, is liable because the permission given to him will not invalidate his liability in the case of *al-taᶜaddī*. He also theorizes: "The doctor will be regarded as *mutaᶜaddin* when he does not have the permission (of the patient or of his guardian) and will not be a *mutaᶜaddin* when the permission is given".[46] According to the *fuqahā'*, the intentional *mutaᶜaddin* will be punished by *qiṣāṣ*.[47]

BREACH OF DUTY (*AL-TAᶜADDĪ*) IN TREATMENT

In general, the basis of the liability for the doctor is *al-taᶜaddī* or a mistake or negligence, not on the basis of *ḍarar* (injury). If the doctor, therefore, trespasses or errs or is negligent in the treatment of the patient, he will be liable for it. However, if the doctor gives his services with good intent without exceeding the normal practice or without neglect, he is not liable for an injury which occurs by reason that such an injury

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[45] Ibn Qayyim, Zād al-Maᶜād, vol.3, pp.109-110; Ibn Qayyim, al-Ṭibb al-Nabawī, p.137. See also al-Mughnī, vol.5, p.491.

[46] Ibn Qayyim, Zād al-Maᶜād, vol.3, p.110; Ibn Qayyim, al-Ṭibb al-Nabawī, p.137. *Huwa mutaᶜaddin ᶜinda ᶜadam al-idhn, ghayr mutaᶜaddin ᶜindaal-idhn.* See also Muḥammad Aḥmad Sirāj, Ḍamān al-ᶜUdwān, p.438.

[47] Al-Mughnī wa al-Sharḥ al-Kabīr, vol.10, p.350; Sharḥ Fatḥ al-Qadīr, vol.8, p.286; al-Ṭaḥṭāwī, Ḥāshiyat al-Ṭaḥṭāwī, vol.4, p.276. See also al-Khirshī, Fatḥ al-Jalīl ᶜalā Mukhtaṣar Khalīl, vol.8, p.15; Bahnasī, al-Mas'ūliyyah al-Jinā'iyyah, p.190.

which happens is beyond his duty of care. This is based on the principle: "Anything which is not possible to be taken care of it, incurs no liability (*mā lā yumkin al-taḥarruz ᶜanh lā ḍamān fīh*). A jurist of the Ḥanafī school, al-Ḥilwānī, states that the doctor will not be called to account unless the mistake he commits is a grave mistake (*khaṭā' fāḥish*). The grave mistake is an act which is unwarranted by the principles of the science of medicine and is unacceptable by medical experts. It is reported that once a girl fell down from the roof of a house and sustained a grievous head injury. A large number of surgeons were of the opinion that if she was operated on, she would die. However, there was one surgeon among them who said that if she was not operated on immediately, she would die and he expressed his willingness to perform the operation, assuring them that he would cure her. So he operated on her. But the girl did not survive for more than a couple of days. The matter was then referred to a renowned jurist of the day. He gave the *fatwā* that the surgeon was not liable if he had performed the operation with the permission of the person concerned and had performed it in the normal exercise and had also made no grave mistake (may be said: no *al-taᶜaddī*). A jurist was also asked whether the surgeon would be liable in the event of the girl's death due to his assurance. The jurits declared that he was not liable despite such assurance, for the doctor would only be liable for his grave mistake, not for his assurance of the success of the operation performed by him.[48]

In the same sense, the Shāfiᶜī jurists forbade anybody or any doctor to perform an operation on a tumour (*silᶜah/ghuddah*) if he presumed that such an operation would

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[48] Al-Ṭaḥṭāwī, Hāshiyat al-Ṭaḥṭāwī, vol.4, p.276; Majmaᶜ al-Ḍamānāt, p.48. See also ᶜAbd al-Qādir ᶜAwdah, al-Tashrīᶜ al-Jinā'ī, vol.1, p.522; Muḥammad Aḥmad Sirāj, Ḍamān al-ᶜUdwān, p.435.

be dangerous to the patient. Al-Nawawī discusses this matter in his famous book Minhāj al-Ṭālibīn and maintains that any free, mature (*bāligh*) and sane person (meaning "a doctor", sic!) may cut a tumour appearing upon a patient's body unless the operation would be dangerous (*makhūfah*) and there is no danger in leaving the tumour without operating on it, or the danger of the operation is greater (than the leaving it without being operated on).[49] This is because God prohibits any dangerous act against the body, life and so on. God says:

> "And make not your own hands contribute to your destruction, but do good, for God loveth those who do good".[50]

In the case of a minor or of a lunatic, it is for his father or grandfather (or any other direct male antecedent) to order the operation, even if there is a danger, provided that in this case the danger is not greater. If the operation would be more dangerous, the doctor should terminate his operation in order to save the life of the minor or the lunatic.[51] The *sulṭān* and his deputies (*nuwwāb*) also may not order the operation in these dangerous circumstances. It is only where the operation is not dangerous and there is no *ḍarar* that the father or the grandfather, as well as the *sulṭān* or his deputies, or the legal trustee (*waṣī*) of the minor or the lunatic, may give his authorization for the operation to be performed.[52] If the *sulṭān* (including his deputies, father, grandfather, etc.) does what is

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[49] Minhāj al-Ṭālibīn wa ʿUmdat al-Muftīn, p.305.

[50] Al-Qur`ān, 2:195. See also Mughnī al-Muḥtāj, vol.4, p.200.

[51] Minhāj al-Ṭālibīn wa ʿUmdat al-Muftīn, p.305; Mughnī al-Muḥtāj, vol.4, p.201; Nihāyat al-Muḥtāj, vol.8, p.33; al-Sirāj al-Wahhāj, p.537.

[52] Minhāj al-Ṭālibīn wa ʿUmdat al-Muftīn, p.305; Nihāyat al-Muḥtāj, vol.8, p.33; Mughnī al-Muḥtāj, vol.4, p.201.

unauthorized to him (like ordering an operation to a minor or lunatic even though the operation would be dangerous) and the minor or the lunatic dies in consequence, he is personally responsible for *diyah mughallaẓah* (*diyah* on the heavier scale)[53] from his own property because the element of *al-taʿaddī* has existed in his act.[54] On the other hand, a person outside the *ʿaṣabah* or the authorities (*al-ajnabī*) cannot give the order to perform the operation in any circumstances. If the injury happens due to him, the punishment of *qiṣāṣ/qawad* is applied in this case.[55] This is also the opinion of the Ḥanbalī school.[56]

Furthermore, in the case of phlebotomy and cupping, if the doctor commits no transgression (*al-taʿaddī*) while carrying out his treatment on the patient, he is not

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[53] There are two kinds of *diyah*: *mughallaẓah* and *mukhaffafah*. In *mughallaẓah*, the *diyah* is one hundred camels: thirty *ḥiqqah* (three-year-old female camels), thirty *jadhʿah* (four-year-old female camels), and forty *khalfah* (pregnant female camels). The *diyah mukhaffafah* is one hundred camels, i.e. twenty *ḥiqqah*, twenty *jadhʿah*, twenty *bint labūn* (two-year-old female camels), twenty *ibn labūn* (two-year-old male camels), and twenty *bint makhāḍ* (one-year-old female camels). This is according to the Shāfiʿī school. See Abū Shujāʿ, Matn Abī Shujāʿ, pp.46-47; al-Iqnāʿ, vol.2, p.205; Minhāj al-Ṭālibīn wa ʿUmdat al-Muftīn, p.279; Minhaj al-Ṭullāb printed with Minhāj al-Ṭālibīn wa ʿUmdat al-Muftīn, p.279; Aḥmad b. Ruslān, Matn al-Zubad, p.62; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.398; ʿUmdat al-Sālik wa ʿUddat al-Nāsik, p.353.
However, according to the Ḥanafī, Mālikī and Ḥanbalī schools, the *diyah mughallaẓah* consists:
[1] Twenty five *ḥiqqah*.
[2] Twenty five *jadhʿah*.
[3] Twenty five *bint labūn*.
[4] Twenty five *bint makhāḍ*.
See al-Risālah, p.123; Bidāyat al-Mujtahid, vol.2, p.307; al-Thamar al-Dānī, p.518; Zarrūq, Sharḥ Zarrūq ʿalā Matn al-Risālah, vol.2, p.231; al-Hidāyah, vol.4, p.177; al-Rawḍ al-Murbiʿ, p.494; al-Kāfī, p.596; Mukhtaṣar, p.277.
For the *diyah mukhaffafah*, the Ḥanafī and Ḥanbalī schools give the same kinds of camels as the Shāfiʿī school, but however, they require *ibn makhāḍ* (one-year-old male camel) instead of *ibn labūn*. See al-Hidāyah, vol.4, p.178; al-Rawḍ al-Murbiʿ, p.495; Bidāyat al-Mujtahid, vol.2, p.307.
It seems that the Mālikī school is similar to the Shāfiʿī school in the discussion of this kind of *diyah*. See Bidāyat al-Mujtahid, vol.2, p.307; al-Thamar al-Dānī, p.518; al-Kāfī, p.596; Mukhtaṣar, p.277; Zarrūq, Sharḥ Zarrūq ʿalā Matn al-Risālah, vol.2, p.231.

[54] Minhāj al-Ṭālibīn wa ʿUmdat al-Muftīn, pp.305-306; Mughnī al-Muḥtāj, vol.4, p.201; Nihāyat al-Muḥtāj, vol.8, p.34; Minhaj al-Ṭullāb printed with Minhāj al-Ṭālibīn wa ʿUmdat al-Muftīn, pp.305-306; Zakariyyā al-Anṣārī, Sharḥ al-Minhaj in the margin of Ḥāshiyat al-Jamal ʿalā Sharḥ al-Minhaj, vol.5, p.172. See also Sulaymān al-Jamal, Ḥāshiyat al-Jamal ʿalā Sharḥ al-Minhaj, vol.5, p.172; al-Sirāj al-Wahhāj, p.538; cf., al-Fiqh al-Manhajī, vol.8, p.87.

[55] Mughnī al-Muḥtāj, vol.4, p.201; Nihāyat al-Muḥtāj, vol.8, p.33. See also al-Fiqh al-Manhajī, vol.8, p.87.

[56] Al-Mughnī wa al-Sharḥ al-Kabīr, vol.10, pp.349-350; al-Muqniʿ, p.272; al-Muqniʿ wa Ḥāshiyatuh, vol.3, p.331.

responsible for any injury which occurs, even though the patient dies.[57]

As far as the matter of cutting the tumour is concerned, the Shāfiᶜī jurists opinion can be highlighted as follows:

1- If cutting the tumour would not be dangerous, the operation can be carried out.[58]

2- Cutting the tumour will not be allowed when two expert doctors (or one expert doctor according to al-Adhraᶜī) acknowledge that it would be dangerous to the patient, provided that:

[a] there is no danger in leaving the tumour without cutting it, or

[b] the danger of the operation is greater (than leaving the tumour).[59]

3- If the danger in cutting the tumour cannot be assessed (either dangerous or not), cutting is permitted (*yajūz*) by reason that by leaving the tumour without it being operated on, will cause the patient to suffer harm.[60]

4- Cutting the tumour will be obligatory when the doctor acknowledges that the tumour will cause harm to the patient himself if it left without being operated upon.[61]

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[57] Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.306; Mughnī al-Muḥtāj, vol.4, p.201; Nihāyat al-Muḥtāj, vol.8, p.34; Zakariyyā al-Anṣārī, Sharḥ al-Minhaj in the margin of Ḥāshiyat al-Jamal ᶜalā Sharḥ al-Minhaj, vol.5, p.172; Minhaj al-Ṭullāb printed with Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, pp.305-306; al-Sirāj al-Wahhāj, p.538.

[58] Minhaj al-Ṭullāb printed with Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.305; Zakariyyā al-Anṣārī, Sharḥ al-Minhaj in the margin of Ḥāshiyat al-Jamal ᶜalā Sharḥ al-Minhaj, vol.5, p.171; al-Sirāj al-Wahhāj, p.537.

[59] Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.305; Mughnī al-Muḥtāj, vol.4, p.200; Tuḥfat al-Muḥtāj in the margin of Ḥāwāshī al-Sharwānī wa Ibn Qāsim, vol.9, p.194; Nihāyat al-Muḥtāj, vol.8, p.33.

[60] Tuḥfat al-Muḥtāj in the margin of Ḥāwāshī al-Sharwānī wa Ibn Qāsim, vol.9, p.194; Nihāyat al-Muḥtāj, vol.8, p.33; Mughnī al-Muḥtāj, vol.4, p.200; al-Sirāj al-Wahhāj, p.537.

[61] Nihāyat al-Muḥtāj, vol.8, p.33; Tuḥfat al-Muḥtāj in the margin of Ḥāwāshī al-Sharwānī wa Ibn Qāsim, vol.9, p.194; Mughnī al-Muḥtāj, vol.4, p.200; Sulaymān al-Jamal, Ḥāshiyat al-Jamal ᶜalā Sharḥ al-Minhaj, vol.5, p.171.

5- Cutting the tumour is permitted if it more dangerous to leave it without being cut.[62]

In brief, the Ḥanafī and the Shāfiᶜī schools seem to agree in their opinion that the treatment of the patient could be performed so long as it would save the patient's life and cure him from harm. Thus, leaving him to suffer from his disease without any treatment, is prohibited according to Islamic law of tort because the Qur'ān ordains:

"And make not your own hands contribute to your destruction".[63]

However, the treatment cannot be practised on the patient if it will cause grievous danger to him.

Referring to the aforesaid case mentioned by al-Ḥilwānī and also the views of the Shāfiᶜī jurists, it is worth noting that the doctor may practise medicine on his patient in whatever circumstances when he thinks such practice is good for the patient even though he is in a critical situation or in a situation where he cannot presume the risk or result of his treatment.

From the explanation above, we can lay down a few main conditions which the doctor should fulfil in his job: [1] permission, [2] performing the treament in the normal practice, not exceeding the usual way, [3] conforming to the principles of medicine and [4] not putting the patient in a dangerous situation. Therefore, if one of the conditions cannot be fulfilled, the doctor is deemed as *mutaᶜaddin*. In short, the basis of the doctor's liability is *al-taᶜaddī*, no *ḍarar*. Ibn al-Mundhir says: "The *fuqahā'* unanimously agreed that the practitioner who does not transgress (*lam yataᶜadd*-in his practices), is not

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[62] Mughnī al-Muḥtāj, vol.4, p.200; al-Sirāj al-Wahhāj, p.537; Nihāyat al-Muḥtāj, vol.8, p.33; Tuḥfat al-Muḥtāj in the margin of Ḥāwāshī al-Sharwānī wa Ibn Qāsim, vol.9, p.194; Zakariyyā al-Anṣārī, Sharḥ al-Minhaj in the margin of Ḥāshiyat al-Jamal ᶜalā Sharḥ al-Minhaj, vol.5, p.171.

[63] Al-Qur'ān, 2:195.

liable".[64]

EXEMPTION OF THE DOCTOR FROM LIABILITY ACCORDING TO THE OPINIONS OF THE *FUQAHĀ'*

The *fuqahā'* unanimously agreed with regard there being no liability for the doctor from the adverse effects of his treatment to the patient when there is no *al-taᶜaddī*. However, they differ on the cause of this exemption from liability. Abū Ḥanīfah opines that there are two grounds for the doctor's exemption from liability: First, his services are a necessity[65] for society and as such his presence in society is indispensable. This social necessity requires that the doctor should be encouraged and his action should be treated as permitted action (*ibāḥah al-ᶜamal*) so that he should be exempt from accountability providing there is no *al-taᶜaddī*, thus enabling him to make the best use of his professional skill and knowledge with impunity.[66] The second ground for the exemption of the doctor from liability is the permission of the patient or of the patient's guardian.[67] In short, the combination of the permission and the social necessity constitute the cause of exculpation or absolving the doctor from liability.[68]

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[64] Mughnī al-Muḥtāj, vol.4, p.202; al-Sharwānī, Ḥāshiyat al-Sharwānī ᶜalā Tuḥfat al-Muḥtāj printed with Ḥāshiyat Ibn Qāsim ᶜalā Tuḥfat al-Muḥtāj, vol.9, p.197; Sulaymān al-Jamal, Ḥāshiyat al-Jamal ᶜalā Sharḥ al-Minhaj, vol.5, p.173.

[65] Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.305.

[66] ᶜAbd al-Qādir ᶜAwdah, al-Tashrīᶜ al-Jinā'ī, vol.1, p.521.

[67] Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.305.

[68] See ᶜAbd al-Qādir ᶜAwdah, al-Tashrīᶜ al-Jinā'ī, vol.1, p.521.

The tenor of al-Shafiᶜī's argument is that the doctor is exempted from liability on the grounds that his action is permitted by the patient and also because the doctor intends to cure the patient, not to harm him. In the presence of the combination of these two elements, whatever the doctor does by way of treatment is permissible, and liability will not be borne by him if his action is warranted by the science of medicine and professional practice and is acknowledged by other medical practitioners who know about such treatment.[69] Aḥmad b. Ḥanbal agreed with al-Shāfiᶜī on this point.[70]

Mālik b. Anas, on the other hand, holds that the exemption of the doctor from liability is first: warranted by the permission of government or authority (*ḥākim*) and secondly, by the permission of the patient himself.[71] The permission of the authority warrants the doctor to carry out the medical practice, while the permission of the patient enables him to resort to any remedy he deems fit and useful. Under these two requisite permissions, the doctor or the physician or the like is absolved from any adverse consequence, provided that the medical treatment or remedy is not inconsistent with the principles of medicine and he does not err in his action.[72]

In short, any act done by the doctor in the treatment of his patient does not involve accountability, for it is his duty which he performs and is not liable for the consequences thereof, notwithstanding that he is independent in the choice of the treatment and of the

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[69] Al-Umm, vol.6, p.239; Nihāyat al-Muḥtāj, vol.8, p.33 and p.35; Mughnī al-Muḥtāj, vol.4, pp.201-202; al-Sirāj al-Wahhāj, p.538.

[70] Al-Mughnī, vol.8, p.327; al-Mughnī wa al-Sharḥ al-Kabīr, vol.10, pp.349-350.

[71] Al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.321.

[72] ᶜAbd al-Qādir ᶜAwdah, al-Tashrīᶜ al-Jinā'ī, vol.1, p.521.

method adopted by him for the purpose. In cases in which the doctor operates on his patient and the patient dies, or prescribes a medicine which produces harmful effects or poisoning resulting in the death of the patient, he will not be liable on criminal or civil grounds.[73]

NECESSITY OF CONSENT IN MEDICAL TREATMENT

All the *fuqahā'* of the *madhāhib* unanimously agree that in general if the doctor has been granted permission or given consent by the patient or the guardian of the patient to give medical treatment, he is not held responsible for any injury which occurs.

According to the Ḥanafī jurists, if a veterinary bleeds a man's animal in the treatment at the direction (i.e. with the permission) of his owner or a cupper performs the operation of cupping upon a slave by direction (i.e. with permission) of his master and the animal or the slave dies as a result thereof, no liability is incurred by the veterinary or the cupper.[74] This is because the service given by the veterinary and the cupper is at the consent and permission of the owner and the master himself. This is supported by Ibn ᶜĀbidīn mentioning that the cupper, the farrier (the veterinary) and the phlebotomist are not liable for any injury which happens if they perform their treatment with the consent of the patient or his guardian.[75] In the light of the case mentioned above, Ibn ᶜĀbidīn

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[73] ᶜAbd al-Qādir ᶜAwdah, al-Tashrīᶜ al-Jinā'ī, vol.1, pp.521-522.

[74] Al-Jāmiᶜ al-Ṣaghīr, p.449; al-Hidāyah, vol.3, p.245. See also al-Fatāwā al-Hindiyyah, vol.6, p.34; Majmaᶜ al-Ḍamānāt, p.48.

[75] Radd al-Muḥtār, vol.6, p.68. See also Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.305.

theorizes: "By not action in excess and by being given permission, no liability will be imposed".[76] Otherwise, if a slave asks the cupper to extract his tooth without having permission from his master, the cupper is liable if he does so because asking the slave himself is considered as invalid.[77] Likewise, if a minor asks a phlebotomist to bleed his vein and the phlebotomist does so without being given permission by his guardian and then the minor dies thereby, the liability for *diyah* is due on the *ʿāqilah* of the phlebotomist.[78]

The Mālikī jurists also highlighted the necessity of consent in medical treatment in their writings. If the doctor treats the patient without previously getting permission, he will be liable. Mālik b. Anas states, as reported by al-Mawāq in his book, that if a slave asks a doctor to circumcise or to cup him or to incise his vein and the doctor does so, the doctor will be liable for injury which occurs to the slave on the grounds that he has performed such an exercise without previously getting the permission from the master of the slave.[79] Khalīl b. Isḥaq states:

> "A doctor will be held responsible if he treats a patient without previously having been permitted to do so, either by the man himself or his master if he is a slave; and this rule applies even if a slave had asked the doctor to bleed or cup him or to circumcise him".[80]

The jurists of this school continue their clarification of the necessity for consent

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[76] Radd al-Muḥtār, vol.6, p.69. *ʿAdam al-tajāwuz wa al-idhn li ʿadam al-ḍamān.*

[77] Al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.6, p.389. See also Radd al-Muḥtār, vol.6, p.215.

[78] Al-Durr al-Mukhtār, vol.2, p.341; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.215.

[79] Al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.321.

[80] Mukhtaṣar, p.291. See also al-Ābī, Jawāhir al-Iklīl, vol.2, p.296.

by saying that if a doctor treats a patient with the permission of the patient or of his guardian in the case of the patient being a minor, and the patient is injured or dies in consequence, the doctor is not liable. Otherwise, he will be liable even if he is an expert doctor and there is no neglect on his part.[81]

In the Shāfiᶜī school, al-Shāfiᶜī himself lays down a principle:

> "A person is not liable for whatever he has been given permission to do".[82]

On this principle al-Nawawī asserts that a cupper or a phlebotomist who performs his works with permission, is in no way responsible (for the consequences).[83] Similarly, Zakariyyā al-Anṣārī states that whoever gives medical treatment (to one who is suffering from a pain) with permission, is not liable (for any injury which happens).[84] Thus, no slave can be bled without the owner's permission, nor a minor without that of his guardian, ...[85] The permission which should be given to the doctor takes the form of saying such thing as: "Please perform a cupping on me," or "please perform an operation on me".[86]

Ibn Qudāmah indicates this matter in a similar way to the Ḥanafī, Mālikī and

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[81] Al-Dusūqī, Ḥāshiyah ᶜalā al-Sharḥ al-Kabīr, vol.4, p.317; Tabṣirat al-Ḥukkām, vol.2, p.243. See also Bahnasī, al-Mas'ūliyyah al-Jinā'iyyah, p.150.

[82] Al-Umm, vol.6, p.240. *Falam yaḍman man qabila annahu ma'dhūn lah fīmā fᶜila.*

[83] Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.306. See also Mughnī al-Muḥtāj, vol.4, p.202; Nihāyat al-Muḥtāj, vol.8, p.35; al-Wajīz, vol.2, p.184; al-Sirāj al-Wahhāj, p.538; Tuḥfat al-Muḥtāj in the margin of Ḥāwāshī al-Sharwānī wa Ibn Qāsim, vol.9, p.197.

[84] Zakariyyā al-Anṣārī, Minhaj al-Ṭullāb printed with Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.306; Zakariyyā al-Anṣārī, Sharḥ al-Minhaj in the margin of Ḥāshiyat al-Jamal ᶜalā Sharḥ al-Minhaj, vol.5, pp.172-173; Sulaymān al-Jamal, Ḥāshiyat al-Jamal ᶜalā Sharḥ al-Minhaj, vol.5, p.173.

[85] Ibn Ukhuwwah, Maᶜālim al-Qurbah, p.159.

[86] Mughnī al-Muḥtāj, vol.4, p.202.

Shāfiᶜī jurists. If a surgeon operates on a part of a patient's limbs to treat a canker (*aklah*) or a tumour (*silᶜah*) with his permission while he is a major, the liability will not be ascribed to the surgeon if any injury happens in consequence.[87]

In brief, according to Islamic jurisprudence, as mentioned above, the doctor or the physician is not held responsible if he has been granted permission to give medical treatment by the competent authority or guardian of the patient. Otherwise, if the doctor has permission from the guardian to treat the patient but he is ignorant, then he is held responsible for any mistake. He will be held responsible for premeditation (*al-ᶜamd-> qiṣāṣ*) or for negligence if he has the intent to harm the patient or is negligent.[88]

GOOD INTENT (*ḤUSN AL-NIYYAH*)

It can be assumed that whatever the doctor does for the treatment of his patient, he does with the intention of curing him and in good faith. Al-Shāfiᶜī maintains:

> "A person who has been injured by poison asks a doctor to incise his injury or who has got a canker asks him to cut a limb of his body because of fear of it moving to another part of the body, or asks him to open a vein, or a person who asks a cupper for cupping or asks a cauterizer for performing the cauterization on him, or a guardian of a minor or a master of a slave asks a person who is an expert in circumcision to circumcise his minor or slave and the patient dies in consequence with no *taᶜaddī* on the

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[87] Al-Mughnī, vol.8, p.327; al-Mughnī wa al-Sharḥ al-Kabīr, vol.10, pp.349-350. He also states: "If a patient is a minor or a lunatic and someone else other than the surgeon, who has been given the permission, operates upon such a patient and the patient is injured or died, the person whom operates him is liable for *qiṣāṣ* because he has no power to do that and no responsibility to take care of such a patient (*liannahu lā wilāyah lah ᶜalayh*). If that operation is performed by his father or caretaker (*al-waṣī*) or government (*ḥākim*) or authorized representative (*amīnahu al-mutawallā ᶜalayh*), the liability is not due from him because he performed the operation with the intention of healing and curing the person under him (*qaṣd bih maṣlaḥah*). See also Bahnasī, al-Mas'ūliyyah al-Jinā'iyyah, p.190.

[88] See Bahnasī, al-Mas'ūliyyah al-Jinā'iyyah, p.150.

> part of the doctor or the person who has been commanded to do so, the doctor or the person is not liable for blood-money (*ᶜaql*) and is not punished (*ma'khūdhiyah*) if he acts in good intent".[89]

However, if the doctor treats the patient with the intention of killing him or with bad intent, he will be liable for his treatment on both criminal and civil grounds even if his act does not result in the patient's death or bodily defect (*ᶜāhah*). The treatment of the doctor acting with bad intent will also be liable even if his treatment is to cure the patient because whatever the doctor does in bad intent is prohibited and punishable.[90]

MEDICAL NEGLIGENCE

All persons engaged in the practice of medicine owe a duty of care to their patients. It seems that the *fuqahā'* agree that such duties are owed not only by doctors and hospital authorities, but also by cuppers, surgeons, circumcizers, farriers, veterinarians, cauterizers, orthopedists and those responsible for injection (*ḥāqin*). In moden medical practice, there are many specific names other than those who have been mentioned above, like dentists, radiographers, anaesthetists, physiotherapists, psychiatrists, pathologists and nurses. The most common example of the application of the tort of negligence to medical practice is that in which a practitioner's failure to show due care or skill in treatment results in the patient suffering consequential death, injury or pain. The tort has, however, been established as applicable in a variety of other situations.

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[89] Al-Umm, vol.6, p.244.

[90] ᶜAbd al-Qādir ᶜAwdah, al-Tashrīᶜ al-Jinā'ī, vol.1, p.522.

Negligence may also consist of failing to make adequate arrangements for a patient, failing to give proper instructions, failing to write a prescription to a standard of legibility which would reduce the possibility of its being misread by a busy or careless pharmacist, failing to make proper inquiries to discover the appropriate treatment, failing to give warning to a patient who has a tendency towards dangerous side effects of any medicine or drug, etc.

Al-Baghdādī, one of the Ḥanafī jurists, mentions in his book that the doctor is not liable for any injury that he may have caused if such injury occurs through a normal exercise (*muʿtadan*) and not through his negligence. Otherwise, he is liable.[91] Similarly if the phlebotomist negligently leaves his patient who is under his care and he dies due to gross bleeding at that time, the phlebotomist is held liable for *qiṣāṣ*.[92]

As far as medical negligence is concerned, the Mālikī jurists put the liability strictly on the negligent person who has neglected the treatment of the patient. They mention that a doctor will be held liable for any injury that he may have caused either through ignorance or through neglecting (*qaṣṣara*) the precepts of his art.[93] The negligence may occur in examining, treating or operating a patient or in other situations which occur at the time of giving the prescription, performing the circumcision or cupping and the like.[94] The same is the view of the Shāfiʿī jurists. According to them, a

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[91] Majmaʿ al-Ḍamānāt, p.47.

[92] Majmaʿ al-Ḍamānāt, p.48; Radd al-Muḥtār, vol.6, p.215.

[93] Mukhtaṣar, p.129; al-Ābī, Jawāhir al-Iklīl, vol.2, p.296. See also al-Dusūqī, Ḥāshiyah ʿalā al-Sharḥ al-Kabīr, vol.4, p.317; Tabṣirat al-Ḥukkām, vol.2, p.243.

[94] Al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.321.

doctor who does not negligently carry out any injury in his treatment cannot be made accountable. Otherwise he will be accountable. This principle is also applied to the non-Muslim doctor.[95] Ibn Ukhuwwah mentions in his Maᶜālim al-Qurbah:

> "If the patient recovers, the doctor shall receive his fee and honorarium; if he dies, the nearest relatives shall present themselves before the most famous doctor in the area (*al-ḥākim al-mashhūr*) and lay before him the copies (of the prescriptions) which the doctor wrote. If, after he has seen such copies, the doctor follows the requirement of science and the art of medicine without negligence and fault on the doctor's part, he shall say, "This man's life is ended by the term of his allotted span". But if he is of the opposite opinion, he shall say, "Take the *diyah* from the doctor for your kinsman, for it is he who slew him by his poor skill and negligence".[96]

Furthermore, Ibn Ukhuwwah summarizes his writing by indicating that no one should engage in the practice of medicine who is unfitted for it and no doctor could be negligent in his treatment.[97]

Liability of Nursing Staff and Doctor's Assistants

Nursing staff and doctor's assistants, as well as medical practitioners, owe a duty of care to the patients in their care. The principle relating to the liability of doctors applies equally to nurses and doctor's assistants. The nurse and doctor's assistant must attain the

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[95] Al-Shibrāmalsī, Ḥāshiyah printed with Nihāyat al-Muḥtāj, vol.8, p.35.

[96] Ibn Ukhuwwah, Maᶜālim al-Qurbah, p.167.

[97] Ibn Ukhuwwah, Maᶜālim al-Qurbah, p.167. He also says: "The practitioner must not be negligent with respect to the instruments of his craft, such as hooks for removal of *sabal* (a film, formed by swelling or inflation of the external veins of the eye, upon the white of the eye and the appearance of a web between the veins and the whiteness of the eye) and pterygium, lancets for bleeding, the case of *kuḥl*-pencils, etc. See p.168. For the meaning of *sabal*, see Lane, An Arabic-English Lexicon, vol.1, p.1302.

standard of competence and skill in their field. A nurse or a doctor's assistant who fails to take note and act on instructions given by the medical practitioner will be liable for any consequent injury to the patient. The nurse and the doctor's assistant will be liable for their negligence. Where a nurse or doctor's assistant, is assisting in surgery and being responsible for checking that the swabs are removed, a nurse will be liable if a lack of care by him results in swabs remaining in the patient's body. Nurses responsible for equipment will be liable if their negligence allows that equipment to become contaminated. Generally, a patient alleging negligence resulting from inadequate nursing care will sue the health authority employing the nursing staff. However, if any injury results from *al-taᶜaddī* or deliberate intent or in case of carelessness and negligence on the part of that nursing staff, the liability will be ascribed to himself. This decision can be referred to the case when the *ajīr* of the fuller or his *tilmīdh* in the work of a fuller carries out a pounding and the instrument used for pounding slips away from the *ajīr* or *tilmīdh* to be damaged, the master is vicariously liable because pounding is part of the work of a fuller. Otherwise, where the pounding of the fuller causes damage to a garment other than the garment which the fuller is working on, the liability is due on the *ajīr* or *tilmīdh* because his act is considered as *al-taᶜaddī* and negligence. Similarly if the *ajīr* or the *tilmīdh* causes damage to another with his instrument for pounding, the liability will be ascribed to him by reason that he is *al-mutaᶜaddī* and negligent in his activity.[98]

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[98] Majmaᶜ al-Ḍamānāt, p.43; Wāqiᶜāt al-Muftīn, p.134.

Liability of Dental Practitioners

It is mentioned by the *fuqahā'* that, in general, dental practitioners are subject to the same principles in relation to the tort of negligence as are other medical practitioners. In other words, the duty of a dentist to exercise due care and skill in his treatment of his patients is the same as that of a surgeon or a physician who is under a concurrent liability in tort. Where a tooth or a molar tooth (*ḍarsan*) has been extracted and, after the extraction, the dentist realises that he has extracted the wrong tooth, he is held liable. The liability is due from him because he has made a mistake or exceeded normal practice without reasonable care and skill in his treatment of that patient.[99] The liability will also be due for a dentist if, after the extraction, the jaw is found to be fractured or the dentist does not notice the dislocation of any tooth. In such a case, the dentist is held to be negligent.

Breach of Duty: Diagnosis

Breach of duty in diagnosis is failure to take proper examinations or tests on the symptoms which cause the patient suffering. When the doctor is alleged breach of duty in diagnosis, this means that a wrong diagnosis has been made negligently. We can say that the breach of duty in this case must be established by the fact that the practitioner either omitted to carry out an examination or test which the symptoms indicated as

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[99] Al-Dusūqī, Ḥāshiyah ʿalā al-Sharḥ al-Kabīr, vol.4, p.317; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.321; Majmaʿ al-Ḍamānāt, p.48. See also al-Mabsūṭ, vol.16, p.14.

necessary or which no reasonably competent doctor would have diagnosed or the like. If there is failure by the doctor or practitioner in his diagnosis, he will be sued for negligence. Therefore, the doctor should not err and be neglectful in his diagnosis because the error and negligence of the doctor will threaten the life of the patient. Ibn Ukhuwwah clearly remarks regarding this matter saying that when the doctor comes to visit a patient, he must inquire (diagnose) of him the cause of his sickness and what pain he experiences. He must then prescribe a regimen for him of syrups and other medicaments and shall write a copy of it for the near relatives in the presence of those there with the patient. On the morrow he shall inquire into the (progress of the) disease and inspect (diagnose) the urine-flask and ask the patient whether the sickness has diminished or not. He shall then prescribe in accordance with the requirements of the case and write a copy which he shall give to the relatives. Similarly on the third day and the fourth until either the patient is healed or dies.[100]

CONDITIONS OF NON-LIABILITY OF THE DOCTOR

It is clear from the foregoing statement that there are five conditions for the doctor to be exempted from liability, namely:

[1] The doctor should be a qualified practitioner.

[2] He should treat his patient with the intention of curing him and with good intent.

[3] His treatment should conform to the principles of medicine and medical practice.

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[100] Ibn Ukhuwwah, Maʿālim al-Qurbah, p.167.

[4] He treats the patient with the permission of the patient or his heir, guardian, etc.

[5] Non-existence of *al-taᶜaddī*, mistake and negligence.

If all the above conditions are fulfilled, the doctor will not be liable for the consequences of his treatment. But in the absence of any of the five conditions, he will have to be liable for such consequences.[101]

LIABILITY OF PARA-MEDICAL STAFF

The para-medical staff attached to the doctor, whether veterinary surgeon or farrier or cupper or circumciser, are subject to the same injunction as is applicable to the medical practitioner. The circumciser, for instance, should know his job properly and should do the job with good intent and perform it with the intention of only circumcising the patient. His operation should conform to the principles of his specialized field of surgery and with the permission of the person to be circumcised or his guardian, etc.[102]

This part is elaborated by Ibn Qayyim's statement which maintains that the word *al-ṭabīb* used by the Prophet in his Ḥadīth implies: [1] one who diagnoses people's illnesses, treats their illness with his advice and prescriptions, known in Arabic as *al-ṭabāᵓiᶜī* (specialist in natural medicine); [2] one who uses his little stick (*mirwad*) for applying kohl to the eyelids of his patient, known in Arabic as *al-kaḥḥāl* (eye doctor, oculist); [3] one who operates on people by using a dissecting knife or scalpel (*mibḍaᶜ*)

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[101] For detail see ᶜAbd al-Qādir ᶜAwdah, al-Tashrīᶜ al-Jinā'ī, vol.1, p.523.

[102] See ᶜAbd al-Qādir ᶜAwdah, al-Tashrīᶜ al-Jinā'ī, vol.1, pp.523-524; al-Qarāfī, al-Furūq, vol.4, p.29.

and applies ointment or salve (*marāhim*), known in Arabic as *al-jarā'iḥī* (surgeon); [4] one who uses his razor (*mūsā*) in his treatment, known in Arabic as *al-khātin* (doctor of circumcision); [5] one who performs his treatment with a lancet (*rīshah*), known in Arabic as *al-fāṣid* (phlebotomist); [6] one who carries out his job with cupping-glasses (*maḥājim*) and a lancet (*mishraṭ*), known in Arabic as *al-ḥajjām* (cupper); [7] one who treats the patient by extraction (*khal'*) (from a limb or a vein, etc.), connection (*waṣl*) (of a limb or a vein, etc.) and dressing (*ribāṭ*) (of a wound, etc.), known in Arabic as *al-mujabbir* (orthopaedist); [8] one who excercises his treatment by hot iron or flatiron (*mikwāh*) and fire for cauterizing, known in Arabic as *al-kawwā'* (ironer or cauterizer); [9] one who brings his waterskin (*qirbah*) for the treatment, know in Arabic as *al-ḥāqin* (doctor of injection who gives a clyster- an injection of liquid into the bowel to wash it out). Their services are considered as similar to each other whether practised on animals or human-beings. Generally, they are referred to doctor (*al-ṭabīb*) by the public. Analogously, it is similar to the application of the word *al-dābbah* which is used for all animals in general.[103]

In short, all kinds of physicians mentioned above are subject to the same injuctions, jurisdictions, regulations and conditions as are applicable to the doctor or medical practitioner. Therefore, if the doctor is free from any liability if he treats his patient with the permission of the patient, the cupper or the phlebotomist or the circumciser or the farrier are also free from liability if they perform their job with permission. It has been confirmed in Tabṣirat al-Ḥukkām:

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[103] Ibn Qayyim, Zād al-Ma'ād, vol.3, p.110; Ibn Qayyim, al-Ṭibb al-Nabawī, pp.137-138.

"If a person permits a cupper to perform a cupping on him or a circumciser to circumcise his son or a farrier to bleed an animal and as a result of that, the person or the son or the animal dies or is injured, the cupper or the circumciser or the farrier will not be liable by reason that they are permitted to do so".[104]

[104] Tabṣirat al-Ḥukkām, vol.2, p.243.

CHAPTER SIX

NEGLIGENCE

INTRODUCTION

Tort regarding careless conduct or neglect of some care which we are bound to exercise towards anybody else is known as "tort of negligence". In Arabic, the term for negligence may be rendered as "*al-tafrīṭ*" or "*al-taqṣīr*".[1] They both literally mean "negligence" or "recklessness" or "carelessness" where a person failed to do what he ought to do. The word "*al-tafrīṭ*" is laid down in the Qur'ān:

> "Lest the soul should (then) say: Ah! woe is me!, in that I neglected (*farraṭtu*) (my duty) towards God, and was but among those who mocked".[2]

It has also been highlighted in a Ḥadīth:

> "There is no negligence (*tafrīṭ*) (of one's duty) in sleeping, the negligence of one's duty is not awaking until the time of the other (prayer) commences however".[3]

In legal terminology, the term *al-tafrīṭ* may be signified as the omission to do something which a prudent and reasonable man would do, or the doing of something which a prudent and reasonable man would not do. There is, however, no specific

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[1] Lane, An Arabic-English Lexicon, vol.2, p.2376 and p.2533; Tāj al-ᶜArūs, vol.19, p.533. See also Hans Wehr, A Dictionary of Modern Written Arabic, p.706 and p.768.

[2] Al-Qur'ān, 39:56.

[3] Cited in Lane, An Arabic-English Lexicon, vol.2, p.2376; Tāj al-ᶜArūs, vol.19, p.533.

definition for this term. Occasionally, the term of "*al-khaṭā'*" (mistake or misadventure) has been used by the classical and contemporary *fuqahā'* who render its signification as the same as *al-tafrīṭ*. Further, there is no systematic theory of negligence in the Islamic law of tort. All discussion of it which can be found in the manual texts are instances written by the *fuqahā'* on certain topics- mainly in the chapter of *al-jināyah* or *al-diyāt* or *al-ṣiyāl*. When these texts are looked at, it will be seen that the word *tafrīṭ* is not based on any theory as in the discussions in Western law. However, there is a contemporary Islamic treatise- al-Fiqh al-Manhajī ᶜalā Madhhab al-Imām al-Shāfiᶜī by Muṣṭafā al-Khin, ᶜAlī al-Sharbajī and Muṣṭafā al-Bughā which provides a small chapter to discuss the cases of negligence. That chapter is named as "*al-mas'ūliyyah al-taqṣīriyyah*". Other than that, Ṣubḥī Maḥmaṣṣānī and Muḥammad Aḥmad Sirāj have also briefly analysed cases which can be related to negligence in their books- al-Naẓariyyah al-ᶜĀmmah li al-Mūjabāt wa al-ᶜUqūd and Ḍamān al-ᶜUdwān fī al-Fiqh al-Islāmī. It is extremely difficult to formulate any general rule from the few instances given by the Islamic manual texts. As such, the researcher will attempt to study it based on the classical and contemporary manual texts.

Before that, we should know that some *fuqahā'* prefer to use the term "*farraṭa--->al-tafrīṭ*" in their writing like al-Sarakhsī, al-Ghazālī, Ibn Qudāmah, al-Nawawī, Ibn Farḥūn, Zakariyyā al-Anṣārī, Muḥammad al-Sharbīnī al-Khaṭīb, al-Bahūtī, Ibn Ḍūyān and others. At the same time, some of these have also used the word "*qaṣṣara--->al-taqṣīr*" in giving the same meaning as *al-tafrīṭ*. They are al-Ghazālī, al-Nawawī, Zakariyyā al-Anṣārī and Muḥammad al-Sharbīnī al-Khaṭīb. Others prefer to use the word "*al-taqṣīr*", like al-Marghīnānī, Khalīl b. Isḥaq, al-Ābī, al-Mawāq and al-Ḥaṭṭāb.

The word "*al-ihmāl*" is also occasionally used by the *fuqahā'* in their texts to convey the same meaning as *al-tafrīṭ* and *al-taqṣīr*. These include Ibn Farḥūn and Muḥammad al-Sharbīnī al-Khaṭīb.

The present study will be divided into a few sub-topics, viz: duty of care and no duty of care, duty of persons using highway to take care, cases of collision, duty of carriers of passengers or goods, duty of bailees of goods and duty of care of persons in charge of children.

DUTY OF CARE AND NO DUTY OF CARE

Not every instance of carelessness resulting in harm and injury will lead to liability in the tort of negligence. Liability is limited by reference to various cases of which the most significant is the duty of care. Contrariwise, in the cases where the defendant admits the accident but denies that it is solely caused by his own negligence or owes no duty of care or that he owes no duty to protect the plaintiff from injury, the defendant is not held liable because the injury which happens is outside his volition.

Regarding the duty of care, al-Marghīnānī remarks:

> "It is a rule that the right of passing on the highway is allowed to the whole community under the condition of safety; for it is the exercise of a privilege with respect to a person on one side and with respect to others on the other side. It means the right of passage is shared and participated by the whole community and in the interest both parties. It is moreover to be observed that a restriction to the condition of safety can only obtain in matters where the duty of care is practicable (*fī mā yumkin al-taḥarruz*); if, on the other hand, the duty of care is impracticable (*fī mā*

lā yumkin al-taḥarruz), no duty of care is owed to any passer-by".[4]

Thus, it becomes duty of care for a man to prevent the animal he is riding from treading on another man or property of another, but the first man owes no duty of care in the case of *al-nafḥah* by his animal's hind-legs or tail since he cannot look after it while he is travelling.[5]

No action lies in negligence unless there is damage and a lack of the duty of care. Hence, if a person driving an animal along and the animal's saddle (*sarj*) falls off and kills or injures a man, the driver is responsible as having been guilty of a *mutaᶜaddin* and in neglecting (*taqṣīr*) to secure the saddle properly upon the animal. If it had been sufficiently secured, it could not have fallen off.[6] A similar decision could be imposed if a load which is carried by a man upon the highway falls upon any other person so as to kill or injure him or destroy his property.[7] The cases above could be held as follows:

1- The driver or the carrier owes a duty of care to the victim, as it is reasonably foreseeable that the saddle or the load would be likely to cause injury to any person if it falls down.

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[4] Al-Hidāyah, vol.4, pp.197-198. See also Majmaᶜ al-Anhur, vol.2, p.659.

[5] See this discussion in the topic of "Liability for Animals", in the sub-topic: the case of *al-nafḥah*, pp.210-214.

[6] Al-Hidāyah, vol.4, p.200; al-Fatāwā al-Hindiyyah, vol.6, p.43; al-Mabsūṭ, vol.26, p.189; Radd al-Muḥtār, vol.6, p.606; Majmaᶜ al-Anhur, vol.2, p.661; al-Shaybānī, Kitāb al-Aṣl, vol.4, p.499; al-Jawharah al-Nayyirah, vol.2, p.136; Ḍamān al-Mutlifāt, p.415. See also al-Shaybānī, al-Amālī, p.52; al-Jāmiᶜ al-Ṣaghīr, pp.515-516; al-Kanawī, al-Nāfiᶜ al-Kabīr printed with al-Jāmiᶜ al-Ṣaghīr, p.515; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.456. In this case, the position of the leader or rider is similar to the position of driver in bearing the liability. If there is a leader as well as a driver, in this case, both of them concurrently incur liability. See Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.456.

[7] Al-Hidāyah, vol.4, p.194; al-Fatāwā al-Hindiyyah, vol.6, p.41; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.251, p.456 and p.458; al-Jāmiᶜ al-Ṣaghīr, pp.514-515; al-Jāmiᶜ al-Ṣaghīr in the margin of Kitāb al-Kharāj, p.119; Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.306; Jāmiᶜ al-Fuṣūlayn, vol.2, p.88; Radd al-Muḥtār, vol.5, p.523; Majallah, article 926. See also al-Kanawī, al-Nāfiᶜ al-Kabīr printed with al-Jāmiᶜ al-Ṣaghīr, p.514; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.423.

2- He fails to take reasonable care of his saddle or load with regard to the passer-by.

On the other hand, if a cloak (*ridā'*) which is worn by a person upon the highway falls upon any man or upon the road so as to occasion an injury or the death of that man, the wearer of the cloak is not responsible. It is because the wearer has no duty to take care of his cloak. The wearing of it is absolutely permitted and allowed. The restriction in using it to the condition of safety would operate as a hardship.[8]

Here it becomes necessary to indicate briefly the relationship between the wrongful act which is carried out by a person and the duty of care. It should be remembered that if a person doing any wrongful act and an injury happens thereby, the liability will definitely be imposed on him irrespective of whether his act is put under the duty of care or not. For instance, a public road is meant for traffic and any other use of it amounts to *al-taᶜaddī*. Hence, if a man makes a projection of *rawshan* or *mīzāb* 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 responsible for *diyah* which is ascribed to his *ᶜāqilah*. He is held guilty as an indirect *mutaaddin* in having erected such a projection with a lack duty of care over the public road.[9] Contrast this case with the decision in the case that if a person constructs a bridge or lays a plank in the highway without the permission of the authority, and another person knowingly and wilfully

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[8] Al-Hidāyah, vol.4, p.194; al-Shaybānī, al-Amālī, pp.51-52; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.271; al-Jāmiᶜ al-Ṣaghīr, p.515; al-Jāmiᶜ al-Ṣaghīr in the margin of Kitāb al-Kharāj, p.119; al-Kanawī, al-Nāfiᶜ al-Kabīr printed with al-Jāmiᶜ al-Ṣaghīr, p.515. According to Muḥammad b. al-Ḥasan al-Shaybānī, if the person is wearing something which is not normally worn by common people, his position is considered the same as the person who carrying a load on the highway. See al-Hidāyah, vol.4, p.194; al-Shaybānī, al-Amālī, p.52; Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.271.

[9] Al-Hidāyah, vol.4, p.191; Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.284; Minhaj al-Ṭullāb printed with Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.284; Mughnī al-Muḥtāj, vol.4, p.85.

(*taʿammada*) passes over such a bridge or plank, falls off and perishes, the first person is not responsible even though he is *mutaᶜaddin* in creating the cause (*tasbīb*), yet the second person is a wilful agent known to be a *mutaᶜaddin* and *mubāsharah* in his own act and therefore his injury is referred to himself.[10] This is based on a legal maxim: if there are both *al-mubāshir* and *al-mutasabbib*, the judgement falls on the *mubāshir*.[11] Contrariwise, if the second person is not wilfully and knowingly passing over it, the first person is liable on the grounds that he has not had the permission from the authority and has shown a lack of the duty of care for it as well as being negligent, not only by constructing but also by maintaining the bridge.

Based on all cases mentioned above, we can hold that the principle of the duty of care is attached to anybody who is either *mubāshir* or *mutasabbib* in a particular case. However, if the *mubāshir* and *mutasabbib* are both involved in a case, responsibility for the duty of care shall be attached to the former.

DUTY OF PERSONS USING A HIGHWAY TO TAKE CARE

Every person using a highway or any other place frequented by the public owes a duty to take care as regards the persons and property of others. So if a person, driving or riding negligently on a highway, runs over, or otherwise damages, another person on

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[10] Al-Hidāyah, vol.4, p.194; al-Jāmiᶜ al-Ṣaghīr, p.515; al-Jāmiᶜ al-Ṣaghīr in the margin of Kitāb al-Kharāj, pp.119-120.

[11] Majallah, article 90; The Jordan Civil Code, section 258.

the highway, a claim can be made against him for the damage suffered.[12] This rule does not depend on the special nature of highways. It applies generally to all places where persons are at liberty to meet others. As such, those who go personally or bring property where they know that they or it may come into collision with other persons or the property of others, have, by the law of tort, a duty to use reasonable care and skill to avoid such a collision. Thus, anyone who carries wood upon his back or loads an animal with it, and then he or his animal collides with a building and the wood falls down, is responsible for the consequences of the wood falling. Similarly, when a person carrying wood (or someone in charge of an animal with a load of wood) enters a market and causes damage to the person or property of another, he is responsible if there is a crowd, but not otherwise by reason that the negligence (*al-taqṣīr*) and the duty to take reasonable care (*al-iḥtirāz*) also applies to the person injured or the owner of the property.[13] He is also responsible if the wood tears the clothes of the blind man and also a man whose position does not face the animal (*mustadbir*) at the moment it is passing along the road provided that the person does not give the man a warning to move quickly to one side so as to avoid the danger. This is because the accident happens on account of the person's negligence. Otherwise, if the warning is given and a duty to take reasonable care is taken, while the blind man or the other man have been imprudent, the

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[12] The duty of care on the highway could be referred to the cases mentioned earlier, pp.350-353 and also to the discussion of "Liability for Animals on the Highway" and "Stopping or Tying Up an Animal on the Public Road or at the Market", pp.203-210.

[13] Minhāj al-Ṭālibīn wa ʿUmdat al-Muftīn, p.306; Minhaj al-Ṭullāb prited with Minhāj al-Ṭālibīn wa ʿUmdat al-Muftīn, p.306; Mughnī al-Muḥtāj, vol.4, pp.205-206; Fatḥ al-Wahhāb, vol.2, p.207; Zakariyyā al-Anṣārī, Sharḥ al-Minhaj in the margin of Ḥāshiyat al-Jamal ʿalā Sharḥ al-Minhaj, vol.5, p.177; cf., al-Mudawwanah, vol.3, pp.456-457.

liability is not due on the person.[14] Al-Nawawī, in addition, lays down the following rule: the owner of the animal is responsible for any injury which occurs to the property of another if there is no negligence on the part of the owner of the property. Contrariwise, if the owner of the property is negligent where he has, for example, deposited his property or thing on the road or placed it before the animal, the owner of the animal would not be rendered liable if any damage is caused by his animal to such a property or thing.[15]

In brief, the rule of duty of care in the highway applies equally to persons on railway stations, in shops, or any other places where people congregate. In general, a common cause of action in negligence arises out of a carrier of a load or a driver of an animal, but any other user of the road or a pedestrian on the highway also owes a duty of care to the other road users, and if he fails to fulfil it and causes damage, he is liable. When a man steps from the kerb into the roadway, he owes a duty to traffic which is approaching him within risk of collision to exercise due care. He may cross where he likes, provided he takes reasonable care.

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[14] Minhāj al-Ṭālibīn wa ʿUmdat al-Muftīn, p.306; Minhaj al-Ṭullāb printed with Minhāj al-Ṭālibīn wa ʿUmdat al-Muftīn, p.306; Mughnī al-Muḥtāj, vol.4, p.206; Zakariyyā al-Anṣārī, Sharḥ al-Minhaj in the margin of Ḥāshiyat al-Jamal ʿalā Sharḥ al-Minhaj, vol.5, p.177. See also Sulaymān al-Jamal, Ḥāshiyat al-Jamal ʿalā Sharḥ al-Minhaj, vol.5, p.177; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.423; Fatḥ al-Wahhāb, vol.2, p.207; Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ, vol.4, p.129; Sharḥ Muntahā al-Irādāt, vol.2, p.431; al-Fatāwā al-Hindiyyah, vol.6, p.54; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.457. Al-Qaffāl gives his *fatwā* saying: "If a person tries to overtake a donkey which is carrying a load of firewood on the highway and his garment is hung by the firewood which causes a tear, the driver of the donkey is not liable". See Mughnī al-Muḥtāj, vol.4, p.206.

[15] Minhāj al-Ṭālibīn wa ʿUmdat al-Muftīn, p.306. See also Mughnī al-Muḥtāj, vol.4, p.206; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.469; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.423; Fatḥ al-Wahhāb, vol.2, p.207; al-Iqnāʿ, vol.2, p.243.

Cases of Collision

A person who receives injuries on the highway or at sea cannot recover damages unless the person in charge of the animal (vehicle) or the ship is guilty of negligence or *al-taʿaddī* in its management. The collision on the highway will be considered in this section. However, the collision of ships has been discussed in the topic of "Liability for Chattels".[16]

The general rule is that the animal (vehicle) should be driven at a speed which enables the driver to stop and to control it within the limits of his vision, particularly having regard to the weather and the state of the road, and failure to do this will very likely result in the driver being held responsible for the collision.

In the case of two riders driving their animals into each other and killing each other or one of them, the *fuqahāʾ* have a different opinion with regard to the liability which is imposed. Their different opinions could be divided into two groups:

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[16] See pp.244-248.

The first group

The Ḥanafī,[17] Mālikī[18] and Ḥanbalī[19] schools have opined that both of them are liable for *diyah* for each other.

The argument why a full *diyah* should be imposed is that the death of each party must be referred solely to the act of the other, and not in any degree to his own act. His act (namely passing along the highway) is absolutely permitted, and an act which is acted according to a permission does not amount to an occasion of responsibility.[20] In other words, it may be said that a very high standard of care is expected of highway users and accordingly they would not do or omit anything which they should reasonably anticipate might injure themselves.

It is to be observed, however, that a full *diyah* for each rider is due only where they have happened to rush against each other by misadventure (*al-khaṭā'*), for where they have done so wilfully (*al-ᶜamd*), a half *diyah* only is due on account of each by

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[17] Al-Hidāyah, vol.4, p.199; Badā`iᶜ al-Ṣanā`iᶜ, vol.7, p.273; al-Durr al-Mukhtār, vol.2, pp.467-468; Majmaᶜ al-Anhur, vol.2, p.661; al-Durr al-Muntaqā in the margin of Majmaᶜ al-Anhur, vol.2, p.661; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.605; Majmaᶜ al-Ḍamānāt, p.189; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.444; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.5, p.49; al-Shaybānī, Kitāb al-Aṣl, vol.4, p.500; Bidāyat al-Mujtahid, vol.2, p.313; Tabyīn al-Ḥaqā'iq, vol.5, p.150.

[18] Bidāyat al-Mujtahid, vol.2, p.313; al-Kinānī, al-ᶜAqd al-Munaẓẓam li al-Ḥukkām in the margin of Tabṣirat al-Ḥukkām, vol.2, p.81; al-Mudawwanah, vol.3, p.499 and vol.4, p.666; Mukhtaṣar, p.274; al-Ābī, Jawāhir al-Iklīl, vol.2, p.258; al-Kāfī, p.606; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.243; al-Khirshī, Fatḥ al-Jalīl ᶜalā Mukhtaṣar Khalīl, vol.8, p.12. Nevertheless, the opinion of Mālik himself as is reported by Ibn Qudāmah in his book al-Mughnī says that in this case the *ᶜāqilah* of each party owes a half *diyah* only, not a full *diyah*. It is followed and acknowledged by the author of Mūjabāt, Ṣubḥī Maḥmaṣṣānī. See vol.1, p.211. But, according to the majority of the *fuqahā'* of this school, a full *diyah* should be imposed on each.

[19] Al-Khiraqī, Mukhtaṣar al-Khiraqī, p.117; al-Mughnī wa al-Sharḥ al-Kabīr, vol.10, p.359; ᶜUmdat al-Fiqh, p.121; al-ᶜUddah Sharḥ al-ᶜUmdah, pp.459-460; Manār al-Sabīl, vol.2, p.334; Sharḥ Muntahā al-Irādāt, vol.2, p.431; Majallat al-Aḥkām al-Sharᶜiyyah, article 1452, p.452.

[20] Tabyīn al-Ḥaqā'iq, vol.5, p.150; al-Hidāyah, vol.4, p.199; Majmaᶜ al-Anhur, vol.2, p.661.

reason that each of them is considered as a murderer of himself.[21]

As to the elaboration of this case, the jurists of the Ḥanafī school mention that if two men are riding on two different animals, rush against each other and a collision happens in consequence so that they both die, a *diyah* for each is due from the *ᶜāqilah* of the other.[22] If the collision happens through a horseman coming from behind (*al-mu'akhkhir*) and colliding with another who is moving in front of him (*al-muqaddim*), the liability is due on *al-mu'akhkhir*, not on *al-muqaddim* (or *al-sā'ir*)[23] even though, in other situation, the collision is caused by *al-muqaddim* (or *al-sā'ir*).[24] This may be because the position of one who is coming from behind is considered to have a greater awareness of the situation and more chance to control his animal in order to avoid the collision. If the collision happens, it will be evidence that the negligence is on his part. If one horseman is moving (*sā'ir*) and the other is stationary (*wāqif*), the liability is ascribed to the *sā'ir* (that means the *diyah* falls upon the *ᶜāqilah* of the *sā'ir* and the compensation for the animal is due from the horseman himself).[25] This decision could

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[21] Tabyīn al-Ḥaqā'iq, vol.5, p.151; al-Hidāyah, vol.4, p.199; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.5, p.49.

[22] Al-Hidāyah, vol.4, p.199; al-Durr al-Mukhtār, vol.2, pp.467-468; Majmaᶜ al-Anhur, vol.2, p.661; al-Durr al-Muntaqā in the margin of Majmaᶜ al-Anhur, vol.2, p.661; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.605; Majmaᶜ al-Ḍamānāt, p.189; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.444; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.5, p.49; al-Shaybānī, Kitāb al-Aṣl, vol.4, p.500; Bidāyat al-Mujtahid, vol.2, p.313; Tabyīn al-Ḥaqā'iq, vol.5, p.150.

[23] Radd al-Muḥtār, vol.6, p.605; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.444; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.5, p.49; Majmaᶜ al-Ḍamānāt, p.189.

[24] Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.444; al-Ikhtiyār li Taᶜlīl al-Mukhtār, vol.5, p.49; Majmaᶜ al-Ḍamānāt, p.189.

[25] Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.444.

also be applied to the collision or accident among pedestrians (*māshiyūn*).[26] That means a pedestrian on the highway owes a duty of care to the other road users, and if he fails to fulfil it and causes damage, he is liable for *diyah*. Further, when a man steps from the kerb into the roadway, he owes a duty to traffic which is approaching him to exercise due care to avoid being hit by the traffic. Thus, if a pedestrian steps into the path of an oncoming horseman or another pedestrian with the result that the rider of the horse or the latter pedestrian is killed, the former pedestrian is held liable. He may cross where he likes, provided he takes reasonable care.

The opinion of the Mālikī school as regards this issue maintains that if the encounter or collision has taken place without criminal intent (means: *al-khaṭā'*), the *diyah* for the persons killed or wounded will be due from the *ʿāqilah* of each one of the persons, but the compensation for the horses killed in the encounter or other goods lost in the collision, will be due from each individual person.[27] However, this school (in the opinions of Ibn Shāsh and Ibn al-Ḥājib) contradicts the Ḥanafī school in the case of collision which has taken place wilfully where the *qiṣāṣ* is due on the person who does not die in such a collision.[28] This rule may be applied to the case of collision among the horsemen or the pedestrians or the collision between the horseman and the pedestrian or the collision between two boats. In addition, if the encounter or collision has taken place between two pedestrians who are carrying an earthenware jar respectively and the

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[26] See Fatāwā Qāḍikhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.444; al-Ikhtiyār li Taʿlīl al-Mukhtār, vol.5, p.49.

[27] Al-Mudawwanah, vol.4, p.666; Mukhtaṣar, p.274; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.243; al-Ābī, Jawāhir al-Iklīl, vol.2, p.258; al-Kāfī, p.606.

[28] Al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.243.

earthenware jars are broken in consequence, damages are due from each one of the pedestrians. Equally if one of them who is involved in that collision where his earthenware jar is not broken, he would be liable for damages to the other one.[29]

Lastly, the opinion of the Ḥanbalī school, in elaborating this matter, is not greatly different to the discussion made by the Ḥanafī and Mālikī schools. One of the Ḥanbalī jurists, Ibn Ḍūyān indicates this case in his manual text that if two free (*ḥarrān*) and competent (*mukallafān*) persons collide with each other and they both fall down and die, a *diyah* will be due for each from the *ᶜāqilah* of the other as each of them is the mediate causation of killing the other. It is related on the authority of ᶜAlī that the death of each individual resulting from a collision with another amounts to killing by misadventure (*khaṭāʾ*).[30] That means the liability in this case is a *diyah* for each of them. In a further case, if two pregnant women collide with each other, the judgement of their lives is as what has been stated above, and each one bears one-half of the *ḍamān* (*diyah*) for the unborn child due to their participation in his death.[31]

Whoever gives a ride to two small boys when he is not a guardian over either of them, and they collide and die, then the *diyah* for both of them is from his property as their death is caused by his mediate causation, since he is a *mutaᶜaddin* in that manner. On the other hand, if those boys ride by themselves or their *walī* gives them a ride and they collide, then they are considered as mature persons (*bālighīn*) who have had a

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[29] Al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.243.

[30] Manār al-Sabīl, vol.2, p.334. See also al-Khiraqī, Mukhtaṣar al-Khiraqī, p.117; al-Mughnī wa al-Sharḥ al-Kabīr, vol.10, p.360. As to the judgement made by ᶜAlī, see Naṣb al-Rāyah, vol.4, p.386, and also cited in al-Shaybānī, Kitāb al-Aṣl, vol.4, p.500.

[31] Manār al-Sabīl, vol.2, p.334. See also al-Mughnī wa al-Sharḥ al-Kabīr, vol.10, p.360.

misadventure. The *ʿāqilah* of each of them is liable for *diyah* for the other, and each one pays for the damage caused to the property of the other.[32]

The Ḥanbalī school of law coincides in opinion with the Ḥanafī school in the case of the collision between a horseman who is moving and another who is stationary.[33] Nevertheless, this school makes the condition that the pedestrian or the horseman who is stationary shoud not suddenly deviate or swerve from his position. If the collision happens in such a way, both of them are liable for *diyah* for each other because they are considered as two persons who are moving and the damage which occurs is also caused by both of them. In a case where the pedestrian or the horseman who is stationary is *mutaʿaddin* or negligent like sitting in a narrow road, the liability should be imposed on him alone, not on the *sāʾir* by reason that the damage is linked to his *taʿaddin.*[34] In the light of the collision which has happened between pedestrian, the opinion of the jurists of this school is not very different from the opinion of the Mālikī school. They say that the *qiṣāṣ* in general would not be imposed either in case of the collision which happens wilfully or one which happens by misadventure. They argue that the death will mostly not take place in the case of a collision.[35] If a collision so happens there should be an assessment as to whether death was likely to take place or not. If it was likely to take

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[32] Manār al-Sabīl, vol.2, p.334.

[33] See al-Khiraqī, Mukhtaṣar al-Khiraqī p.117; al-Mughnī wa al-Sharḥ al-Kabīr, vol.10, p.360; ʿUmdat al-Fiqh, p.121; al-ʿUddah Sharḥ al-ʿUmdah, p.460.

[34] Al-Mughnī wa al-Sharḥ al-Kabīr, vol.10, p.370; Sharḥ Muntahā al-Irādāt, vol.2, p.431; ʿUmdat al-Fiqh, p.121; al-ʿUddah Sharḥ al-ʿUmdah, p.460; Majallat al-Aḥkām al-Sharʿiyyah, article 1453, p.452.

[35] Al-Mughnī wa al-Sharḥ al-Kabīr, vol.10, p.360.

place, the punishment of retaliation (*al-qawād*) should be imposed.[36] Otherwise if the death was unlikely to take place in such a collision, the case is considered as wilful misadventure (*ᶜamd al-khaṭāʾ*)[37] or in other words, manslaughter (*shibh ᶜamd*).[38] In this case, it seems quite similar to the Ḥanafī school opinion, but however, the Ḥanbalī school does not mention whether the *diyah* is full or half.

The second group

The Shāfiᶜī school and Zufar have opined that in this case the *ᶜāqilah* of each party owe a half *diyah* only. They argue that as the death of both of them has resulted out of the actions of both of them, each is only responsible for half of the death of the other. Each party having died in consequence of his act and the act of the other, or in other words, the actions of each other.[39]

In elaborating this case, the Shāfiᶜī school maintains that where two persons unintentionally collide with each other (either two horsemen, or two pedestrians, a horseman and a pedestrian, either directly or one from behind the other), the *ᶜāqilah* of each is mutually liable for half *diyah mukhaffafah* (*diyah* on the lighter scale i.e. the action is accidental) if the accident has caused the death of both. This case is considered

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[36] Sharḥ Muntahā al-Irādāt, vol.2, p.431.

[37] Al-Mughnī wa al-Sharḥ al-Kabīr, vol.10, p.360.

[38] Sharḥ Muntahā al-Irādāt, vol.2, p.431.

[39] Al-Umm, vol.6, pp.238-239; al-Wajīz, vol.2, p.151; Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.285; Minhaj al-Ṭullāb printed with Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.285; Mughnī al-Muḥtāj, vol.4, pp.89-90. See also Bidāyat al-Mujtahid, vol.2, p.313; al-Hidāyah, vol.4, p.199; Tabyīn al-Ḥaqāʾiq, vol.5, p.150; Majmaᶜ al-Anhur, vol.2, p.661; Badāʾiᶜ al-Ṣanāʾiᶜ, vol.7, p.273.

as homicide by misadventure. This judgement is also applied to the case of two people colliding sideways (*munkibayn*) or crashing head on (*mustalqiyayn*), or between *munkiban* and *mustalqiyan*. If the collision is intentional on both sides, the *ʿāqilah* are responsible for half *diyah mughallaẓah* (*diyah* on the heavier scale i.e. the action is intentional). This case is deemed as manslaughter (*shibh ʿamd*) because the collision mostly does not cause death. That is why the *qiṣāṣ* (i.e. the responsibility of death) should not be imposed. Further, if the element of intention could be proved upon one side only, each should be liable to pay the *diyah* prescribed for its particular case. In such a collision where both persons die thereby, they are charged with double expiation (*kaffāratayn*). One for the death of one side, and the another one for the other side. In addition, where the death of two persons along with their mounts is due to a collision, both persons are charged with *diyah* and *kaffāratayn* including that each person should pay half value of the other's mount. All rules aforesaid are not merely applied to the collision between two adults, but are also applied to the collision between two minors or two lunatics.[40]

According to some jurists (*qīl*), if the *walī* (of the minor or the lunatic) permits him to ride, the *walī* must personally guarantee any injury which happens to him. If a foreigner has caused the minor and the lunatic to ride without the permission of his *walī*, jurists of this school, as is reported by Ibn al-Mundhir, consider him to be responsible for the *diyah* for both of them and also responsible for the damages of the animal. This

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[40] Minhāj al-Ṭālibīn wa ʿUmdat al-Muftīn, p.285; Minhaj al-Ṭullāb printed with Minhāj al-Ṭālibīn wa ʿUmdat al-Muftīn,p.285; Mughnī al-Muḥtāj, vol.4, pp.89-90; al-Sirāj al-Wahhāj, p.506.

is because he is regarded as having committed *al-taᶜaddī* in his actions.[41]

Additionally, a collision between two pregnant women which causes the death of both, and also results in abortion, the *ᶜāqilah* on both sides are responsible for half *diyah* as mentioned earlier and four *kaffārāt* are charged for : [1] the pregnant woman herself, [2] her foetus, [3] the other pregnant woman and [4] the foetus of the other pregnant woman, by reason that both of them have participated in causing death involving four human beings; while the *ᶜāqilah* of the two parties, therefore, owe half *ghurrah* for each party (which means: a half for the foetus of a party and another half for the foetus of the other) which is prescribed for abortion. This is contrary to the liability for *diyah* where the *ᶜāqilah* is only responsible for one side and not for the other.[42]

DUTY OF CARRIERS OF PASSENGERS OR GOODS

Carriage by Sea

Considerations of reasonable care should be taken and applied to the carriage of passengers and their luggage by sea, although the liability of the shipowner is usually regulated by contract. Apart from contract, reasonable care must be taken to provide access to the sleeping berths, to make the cabins safe, to provide suitable space for luggage, and to warn passengers against the slippery condition of the deck and other

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[41] Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.285; Minhaj al-Ṭullāb printed with Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.285; Mughnī al-Muḥtāj, vol.4, pp.90-91; al-Sirāj al-Wahhāj, p.506.

[42] Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.285; Mughnī al-Muḥtāj, vol.4, p.91; al-Sirāj al-Wahhāj, p.506.

places.

It is to be observed that the Ḥanafī jurists rule where a ship is sunk on account of the winds and waves, or it collides with a mountain without any fault of those sailing the ship, they, according to consensus, are not liable. Otherwise, they would be liable if the sinking of the ship resulted from their contributory act, either their actions amounted to exceeding normal practice or not. The position of the master and his crew are considered as *ajīr mushtarak* (common carrier). Likewise, if water enters the ship and damages the luggage, the master, according to consensus, is liable if the incident results from his tortious conduct or his contributory act of letting the water enter. If, however, the water flows into it without his contributory act and it is not possible to take reasonable care (*lam yumkin al-taḥarruz ᶜanh*), he is not liable. Nevertheless, Abū Ḥanīfah himself opines that he is not liable even though he can prevent the water from flowing in. In contrast, his two disciples Abū Yūsuf and Muḥammad b. al-Ḥasan al-Shaybānī give their views that he is liable.[43]

Further, this school discusses whether the owner of goods accompanies his goods or not on a voyage. If the goods are not accompanied by their owner, the responsibility for them belongs to the master. Hence, if the owner escorts his goods, the master is not liable for any damage which occurs to the goods unless he has committed an action which exceeds normal practice on the voyage.[44]

The Mālikī jurists consider the liability of a shipmaster or sailor (*nūtī*) whose

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[43] Majmaᶜ al-Ḍamānāt, p.48; al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.5, p.95. See also Radd al-Muḥtār, vol.6, p.66 and p.67; al-Durr al-Mukhtār printed with Radd al-Muḥtār, vol.6, p.66.

[44] Majmaᶜ al-Ḍamānāt, p.48; al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.5, p.95; Badā'iᶜ al-Ṣanā'iᶜ, vol.4, p.210; Radd al-Muḥtār, vol.6, p.67.

ship is wrecked and conclude that he is not liable for any loss or damage as a consequence of a permissible act such as changing, hoisting, and adjusting the sails of a ship according to the winds and waves or any other customary duty. Thus, he is allowed to accept the usual freight or its equivalent so long as the load does not cause water to come over the topsides. If the ship is later wrecked owing to the fury of the sea (*hayajān al-baḥr*) or violent winds (*hayajān rīḥ*), the shipowner or master is not liable, provided that he did not exceed the load line limit when loading the cargo.[45]

Mālik relates that when the owner of goods is aboard the ship, it makes no difference whether the goods are destroyed by *force majeure* (*quwwah qāhirah*) or any other cause, because the shipowner (*ṣāḥib al-safīnah*) is not liable when an owner accompanies his goods on a voyage.[46]

According to Ibn Abī Firās, a sailor, such as the shipowner, is a skilled professional, and thus, he is an *amīn* (trustee) and not liable for any loss or damage unless he has been negligent or has committed *al-taᶜaddī*.[47] Mālik says:

> "Every employee (*ajīr*) or shepherd or workman who performs a task for you in your house, or veterinary (*bayṭār*) or doctor and others who have similar work, and a camel-driver, each of these is liable if they have caused a transgression (*taᶜaddū*) and the (master of) ship in my opinion is in the same position".[48]

This equating of (the master of) ship and a shepherd results in a ship, and consequently

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[45] Al-Dusūqī, Ḥāshiyah ᶜalā al-Sharḥ al-Kabīr, vol.4, p.27; Mukhtaṣar, p.244; al-Ābī, Jawāhir al-Iklīl, vol.2, p.191; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.429.

[46] Al-Mudawwanah, vol.3, p.501.

[47] Ibn Abī Firās, "Kitāb Akriyāt al-Sufun", fol. 50b. Cited in Deborah Rice Noble, The Principle of Islamic Maritime Law, (Unpublished PhD. Thesis), p.174. See also al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.429.

[48] Al-Mudawwanah, vol.3, p.502.

a shipmaster, being treated as an *amīn* and therefore being not liable except for *taᶜaddin* or negligence.[49]

Saḥnūn notes that where a ship is wrecked because (the measure of freight by) the sailors (exceeds the ship's load lines), they are not liable unless they commit *al-taᶜaddī* in the course of exercising their skill.[50] It could be understood that if it is established that they have transgressed and been negligent, then they are liable for all of what is in the ship, including both cargo and passengers.[51]

It is reported in al-Mughnī, the Ḥanbalī jurist al-Qāḍī clearly concurs with the jurists of other schools as mentioned above saying:

> "If the owner of the goods travels aboard the same ship as his goods, or a rider on a beast which also carries the rider's goods, the owners of the ship and the beast are not liable for any damage to the goods because they are still in the owner's care".[52]

This is also the view of the Mālikī and Shāfiᶜī schools.[53] However, Ibn ᶜAqīl disagrees with those opinions. His contrary view is that if the goods are damaged by the oar (*jadhf*) of the sailor, or by being fastened tightly by the hirer (*al-mukārī*) or the like, the sailor or the hirer is liable whether the owner of the goods accompanies his goods or not, because the obligation of liability for him is due to the offence (*jināyah*) of his own

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[49] Al-Rawḍ al-Murbiᶜ, p.324; al-Mughnī, vol.5, p.495.

[50] Al-Mudawwanah, vol.3, p.501. See also al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.429.

[51] Al-Mudawwanah, vol.3, p.502; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.429.

[52] Al-Mughnī, vol.5, p.480.

[53] Al-Mughnī, vol.5, p.480. See also al-Mudawwanah, vol.3, p.501; Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.162; Mughnī al-Muḥtāj, vol.2, p.351.

hand.[54] It could be understood that a common carrier who holds himself out as engaged in the business of carrying the goods of all and sundry from place to place, is liable for any loss of, or injury to, the goods when he commits *al-taᶜaddī* or negligence during carrying them, irrespective of whether the owner accompanies them or not.

Al-Bahūtī concurs with Ibn ᶜAqīl when he mentions that:

> ".... a sailor (*mallāḥ*) is liable for any loss or damage resulting from his hand or oar or anything which is aboard the ship whether the owner of property accompanies it or not. Similarly, the liability is ascribed to the camel driver (*jammāl*) for any loss or damage caused by his hand by driving and leading the animal, and also by cutting the rope which is bound to such a thing".[55]

In general, *al-ajīr al-mushtarak*, like the sailor or the camel driver or the carrier or the cooker or the fuller or the baker, is definitely liable for what is destroyed by his hand. This is the opinions of ᶜUmar, ᶜAlī, ᶜAbd Allāh b. ᶜAtabah, Shurayḥ, Abū Ḥanīfah, Mālik and a view of al-Shāfiᶜī. In another view of al-Shāfiᶜī, he is not liable as long as he does not commit *al-taᶜaddī* (*mā lam yataᶜadd*-or we can say he does not commit a negligent act).[56]

The shipowner or master is not liable where he is a skilled person unless he commits *al-taᶜaddī* or negligence:

> "If he is a skilled person, he is not liable because he is a real *amīn*. If there is a disagreement about whether he is a simple employee (*ajīr*) or a skilled worker (*mutabarraᶜ*), his word that he is skilled absolves him from liability for what is destroyed in his custody by theft or without his act so long as he has not been negligent (*yufarraṭ*), because the property

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[54] Al-Mughnī, vol.5, pp.480-481.

[55] Sharḥ Muntahā al-Irādāt, vol.2, p.378.

[56] Al-Mughnī, vol.5, p.479.

in his hand is *amānah* and he is like the trustee (*mūdaᶜ*).[57]

To sum up, the shipowner or carrier, etc., who may be either an *ajīr khāṣṣ* or an *ajīr mushtarak*, is not liable where it is established that he has not *al-taᶜaddī* or been negligent and otherwise he incurs liability where he commits *al-taᶜaddī* or negligence.[58]

Road carriage

The general principle of negligence set out above in relation to carriage by sea applies also to carriage by road. Thus, carriers of passengers by any sort of carriage or conveyance owe to passengers or goods a duty of taking reasonable care to carry them safely. They must use reasonable care to see that the tyre and other apparatus is reasonably safe. It is *prima facie* evidence of negligence if the wheel of a carriage is wrenched off by something. The duty of care arises from the fact that the passenger is being carried with the knowledge and consent of the carrier; and it applies whether the carrier is doing it for nothing or not, but not if the passenger is a *mutaᶜaddin* (trespass).

It must be noted that a carrier of passengers or goods, in general, should guarantee the safety of them. However, the liability will only be ascribed to him if he has committed *al-taᶜaddī* or been negligent, otherwise, he will not be liable. Mālik b. Anas says:

"A man who is hired to load goods on an animal and then goods are

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[57] Kashshāf al-Qināᶜ ᶜan Matn al-Iqnāᶜ, vol.4, pp.35-36. This case is like the case of expert and skilled doctor who is not liable upon his treatment. See al-Rawḍ al-Murbiᶜ, p.324; al-Mughnī, vol.5, p.490.

[58] Al-Rawḍ al-Murbiᶜ, p.324; al-Mughnī, vol.5, pp.479-481.

> damaged by falling off which is caused by the breaking of the rope which tied them up, or the animal (which is carrying goods) lies down and damage is caused thereby,....., the man is liable".[59]

It is reported in al-Mudawwanah, Yaḥyā b. Sa^{c}īd lays down a general statement: "The carrier (*al-ḥammāl*) is liable for any damage or loss".[60] And then, it is supported by Khalīl b. Isḥaq by saying that a carrier is responsible for any loss caused by his own fault.[61] However, the carrier is not liable if no element of *al-ta^{c}addī* can be proved. Thus, a carrier hired for the purpose of carrying oil (*duhn*), food-stuff (*ṭa^{c}ām*) or a fragile object (*āniyah*) is not responsible for any damage or loss which is not caused by any *al-ta^{c}addī* of his. Similarly, he is not liable for loss or damage which is caused by the fall of the beast of burden or by the breaking of a rope which is used to tied the goods up.[62]

The *fuqahā'* unanimously agree that the common and the private carrier (*ajīr mushtarak* and *ajīr khāṣṣ*) incur liability where they (or their servants) commit *al-ta^{c}addī* or neglect (*farraṭa*), and that they are not liable where it is established that they have not transgressed (*yata^{c}add*) or been negligent.[63] The common or the private carrier has a duty

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[59] Al-Mudawwanah, vol.3, p.458.

[60] Al-Mudawwanah, vol.3, p.458.

[61] Mukhtaṣar, p.244; al-Ābī, Jawāhir al-Iklīl, vol.2, p.190; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.429.

[62] Mukhtaṣar, p.244; al-Ābī, Jawāhir al-Iklīl, vol.2, p.190.

[63] Badā'i^{c} al-Ṣanā'i^{c}, vol.4, p.210; Tabyīn al-Ḥaqā'iq, vol.5, p.134; al-Mardāwī, al-Inṣāf, vol.6, p.73; al-Mughnī wa al-Sharḥ al-Kabīr, vol.6, p.115; al-Mughnī, vol.5, p.479; al-Muqni^{c} wa Ḥāshiyatuh, vol.2, p.216; Hidāyat al-Rāghib, p.381; al-Ābī, Jawāhir al-Iklīl, vol.2, p.191; al-Dusūqī, Ḥāshiyah ^{c}alā al-Sharḥ al-Kabīr, vol.4, p.26; al-Khirshī, Fatḥ al-Jalīl ^{c}alā Mukhtaṣar Khalīl, vol.7, p.28; al-Mudawwanah, vol.3, pp.449-450 and p.457; al-Muhadhdhab, vol.1, p.415; al-Umm, vol.3, pp.261-262; Mughnī al-Muḥtāj, vol.2, p.351; Radd al-Muḥtār, vol.6, p.65; al-Rawḍ al-Murbi^{c}, p.324; ^{c}Alī Ḥaydar, Durar al-Ḥukkām, vol.1, p.598; Sharḥ Muntahā al-Irādāt, vol.2, pp.378-379; al-Wajīz, vol.1, p.237; Majallat al-Aḥkām al-Shar^{c}iyyah, article 704 and 706, p.261; ^{c}Umdat al-Fiqh, p.60; al-^{c}Uddah Sharḥ al-^{c}Umdah, pp.228-229; Manār al-Sabīl, vol.1, pp.421-422; al-Muqnf, p.141 ; Sharaf, al-Ijārah, p.251 and p.253. However, there is the view which opines that the *ajīr mushtarak* is absolutely liable for any damage caused by his hand (irrespective of whether he has committed *al-ta^{c}addī* or

where his duty is a high duty, he must, for instance, supply a carriage as appropriate for its purpose as skill and care can make it and if the accident is due to a breakdown of the carriage, the onus is on him to show that the breakdown was not preventable by any care or skill.

For the common carrier, if he admits that the injury or damage happened did not result from his act, the *fuqahā'* have a different opinion regarding it. Their opinions can be divided into two groups:

First group, is those who say that the *ajīr* is *amīn* (trustee). The *ajīr*'s acknowledgement should be accepted and the liability is not due from him unless the person who hired him (*al-musta'jir*) can establish that he has transgressed (*taᶜaddā*) or been negligent (*farraṭa*).

Second group, is those who say that the *ajīr* is guilty by disloyalty (*al-khiyānah*). The acknowledgement made by the person who hired him should be accepted and the liability is due from the *ajīr* until he can prove that he did not transgress and act negligently in his employment.

The view of the first group are Abū Ḥanīfah, Zufar, al-Ḥasan b. Ziyād,[64] the

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been negligent, or not) because he works for the public. This view is ascribed to ᶜUmar, ᶜAlī, Shurayḥ, al-Ḥasan, Abū Ḥanīfah and Mālik. See Manār al-Sabīl, vol.1, pp.421-422; al-Rawḍ al-Murbiᶜ, p.324; al-Mughnī, vol.5, p.480; al-Muqniᶜ wa Ḥāshiyatuh, vol.2, p.216. The hand of the *ajīr mushtarak* is the hand of liability (*yad ḍamān*). See al-Wajīz, vol.1, p.237.

[64] Badā'iᶜ al-Ṣanā'iᶜ, vol.4, p.210; Tabyīn al-Ḥaqā'iq, vol.5, p.134; al-Muqniᶜ wa Ḥāshiyatuh, vol.2, p.216; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.1, p.598 and p.604.

correct opinion of the Shāfiᶜī school[65] and the Ḥanbalī school.[66] It is also the opinion of Ṭāwus and ᶜAṭā'.[67] And, further, the view of the second group are ᶜUmar, ᶜAlī, ᶜAbd Allāh b. ᶜAtabah, Shurayḥ, al-Ḥasan, a view of Abū Ḥanīfah, the Mālikī school and a view of al-Shāfiᶜī.[68]

In addition, Abū Yūsuf, Muḥammad b. al-Ḥasan al-Shaybānī,[69] the Shāfiᶜī school[70] and the Ḥanbalī school[71] mention that if the injury and damage happen as a result of the accident which may be preventable by any care or skill, the *ajīr* should bear the liability until he can prove that the accident has occurred without his *al-taᶜaddī* and negligence. Hence, if the damage which happens due to the accident which is unavoidable as a result of fire or drowning, and the *ajīr* was not able to prevent such a debacle under any circumstances, then there is no liability on his part.

It is clear as mentioned previously that the *fuqahā'* have unanimously agreed that the *ajīr khāṣṣ* shall not be liable for any deficiency in damage to, or loss of, the

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[65] Al-Muhadhdhab, vol.1, p.415; al-Umm, vol.3, pp.261-262; Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.162; Mughnī al-Muḥtāj, vol.2, p.351; al-Wajīz, vol.1, p.237; al-Muqniᶜ wa Ḥāshiyatuh, vol.2, p.216.

[66] Al-Mardāwī, al-Inṣāf, vol.6, p.73; al-Mughnī wa al-Sharḥ al-Kabīr, vol.6, p.115; al-ᶜUddah Sharḥ al-ᶜUmdah, p.229; Manār al-Sabīl, vol.1, p.422; al-Najdī, Hidāyat al-Rāghib, p.381.

[67] Al-Mughnī wa al-Sharḥ al-Kabīr, vol.6, p.115; Radd al-Muḥtār, vol.6, p.65; al-Muqniᶜ wa Ḥāshiyatuh, vol.2, p.216.

[68] Al-Bakrī, Lubāb al-Lubāb, p.228; al-Ābī, Jawāhir al-Iklīl, vol.2, p.191; al-Dusūqī, Ḥāshiyah ᶜalā al-Sharḥ al-Kabīr, vol.4, p.23; Radd al-Muḥtār, vol.6, p.65; al-Muqniᶜ wa Ḥāshiyatuh, vol.2, p.216; al-Mudawwanah, vol.3, p.457; Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.162; Mughnī al-Muḥtāj, vol.2, pp.351-352; Manār al-Sabīl, vol.1, pp.421-422; al-Mughnī, vol.5, p.479; al-Rawḍ al-Murbiᶜ, p.324.

[69] Radd al-Muḥtār, vol.6, p.65; Badā'iᶜ al-Ṣanā'iᶜ, vol.4, p.210; Tabyīn al-Ḥaqā'iq, vol.5, p.134; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.1, p.598.

[70] Mughnī al-Muḥtāj, vol.2, p.351; al-Sirāj al-Wahhāj, p.294.

[71] Al-Mughnī wa al-Sharḥ al-Kabīr, vol.6, p.115; al-Mardāwī, al-Inṣāf, vol.6, p.73; al-Rawḍ al-Murbiᶜ, p.324.

employer's property unless the former has committed *al-taᶜaddī* or been negligent.[72] If *al-taᶜaddī* or negligence cannot be proved and established, the *ajīr khāṣṣ* will be free from any liability because he is a person who is to be trusted (*musta'man*) and in general it is based on a Quranic verse:

"On no soul doth God place a burden greater than it can bear".[73]

Also, the Prophet said: "There is no liability on a person who is entrusted (*mu'taman*)".[74] Also, it is reported by ᶜAlī and Ibn Maṣ ūd that: "There is no liability imposed on *mu'taman*".[75]

In relation to the case of breakdown of a carriage which is not preventable by any care or skill and as a result of that, passengers or their luggages are damaged and destroyed, the carrier or the like will incur no liability. This case may be related to the case which is caused by *force majeure* or *cas fortuit* (*quwwah qāhirah*). This concept is quite extensive and established in the writings of the *fuqahā'*. It includes a misfortune from heaven (*āfah samāwiyah*), an act of God (*amr min Allāh*) and a sudden accident

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[72] Badā'iᶜ al-Ṣunā'iᶜ, vol.4, p.210; Radd al-Muḥtār, vol.6, p.67; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.1, p.598 and pp.604-605; al-Ābī, Jawāhir al-Iklīl, vol.2, p.191; al-Dusūqī, Ḥāshiyah ᶜalā al-Sharḥ al-Kabīr, vol.4, p.26; al-Khirshī, Fatḥ al-Jalīl ᶜalā Mukhtaṣar Khalīl, vol.7, p.28; al-Muhadhdhab, vol.1, p.415; al-Mughnī wa al-Sharḥ al-Kabīr, vol.6, p.106 and p.115; al-Mardāwī, al-Inṣāf, vol.6, p.70 and p.72; al-Najdī, Hidāyat al-Rāghib, p.381. See also Sharaf, al-Ijārah, p.251; The Jordan Civil Code, section 817; Ibn Abī Firās, Kitāb Akriyyāt al-Sufun, fol.50b, cited in Deborah Rice Noble, The Principle of Islamic Maritime Law,(Unpublished Ph.D. Thesis), p.174; Majallah, article 607; al-Rawḍ al-Murbiᶜ, p.324.

[73] Al-Qur'ān, 2:286.

[74] Cited in Sharaf, al-Ijārah, p.252. *Lā ḍamān ᶜalā mu'taman.*

[75] Cited in Sharaf, al-Ijārah, p.252. Mālik b. Anas also discusses the *mu'taman* in his book. See al-Mudawwanah, vol.3, p.498.

(*ḥādith fujā'ī*).[76]

Furthermore, we can analogously use words of Ibn Qudāmah who notes that where a ship (or a road carriage) is wrecked as a result of overloading, the person who committed *al-taʿaddī* by burdening the already loaded ship (or lorry or van, etc.) with excess weight would be liable.[77]

Based on cases mentioned above, we can say that the carrier or the lorry driver or the sailor or the shipmaster or the like must adopt the best known apparatus, kept in perfect order, and worked without negligence by anybody employed, and a breach of any of these obligations and duties will render him liable for negligence; but if he perfoms them, he will not be liable for an accident which cannot, in a business sense, be prevented by any known means.

DUTY OF BAILEES (*MŪDAʿ*) OF GOODS

Bailees owe a duty of taking care of the goods and chattels bailed. All kinds of bailees of goods and chattels are bound to take reasonable care of the goods bailed to them, though, generally speaking, greater care is expected of one who derives benefit from the bailment, such as a borrower of goods, or a pawnbroker, or hirer who is paid for keeping them. The topic of the liability of carriers and other bailees for the safety of goods entrusted is too large to be extensively dealt with fully in this work. In the writings

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[76] Those terms could be seen in al-Mudawwanah, vol.3, p.439; Sharḥ Muntahā al-Irādāt, vol.2, p.374; The Jordan Civil Code, section 261.

[77] Al-Mughnī, vol.5, p.459.

of the *fuqahā'*, this topic is discussed either in the chapter of hire (*ijārah*) or pledge (*rahn*) or trust (*wadī'ah*), etc. The duty to take care of goods bailed arises by reason of the bailment and is quite separate from any contract, and an action for a breach of that duty is founded on tort. Here, only three topics will be dealt with, viz: pledge, trust and hire.

Pledge

The Ḥanafī, Mālikī, Shāfi'ī and Ḥanbalī schools unanimously agree that if the destruction or damage of the property pledged as result of transgression or negligence by the pledgee, he must replace it if it is fungible property or pay the value of it, if it is infungible property.[78]

In articles 741 and 742 of the Majallah, the duty and liability of a pledgee is dealt with clearly, where if the pledgee destroys or damages the property pledged, a sum corresponding to the amount of such destruction or damage shall be deducted from the debt. This case could be extended to the case of destruction or damage resulting from negligence. The servant or agent of the pledgee is also subjected to the same position as

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[78] Badā'i' al-Ṣanā'i', vol.6, p.163; Tabyīn al-Ḥaqā'iq, vol.6, p.87; al-Dardīr, al-Sharḥ al-Kabīr, vol.3, p.244 and p.253; Mughnī al-Muḥtāj, vol.2, p.137; al-Muftī al-Ḥubayshī, Fatḥ al-Mannān, p.270; Aḥmad b. Ruslān, Matn al-Zubad, p.42; Raḥmat al-Ummah, p.150; al-Mughnī, vol.4, p.396; Kashshāf al-Qinā' 'an Matn al-Iqnā', vol.3, p.341 and p.343; al-Rawḍ al-Murbi', p.288; Sharḥ Muntahā al-Irādāt, vol.2, p.236; al-Muqni' wa Ḥāshiyatuh, vol.2, p.106; Manār al-Sabīl, vol.1, p.354; al-Fiqh al-Manhajī, vol.7, p.111; al-Kāfī, p.413; al-Risālah, p.119; al-Fawākih al-Dawānī, vol.2, p.167; al-Thamar al-Dānī, p.505; Zarrūq, Sharḥ Zarrūq 'alā Matn al-Risālah, vol.2, p.207; al-Qawānīn al-Fiqhiyyah, p.213. There is a different opinion among the *sunnī madhāhib* about the time for assessment of the value of infungible property. For a detailed discussion of it see Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.5, pp.271-273.

the pledgee. In another case, if a third person destroys the property pledged, such a person shall make good the value thereof as on the day when it is destroyed. Then, the sum in question shall be held as a pledge by the pledgee.[79]

Trust

With regard to this topic, the *fuqahā'* have discussed the rule underlying the concept of the duty of care. If a trust is destroyed or lost without any act of negligence (*taqṣīr*) by a trustee (or his servant), he is not liable for compensation.[80] The liability will not be imposed on him in the case where he is unable to take reasonable care of the goods entrusted to him such as when it is damaged or lost by shipwreck, nor in the case where he is possible to take care of it like it is lost through theft. This is because the shipwreck (*al-gharaq*) or the stealing (*al-sarīqah*) is not considered, according to the *fuqahā'*, as being *al-taᶜaddī* or negligence. Contrariwise, if one or either of these elements existed, the trustee is guilty as in the case where a man leaves his clothes to a keeper of clothes (*ḥāris al-thiyab/al-ḥammāmiyy*) while he is entering the bath room and the keeper gives the clothes back to someone else on the wrongful assumption that the

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[79] See also Salīm Rustam, Sharḥ al-Majallah, vol.1, pp.410-411. For detail, see al-Hidāyah, vol.4, pp.147-148; Radd al-Muḥtār, vol.6, p.510; Tabyīn al-Ḥaqā'iq, vol.6, p.87; al-Durr al-Mukhtār, vol.2, pp.428-429.

[80] Majallah, articles 768, 777 and 780; Salīm Rustam, Sharḥ al-Majallah, vol.1, p.426; al-Hidāyah, vol.3, p.215; al-Wajīz, vol.1, p.237; al-Jazīrī, al-Fiqh ᶜalā al-Madhāhib al-Arbaᶜah, vol.2, p.289. The author of al-Hidāyah notes that a trustee is not responsible for a trust (deposit) unless there is *al-taᶜaddī* (or negligence) with respect to it. In general, the trust remains in the hand of the trustee as a trust and he is not subject to compensation because the Prophet said: ".... an honest trustee is not responsible", and also because there is a necessity amongst mankind for deposits and this necessity could not be answered by making the trustee responsible, as no one would then accept the trust. See al-Hidāyah, vol.3, p.210.

person is the owner of the clothes. The keeper (the trustee) is liable. In another case, if the clothes are stolen while the keeper of a bath (*al-ḥammāmiyy*) is sleeping, he is not obliged to make good the loss if he slept in the position of sitting, otherwise if he is in the position of lying down, he is responsible to make good the loss.[81]

Nevertheless, if the trust has been deposited with a payment and it is destroyed or lost owing to a cause which it is possible to take reasonable care against, the trustee must be liable. For example, if a watch is destroyed by falling from the hand of a trustee without any wrongful act, compensation should not be ascribed to him, but, if a man entrusts his property to another for safekeeping and pays him a sum of payment for so doing, and it suffers damage arising from a cause which is possible to take reasonable care against like theft, he shall be liable for compensation.[82] It is reported by ᶜAlī Ḥaydar that the jurists unanimously agree in the case where a trust is damaged by an occasion, which is under the control of the trustee and it is possible for him to take care against it and he is also given a wage for its safekeeping, he is liable for compensation.[83] This is contrary to the damage arising from a cause which is not possible to take care against

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[81] Majmaᶜ al-Anhur, vol.2, pp.337-338 and p.340; al-Durr al-Muttaqā in the margin of Majmaᶜ al-Anhur, vol.2, pp.337-338; Salīm Rustam, Sharḥ al-Majallah, vol.1, p.426; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.6, pp.202-204; al-Fatāwā al-Hindiyyah, vol.4, p.339; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.370 and p.373; al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.5, p.90; cf., al-Mudawwanah, vol.3, p.457; Mukhtaṣar, p.244; al-Ābī, Jawāhir al-Iklīl, vol.2, p.191; al-Mawāq, al-Tāj wa al-Iklīl in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.5, p.427.

[82] Majallah, article 777; Salīm Rustam, Sharḥ al-Majallah, vol.1, p.431. See also al-Fatāwā al-Hindiyyah, vol.4, p.342; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.371. It is mentioned in Durar al-Ḥukkām that if a person enters a bathroom and leaves his clothes with the keeper (*nāṭūr*) and then the clothes are stolen, the judgement will be held as follows: [1] If a fee is promised to be given to the keeper because of keeping the clothes, he is liable; [2] If no fee is given, he is not liable. It should be noted, in normal circumstances, a man who gives a fee while entering a bathroom to its owner is recognized as giving payment for using it, not for the safekeeping of his clothes. See ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.6, p.232; al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.5, p.90.

[83] ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.6, p.233.

like fire or sinking. Then the trustee would not be held liable.[84]

The trust must be kept in a suitable place. Consequently, placing the trust such as money and jewels in stables or barns amounts to negligence, and if they are destroyed or lost there, compensation should be paid.[85] Similarly, if the trustee keeps the trust in a bathroom or on the highway or in a mosque and then the trust is lost, he is liable by reason that he is negligent in keeping it.[86] This discussion can be illustrated as follows:

1- An animal which is put in trust is normally kept in a stable and then if it is lost, the trustee is not liable. On the other hand, if cash or precious stones or anything highly valued such as clothes or the like are kept in a barn or garden or courtyard (*al-ᶜarṣah*) and then they are damaged or lost, the trustee will be liable and considered as negligent in keeping them.[87]

2- In the case of the trust being kept by the trustee in his house where many people are coming and going, would the trustee be liable if the trust is lost? It should be understood that if it is believed that the trust is safe in such circumstances, the trustee would not be liable. If not, he is liable.[88]

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[84] Salīm Rustam, Sharḥ al-Majallah, vol.1, p.431.

[85] Majallah, article 782; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.6, p.244; cf., Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.377.

[86] Radd al-Muḥtār, vol.5, p.673; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.6, p.244; cf., al-Fatāwā al-Hindiyyah, vol.4, p.341.

[87] ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.6, p.243; al-Fatāwā al-Hindiyyah, vol.4, p.344.

[88] ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.6, p.243; al-Fatāwā al-Hindiyyah, vol.4, p.343.

3- If the trustee leaves the trust in his house without locking or closing the door when there is nobody in it, and the trust is lost thereby, then the trustee is liable.[89] If the house is not locked but there is somebody there, he is not liable.[90]

4- If the trust is kept in a place where it is believed that there is mice, the judgement of this case should be put in a consideration. If the trustee has told the trustor about it, the trustee is not liable for any damage which happens to the trust provided that he has kept it at the request and with the consent of the trustor. Contrariwise, if the trustee does not tell the trustor about it and also does not take any action to prevent the mice from damaging the trust, he is liable in consequence.[91] If the trust is destroyed or the value thereof diminished by *al-taᶜaddī* or negligence of the trustee, he is liable for compensation. For example:

(1) A trustee rides an animal which has been entrusted to him without the permission of the trustor and such an animal is destroyed either by being made to go too quickly in an unusual manner or for some other reason or for no reason at all or if it is stolen while on the journey, the trustee who undertakes to keep the animal becomes responsible.[92] This case could be applied to cases like putting on a garment or employing a slave which has been entrusted to somebody without

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[89] Radd al-Muḥtār, vol.5, p.673 and p.676; ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.6, p.244; al-Fatāwā al-Hindiyyah, vol.4, p.344; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, pp.378-379.

[90] Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.379.

[91] ᶜAlī Ḥaydar, Durar al-Ḥukkām, vol.6, p.244; al-Fatāwā al-Hindiyyah, vol.4, p.344; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, pp.377-378.

[92] Majallah, article 787; al-Fatāwā al-Hindiyyah, vol.4, pp.347-348; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.373.

the trustor's permission. The trustee is considered as *muta^{c}addin* in putting on the garment or employing the slave.[93] Any act of the trustee which is not authorized by the trustor to the trust is considered as *muta^{c}addin*.[94]

(2) The trustee is bound to remove the trust to another place in case of fire. If he does not remove it and it is burnt in the fire, he must make good the loss.[95]

In a further case, a condition inserted in a contract of trust is taken into consideration if it is capable of execution and benificial, if not, it is void. Therefore, when there is an agreement for the trust on condition that it must be kept in the house of the trustee and then the trust is removed to another place in consequence of a fire breaking out, the condition becomes invalid. And in this case, after having been removed to another place, the trust is destroyed or lost without any *ta^{c}addin* or negligence, no compensation is required.[96]

Hire

A lessee who is engaged in a lease or hire has a duty to take reasonable care of properties held by lease. The property which is taken on hire is considered as trust while

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[93] Al-Fatāwā al-Hindiyyah, vol.4, p.348; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.373; al-Hidāyah, vol.3, p.216.

[94] Majallah, article 779. See also Salīm Rustam, Sharḥ al-Majallah, vol.1, p.431.

[95] Majallah, article 787. See also Radd al-Muḥtār, vol.5, pp.664-665; al-Fatāwā al-Hindiyyah, vol.4, p.346.

[96] Al-Fatāwā al-Hindiyyah, vol.4, p.340; Majallah, article 784; cf., al-Fatāwā al-Hindiyyah, vol.4, p.341; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.373.

in the possession of the hirer.[97] Thus, if the property which is held by way of hire is destroyed while in the possession of the hirer, he would not be called upon to pay compensation so long as he has not committed negligence or *taᶜaddin* or performed any act which is unauthorized.[98] The hire of an animal is lawful either for carriage or for riding. As to the use to which animal is put, if the riding has been allowed in general terms, the lessee is at liberty to permit any person he pleases to ride upon the animal because of the riding being contracted in a general manner, unrestricted to certain person. In the same manner, if a person hires clothes for the purpose of wearing them in a general manner, he is at liberty either to wear them or to allow any other person to wear them. However, if the animal or the clothes are hired on the condition that a particular person shall ride upon it or wear it, and the lessee allows another person to ride the animal or allows another person to wear the clothes, other than the persons specified and then the animal or clothes is injured or destroyed in consequence, the lessee is responsible because he has transgressed (*yataᶜaddī*) the condition imposed on him.[99] Similarly in the case of overloading an animal to a degree beyond what it is able to bear: if the animal perishes as a result of that, the lessee is responsible.[100] The lessee, in this case, could be deemed as *al-mutaᶜaddī* or negligent.

In another case, if a property hired to a hireling (*al-ajīr*) is destroyed by

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[97] See Majallah, article 600.

[98] Majallah, article 601.

[99] Al-Hidāyah, vol.3, p.236; al-Durr al-Mukhtār, vol.2, p.286; al-Fatāwā al-Hindiyyah, vol.4, p.487. See also al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.5, p.35.

[100] Al-Hidāyah, vol.3, p.236; al-Durr al-Mukhtār, vol.2, p.287. See also al-Fatāwā al-Hindiyyah, vol.4, pp.490-491; al-Wajīz, vol.1, p.237; ᶜUmdat al-Fiqh, p.60; al-ᶜUddah Sharḥ al-ᶜUmdah, p.228.

transgression or neglect, the hireling is held liable.[101] Thus, if an animal is hired to a hireling or shepherd (*al-rāʿī*) to look after and the hireling beats it and it injures it or destroys it, the hireling is liable. This is the opinion of Abū Ḥanīfah. It is reported that Abū Yūsuf and Muḥammad b. al-Ḥasan al-Shaybānī say, in accordance with *qiyās*, if the shepherd beats it on a usual place with a normal beating, he is not liable. However, according to some of the Ḥanafī jurists, the liability would be imposed on the shepherd if he beats the goat.[102] The shepherd bears no liability if he lets goats mingle with each other (i.e. they mingle with goats belonging to someone else) as long as he is able to recognize and distinguish them. On the other hand, if he could not recognize them, he is liable.[103] He, in the above case, could be considered as *al-mutaʿaddī* or negligent in carrying out his task.

It is negligence by the hireling (*al-ajīr*) if he commits an offence without excuse in the preservation of the property entrusted to him on account of his employment. For example, if a sheep strays from a flock and is lost on account of the negligence (*ihmāl*) and laziness of the shepherd to come and catch such an animal, the shepherd must pay compensation. He is not liable, however, for compensation if his failure to go after the sheep was because of the probability (*iḥtimāl*) that in so doing he would lose the other sheep.[104] It has also been held that the responsibility is due on the shepherd with regard

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[101] Majallah, article 607.

[102] Al-Fatāwā al-Hindiyyah, vol.4, p.508; Salīm Rustam, Sharḥ al-Majallah, vol.1, p.326.

[103] Al-Fatāwā al-Hindiyyah, vol.4, p.508; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.336; Salīm Rustam, Sharḥ al-Majallah, vol.1, p.326. If he could not recognize them, he is liable for the value of the goat as estimated on the day of mingling. See al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.5, p.85.

[104] Majallah, article 609.

to loss or theft of the sheep, when he is negligent in pasturing his flock by lying down to sleep and not looking after his flock. Even if he sleeps in the position of sitting and his flock roam away from him and out of his sight, he is liable. However, if the flock is still in his sight, he is not liable.[105]

Ibn Qudāmah describes what is deemed *taᶜaddin* (or negligence) for a shepherd:

> "The shepherd bears no liability for any injury which occurs to the livestock so long as he does not act wrongfully (*yataᶜadd*). We know of no contraversy on this point except for the view of al-Shaᶜbī that the shepherd is liable. We hold that the shepherd is entrusted (*mu'taman*) with the safekeeping of the livestock and is therefore, like the trustee (*mūdaᶜ*), not liable provided there is no *taᶜaddin*. Because it is property possessed under a contract of hire (*ijārah*), he is not liable without *taᶜaddin*. But as for that which is lost due to his *ta addin*, he is, by consensus, liable; for example, where he goes to sleep away from the livestock, lets them roam away from him and out of his sight, beats them exceedingly or on unsuitable parts or unnecessarily so that they run away, or he drives them to an obviously dangerous place and the like. This is to be accounted negligence and *taᶜaddin*".[106]

The shepherd is not liable as long as he does not transgress or show neglect in his sleeping which allows his flocks to roam away from him and etc. like beating them or tying them up because he is being treated as an *amīn* in looking after flocks. On the other hand, if he has committed a transgression (*taᶜaddā*) or been negligent (*farraṭa*), he is liable like a trustee (*wadiᶜ*).[107]

Mālik maintains that the keepers of camel or of goat or of cow or of any animal

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[105] Fatāwā Qāḍīkhān, in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.336; al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.5, p.81.

[106] Al-Mughnī, vol.5, pp.495-496. See also al-Rawḍ al-Murbiᶜ, p.324; al-Mudawwanah, vol.3, pp.408-409; Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.162; Minhaj al-Ṭullāb printed with Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.162; Mughnī al-Muḥtāj, vol.2, p.353; ᶜUmdat al-Fiqh, p.60; al-ᶜUddah Sharḥ al-ᶜUmdah, p.229; Manār al-Sabīl, vol.1, p.422; al-Muqniᶜ wa Ḥāshiyatuh, vol.2, p.217; al-Muqniᶜ, p.141; Majallah, article 602 and 609; Fatāwā Qaḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.336.

[107] Sharḥ Muntahā al-Irādāt, vol.2, p.377.

would not be liable unless they have committed wrongful acts (*taᶜaddū*) or been negligent (*farraṭū*).[108]

DUTY OF CARE OF PERSONS IN CHARGE OF CHILDREN

Parents and Teachers in Disciplining Minors or Pupils

According to Islamic law, basically, the father has the authority to discipline (*ta'dīb*) his children who have not reached the age of puberty. The teacher or vocational instructor (*muᶜallim ḥirfah*) also has the same right. The grandfather, as well as the legal guardian also has the right of discipline as long as the minor remains under his guardianship. The mother has also the right of discipline, according to a view of the *fuqahā'*, so long as she has been given authorisation (*waṣiyyah*) for that purpose. In the absence of the father, she also has the same right. Apart from such situations according to the more acceptable opinion (*al-rājiḥ*), the mother does not have the right of discipline to her children or minors.[109]

Conditions in Disciplining Minors

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[108] Al-Mudawwanah, vol.3, p.449.

[109] Al-Jaṣṣāṣ, Aḥkām al-Qur'ān, vol.2, p.11; al-Ṭaḥṭāwī, Ḥāshiyat al-Ṭaḥṭāwī, vol.5, p.275. See also ᶜAbd al-Qādir ᶜAwdah, al-Tashrīᶜ al-Jinā'ī, vol.1, p.518; Bahnasī, al-Masᶜūliyyah al-Jinā'iyyah, p.179.

According to ᶜAbd al-Qādir ᶜAwdah in his book al-Tashrīᶜ al-Jināʾī al-Islāmī with regard to disciplining minors, the disciplinary punishment must be imposed on them for the wrong or offence (*dhanb*) which they have already committed, not for the wrong or offence which they are likely to commit in future or which they have not yet committed. Besides the disciplinary punishment such as beating should be carried out without severe (*ghayr mubarriḥ*) pain in conformity with their physical condition and age. The beating must not hit the face and dangerous parts of the body such as stomach. It should be intended to discipline the minors and should not be excessive. The act of disciplining should be generally recognized as a corrective act. If all these limits are taken into account in disciplinary punishment, the liability will not be rendered on the party who has carried out the beating as his act is permissible.[110]

The Liability for *al-Taᶜaddī* or Negligence in Disciplining Minors

According to Mālik b. Anas and Aḥmad b. Ḥanbal, if disciplinary punishment causes injury or loss of any part of a minor's body and such punishment constitutes the generally recognized form of discipline, or falls within the lawful limits, or no *al-taᶜaddī* or negligence takes place, then the party who has done it will not be liable. But, if the disciplinary punishment or the beating is carried out in such a severe (*shadīdan*) way that it cannot be considered as a corrective or disciplinary act, the party who has done it will, according to this view, be liable for any injury which happens because he has

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[110] ᶜAbd al-Qādir ᶜAwdah, al-Tashrīᶜ al-Jināʾī, vol.1, p.518.

transgressed (*taᶜaddā*) in his action.[111]

On this matter, the Ḥanbalī jurists elaborate by saying that if any one who disciplines his son or his wife who is disobedient (*nushūz*), or a teacher punishes his pupil, or a ruler punishes his subject without exceeding the normal beating, either in number of strokes or their severity, he is not liable for any liability by reason of the fact that he does what is permissible for him to do without *taᶜaddin*. However, if he acts immoderately or in excess of what he should do and the victim dies or is injured because of that, then he is responsible for the victim due to his *al-taᶜaddī* through lack of moderation. In another case, if one strikes whoever is not in command of his mental faculties like a baby or an insane person or an idiot (*maᶜtūh*) and he is killed or injured, the one who did it is liable since the law does not permit disciplinary punishment (*ta'dīb*) to one who is not in command of his mental faculties by virtue of the fact that there is no benefit thereby.[112] Likewise, if one carries out a disciplinary punishment on a pregnant woman which causes an abortion thereby, one is responsible for compensation (*ghurrah*) on account of the *taᶜaddin* in one's action.[113]

It has been reported that Mālik b. Anas justifies this matter by saying that if the teacher or vocational instructor (*muᶜallim al-ṣunᶜah*) beats a minor for the purpose of discipline and the minor dies thereby, the teacher or the vocational instructor is not liable

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[111] Al-Mughnī wa al-Sharḥ al-Kabīr, vol.10, p.349. See also ᶜAbd al-Qādir ᶜAwdah, al-Tashrīᶜ al-Jinā'ī, vol.1, p.518; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.6, p.301; Wahbah, Naẓariyyat al-Ḍamān, p.327.

[112] Manār al-Sabīl, vol.2, p.337; Sharḥ Muntahā al-Irādāt, vol.3, p.305; al-Rawḍ al-Murbiᶜ, p.493; Abū Yaᶜlā, al-Aḥkām al-Sulṭāniyyah, p.282. Injuries which arise from acts of discipline (*al-ta'dīb*) are classed in the tort of manslaughter (*shibh al-ᶜamd*). See al-Muqniᶜ wa Ḥāshiyatuh, vol.3, p.336; al-Muqniᶜ, p.273.

[113] Al-Rawḍ al-Murbiᶜ, p.493.

for whatever happens as a result. But, if he commits *al-taᶜaddī* or exceeds the usual bounds of discipline (*jāwaz fī adabih*) in his beating, he is liable for whatever injury he caused. Similarly, if he beats the minor in a way which causes the loss of his eye, or the breaking up of his molar tooth, the liability for *diyah* is due from the teacher or the vocational instructor which is ascribed to his *ᶜāqilah*.[114] In brief, a *ḥākim* or a teacher or a father will not be held liable for any injury which happens resulting from acts of due care of the permitted disciplinary punishment to somebody under his authority, and the punishment of retaliation (*qawad*) cannot be imposed on him by reason that there is no bad intent (*ᶜudwān*) in his deed.[115] It is also clearly mentioned by the Mālikī jurists that the due punishment which should be imposed on the father or the teacher or the *ḥākim* is the *diyah mughallaẓah* (*diyah* on the heavier scale). This is because he is categorized under the tortfeasor for manslaughter (*shibh al-ᶜamd*).[116] However, there is a view that this case is one of misadventure (*al-khaṭā'*). It is because Mālik recognizes that the cause

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[114] Tabṣirat al-Ḥukkām, vol.2, p.243; al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.690 and p.720.

[115] Al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sālik li Aqrab al-Masālik, vol.2, p.383. See also Bulghat al-Sālik li Aqrab al-Masālik, vol.2, p.284 and p.397; al-Qawānīn al-Fiqhiyyah, p.227. If the father or the teacher beats a minor with a plank, he should be punished by *qiṣāṣ*. Equally, if the minor is slaughtered or his stomach is cut by his father. The punishment of *qiṣāṣ* should be imposed on the father. See al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.690 and pp.720-721. In brief, if the father beats his minor with the intention of killing or injuring him, he is liable for *qiṣāṣ*. See al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.720.

[116] Bulghat al-Sālik li Aqrab al-Masālik, vol.2, p.384; al-Qawānīn al-Fiqhiyyah, p.227; al-Kinānī, al-ᶜAqd al-Munaẓẓam li al-Ḥukkām in the margin of Tabṣirat al-Ḥukkām, vol.2, p.253; Bidāyat al-Mujtahid, vol.2, p.305; al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.706 and pp.720-721; al-Tāwadī, Sharḥ Arjūzah Tuḥfat al-Ḥukkām printed with al-Bahjah fī Sharḥ al-Tuḥfah, vol.2, p.706; al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.266. The payment of the *diyah mughallaẓah* for this case is thirty *jadhᶜah*, thirty *ḥiqqah* and forty *khalfah*. According to some *fuqahā'*, that payment is due on the *ᶜāqilah* of the tortfeasor, but some other *fuqahā'* insist the payment must come from the property of the tortfeasor. In this school, the rate of payment for this case is different to the case of misadventure, that is twenty *ḥiqqah*, twenty *jadhᶜah*, twenty *bint labūn*, twenty *bint makhāḍ* and twenty *banū labūn*. See al-Risālah, p.123; Bidāyat al-Mujtahid, vol.2, p.307; al-Thamar al-Dānī, pp.518-519; Zarrūq, Sharḥ Zarrūq ᶜalā Matn al-Risālah, vol.2, pp.231-232; Ibn Nājī, Sharḥ Ibn Nājīᶜ alā Matn al-Risālah printed with Sharḥ Zarrūq ᶜalā Matn al-Risālah, vol.2, pp.231-232.

for injury or death is based either on premeditation (*ᶜamd*) or misadventure.[117]

On the other hand, in the case of a beating which is done on the authority of a *sulṭān* or governor (*al-wālī*) to a person who has been charged (*muttahiman*), or by a father to his minor for a disciplinary purpose, or by a legal guardian to an orphan, or by a husband to his wife due to her disobedience, or by a teacher to his pupil without the permission of the guardian of the pupil and the party who has been beaten dies or is injured thereby, the *sulṭān* or the father or the teacher and so on is liable. However, the liability which will be imposed is *diyah*, not *qiṣāṣ* by reason that there is no criminal intent in the course of disciplining (*al-ta'dīb*) someone. This is the opinion of Abū Ḥanīfah and al-Shāfiᶜī.[118]

In elaboration, if the father or the legal guardian beats a minor in disciplining him and he dies thereby, the *fuqahā'* of the Ḥanafī school have different opinions as to the responsibility of the father or the legal guardian. According to Abū Ḥanīfah, the father or grandfather or legal guardian are responsible for the minor's death (or loss of a part of his body) just as a husband is responsible in the case of beating or disciplinary punishment of his wife. This is because in disciplining, murder is not permitted. If it happens, that it is not a disciplinary punishment and the law does not give permission to

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[117] See al-Kinānī, al-ᶜAqd al-Munaẓẓam li al-Ḥukkām in the margin of Tabṣirat al-Ḥukkām, vol.2, p.253; Zarrūq, Sharḥ Zarrūq ᶜalā Matn al-Risālah, vol.2, p.232.

[118] Al-Mabsūṭ, vol.16, p.13; Radd al-Muḥtār, vol.5, p.401; Majmaᶜ al-Ḍamānāt, p.54, p.157 and p.166; Badā'iᶜ al-Ṣinā'iᶜ, vol.7, p.305; al-Māwardī, al-Aḥkām al-Sulṭāniyyah, p.233; Mughnī al-Muḥtāj, vol.4, p.199; al-Umm, vol.6, p.241 and p.244; al-Muhadhdhab, vol.3, p.205; Munlākhusrū, Durar al-Ḥikām fī Sharḥ Ghurar al-Aḥkām, vol.2, p.77; Jāmiᶜ Aḥkām al-Ṣighār in the margin of Jāmiᶜ al-Fuṣūlayn, vol.2, pp.8-10; al-Mughnī wa al-Sharḥ al-Kabīr, vol.10, p.349; Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.6, p.301; Wahbah, Naẓariyyat al-Ḍamān, p.326.

the father and legal guardian to do that.[119] In addition, it is reported that the father or the like is definitely liable whether he beats his minor in excess of the normal practice or not.[120] However, according to his disciples Abū Yūsuf and Muḥammad b. al-Ḥasan al-Shaybānī, the father and legal guardian are not liable because they are permitted to discipline and to chastize (*tahdhīb*) the minor and, therefore, they are not accountable for the consequences of the permitted acts just as if the *imām* restrains (*ʿazara*) a person and then the person dies.[121] In another view, the father or legal guardian should not act beyond the permitted bounds of discipline.[122]

As for the mother, the *fuqahā'* have different opinions as to the consequences of her beating her minor for the purpose of discipline. Abū Ḥanīfah says that she is definitely liable. But, some of them maintain that she is definitely not. Others state that she is liable by reason that she has inflicted injury upon a person over whom she has no power to do that (*wilāyat al-taṣarruf*).[123]

With regard to teacher or *ustādh*, Abū Ḥanīfah and his followers opine that if a minor is beaten without the permission of his father or legal guardian, then the teacher

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[119] Badā'iʿ al-Ṣanā'iʿ, vol.7, p.305. See also al-Mabsūṭ, vol.16, p.13; Majmaʿ al-Ḍamānāt, p.166; al-Fatāwā al-Hindiyyah, vol.6, p.34; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.444; Bahnasī, al-Masʾūliyyah al-Jināʾiyyah, p.179; ʿAbd al-Qādir ʿAwdah, al-Tashrīʿ al-Jināʾī, vol.1, p.519.

[120] Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.2, p.337.

[121] Badā'iʿ al-Ṣanā'iʿ, vol.7, p.305. See also al-Mabsūṭ, vol.16, p.13; Majmaʿ al-Ḍamānāt, p.166; al-Fatāwā al-Hindiyyah, vol.6, p.34; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.444; Bahnasī, al-Masʾūliyyah al-Jināʾiyyah, p.179; ʿAbd al-Qādir ʿAwdah, al-Tashrīʿ al-Jināʾī, vol.1, p.519. According to Abū Ḥanīfah, the father and the legal guardian is liable for *diyah* and *kaffārah* as well as being prohibited from inheritance. See Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.444 and vol.2, p.337; al-Fatāwā al-Hindiyyah, vol.6, p.34.

[122] Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.2, p.337.

[123] Takmilat al-Baḥr al-Rā'iq, vol.8, p.383 cited in Bahnasī, al-Masʾūliyyah al-Jināʾiyyah, p.181; al-Fatāwā al-Hindiyyah, vol.6, p.34.

is liable on the grounds that he is *mutaᶜaddin* in performing the beating which is not allowed. But, if the permission had been granted for the beating, he is not liable for the consequences thereof on account of the fact that the beating is a necessity in disciplinary punishment, and so he is not considered as a *mutaᶜaddin*. If the teacher fears liability for the consequences of a beating, he will refrain from teaching the minors, whereas the people are in need of that. Therefore, the penalty or the liability in this respect has been annulled.[124] The view of Abū Ḥanīfah and his followers regarding the disciplinary punishment of pupils is no different from the opinions of Mālik and Aḥmad b. Ḥanbal.

However, there is a view in the Ḥanafī school which holds that the beating should not exceed the usual bounds of a disciplinary punishment and it should be carried out upon a suitable part of the body as well as there being a need for the permission from the father or the legal guardian. If a death or an injury occurs as a result of that, the teacher or *ustādh* will not be liable. Otherwise, if the beating is carried out in excess of the normal practice, he is liable. If the death or injury happens due to the beating or any disciplinary punishment where the father or legal guardian does not grant permission for that to be done, he is definitely liable for *diyah*, irrespective of whether the beating is done in a normal manner or not.[125]

From the point of view of Abū Ḥanīfah regarding the case of the teacher or

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[124] Badā'iᶜ al-Ṣanā'iᶜ, vol.7, p.305; al-Mabsūṭ, vol.16, p.13; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, pp.444-445; Muᶜīn al-Ḥukkām, p.204; al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.5, p.90; Majmaᶜ al-Ḍamānāt, p.54, p.157 and p.167. However, according to Abū Ḥanīfah, the *kaffārah* should be imposed. It is contrary to his disciples Abū Yūsuf and Muḥammad b. al-Ḥasan al-Shaybānī who opine that there is no *kaffārah* in this case. See Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.444; Qaṭlūbaghā, Kitāb Mūjabāt al-Aḥkām wa Wāqiᶜāt al-Ayyām, p.382.

[125] Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.2, p.337; Majmaᶜ al-Ḍamānāt, p.54. See also al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.5, p.78; Bahnasī, al-Masᶜūliyyah al-Jinā'iyyah, pp.180-181.

ustādh mentioned above, a question has been raised by Abū Yūsuf and Muḥammad b. al-Ḥasan al-Shaybānī to Abū Ḥanīfah: "If a teacher is not liable by virtue of the fact that permission has been given by the father, how should the father be liable if he beats his minor himself?". Abū Ḥanīfah replies: "The beating made by the teacher (*ustādh*) is actually for the benefit of the pupil, not for the benefit of the teacher. So the liability should not be imposed on the teacher. On the other hand, the beating made by the father is actually for the benefit of himself, so his act is bound by the condition of safety like a beating made by a husband to his wife. If a death or injury results thereby, the husband is definitely liable".[126]

In another case, if a father beats his minor while teaching a lesson of al-Qur'ān and the minor dies as a consequence, the father is liable for *diyah* and also cannot inherit the minor's property. On the other hand, according to Abū Yūsuf, he has the right of inheritance and is not liable for *diyah*.[127] However, both Abū Ḥanīfah and Abū Yūsuf agree that the *kaffārah* should be imposed on the father.[128]

Some jurists of the Ḥanafī school differentiate between disciplinary chastizement (*ḍarb al-ta'dīb*) and instructive chastizement (*ḍarb al-taᶜlīm*). According to them, chastizement for the purpose of *ta'dīb* is a right whereas chastizement for *taᶜlīm* is a duty. Therefore, *ta'dīb* is bound on the condition of safety but no such condition is attached to *taᶜlīm*. This difference, however, is confined to corporal punishment which

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[126] Al-Mabsūṭ, vol.16, p.13. See also Muᶜīn al-Ḥukkām, p.204; al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.5, p.90.

[127] Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.445 and vol.2, p.337; al-Fatāwā al-Hindiyyah, vol.6, p.34; Muᶜīn al-Ḥukkām, p.204; Majmaᶜ al-Ḍamānāt, p.54 and p.167.

[128] Muᶜīn al-Ḥukkām, p.204.

is considered to be normal in respect of quantity (*al-kam*), quality (*al-kayf*) and place (*al-maḥal*). In the case of exceeding a normal beating, the liability is obligatory in all cases whether it is meant for *ta'dīb* or *taᶜlīm*.[129]

As far as this matter is concerned, the Shāfiᶜī jurists clearly maintain the opinion of Abū Ḥanīfah. They say that a guardian, or ruler, or husband, or teacher who chastizes the person submitted to his authority is responsible for the consequences. The husband is liable for any damage resulting from his punishment of his wife whether by reason that the wife is disobedient (*nushūz*) or the like. Likewise, the liability will be due on the teacher when he chastizes his pupil and injury results whether with the permission of the pupil's guardian or not.[130]

If the guardian or the teacher inflict a beating which normally can cause a death, the punishment of *qiṣāṣ* should be imposed on them. However, the *diyah* will be ascribed to their *ᶜāqilah* if the death is under the category of manslaughter. In disciplinary chastizement, the act of the guardian or the teacher should be bound by the condition of safety. This is because what is intended in this case is *ta'dīb*, not injury or damage. Therefore, if injury happens, it is clear that the *ta'dīb* has been carried out by overstepping the permissible bound (*al-ḥadd al-mashrūᶜ*) of *ta'dīb*.[131]

In brief, in the light of the discussion of *ta'dīb* and *taᶜlīm* above, it can be said

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[129] Al-Ṭaḥṭāwī, Ḥāshiyat al-Ṭaḥṭāwī, vol.4, p.275; Fatāwā Qāḍīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.2, p.337; Majmaᶜ al-Ḍamānāt, p.54; al-Ṭarābulsī, al-Fatāwā al-Kāmiliyyah, p.47. See also Bahnasī, al-Mas'ūliyyah al-Jinā'iyyah, p.181; ᶜAbd al-Qādir ᶜAwdah, al-Tashrīᶜ al-Jinā'ī, vol.1, p.519.

[130] Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.305; Mughnī al-Muḥtāj, vol.2, p.353 and vol.4, p.199. See also al-Umm, vol.6, p.244; al-Muhadhdhab, vol.2, p.267, vol.3, p.205 and p.375; al-Mīzān al-Kubrā, vol.2, p.152; Raḥmat al-Ummah, p.301; Raḥmat al-Ummah in the margin of al-Mīzān al-Kubrā, vol.2, p.143.

[131] Mughnī al-Muḥtāj, vol.2, p.352 and vol.4, p.199. See also al-Māwardī, al-Aḥkām al-Sulṭāniyyah, p.233.

that generally the opinion of the *fuqahā'* may be divided into two groups according to the similarity of opinion among them. The first group is Abū Ḥanīfah and the Shāfiʿī school; and the second group is Abū Yūsuf, Muḥammad b. al-Ḥasan al-Shaybānī and the Mālikī and Ḥanbalī schools.

Liability of Swimmers in Teaching His Trainees

The *fuqahā'* have briefly discussed issues on this matter. In fact it has been discussed by the *fuqahā'* of the Shāfiʿī and the Ḥanbalī schools. Both schools opine that no liability would be imposed on the swimmer or trainer without the element of negligence existing. As such, the swimmer or trainer is liable if in such a case it could be proved that they failed to observe the standard of care required of them. Otherwise, when it is proved that they can be excused (*ʿudhr*) because of loss of control (*ghalabah*) over the act and the like, there would be no liability.[132]

In elaboration, the Shāfiʿī jurists record that when a minor who is sent to a swimmer to learn how to swim, drowns, the swimmer is liable for *diyah* because the minor is under his care. When the drowning happens in the course of learning to swim, the swimmer is deemed as negligent in his task as in the case of a teacher who beats his pupil who dies thereby. The kind of *diyah* which should be imposed is the *diyah* for manslaughter which is ascribed to his *ʿāqilah*. The liability for *diyah* will be obligatory whether he himself takes the minor and throws him into the water or while the minor is

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[132] See Ḥāshiyat Qalyūbī printed with Ḥāshiyat ʿUmayrah, vol.4, p.148.

on the bank, he gives a sign so that he plunges into water. On the other hand, al-Jurjānī indicates that the swimmer is not liable for the latter case because the minor plunges into water of his own accord.[133] However, according to al-Ghamrāwī, the swimmer will be punished by *qiṣāṣ* if he intentionally neglects a minor in the water and causes him to drown and he dies in the course of his teaching.[134] Further, if a mature person goes to the swimmer to learn how to swim and then he is drowned, the swimmer is not liable because the mature person can take care of himself. As such, the swimmer will not be labelled as negligent.[135] On the other hand, the swimmer will be punished by retaliation (*qawad*) if he brings the mature person to a place which is known as dangerous for drowning (*maḥall al-gharq*) and than leaves him there.[136]

The Ḥanbalī jurists appear to discuss this case saying that if a mature person (*bāligh ᶜāqil*) places himself or his son under the charge of an expert swimmer for training, and he or his son is drowned, the trainer (*al-muᶜallim*) is not responsible insofar as he is not negligent because he does what he has permission to do.[137] In al-Mughnī, Ibn Qudāmah separates the liability according to whether the trainee is a mature person or

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[133] Al-Muhadhdhab, vol.3, p.205; Mughnī al-Muḥtāj, vol.4, p.82; al-Shīrāzī, Kitāb al-Tanbīh, p.128. See also Sulaymān al-Jamal, Ḥāshiyat al-Jamal ᶜalā Sharḥ al-Minhaj, vol.5, p.82; Minhaj al-Ṭullāb printed with Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, p.284; Fatḥ al-Wahhāb, p.174; al-Maḥallī printed with Ḥāshiyatān Qalyūbī wa ᶜUmayrah, vol.4, p.148; Ḥāshiyat Qalyūbī printed with Ḥāshiyat ᶜUmayrah, vol.4, p.148; Tuḥfat al-Muḥtāj in the margin of Ḥāwāshī al-Sharwānī wa Ibn Qāsim, vol.9, p.6; al-Wajīz, vol.2, p.149.

[134] Al-Sirāj al-Wahhāj, p.504. See also Ḥāshiyat Qalyūbī printed with Ḥāshiyat ᶜUmayrah, vol.4, p.148; Tuḥfat al-Muḥtāj in the margin of Ḥāwāshī al-Sharwānī wa Ibn Qāsim, vol.9, p.6; al-Sharwānī, Ḥāshiyat al-Sharwānī, vol.9, p.7.

[135] Al-Muhadhdhab, vol.3, p.205; al-Shīrāzī, Kitāb al-Tanbīh, p.128; Ḥāshiyat Qalyūbī printed with Ḥāshiyat ᶜUmayrah, vol.4, p.148; al-Wajīz, vol.2, p.149.

[136] Ḥāshiyat Qalyūbī printed with Ḥāshiyat ᶜUmayrah, vol.4, p.148.

[137] Manār al-Sabīl, vol.2, p.336; al-Muqniᶜ, p.284; Sharḥ Muntahā al-Irādāt, vol.3, p.306; al-Rawḍ al-Murbiᶜ, p.494.

a minor. If the trainee is a minor, the trainer is absolutely liable for any accident which happens to the minor because the duty of care of the minor is on the trainer. However, the liability will be referred to his *ʿāqilah*. Therefore, if the minor is drowned, such circumstances will be referred to the negligence on the part of the trainer because of his duty of care of the minor. But, there is an opinion in this school which opines that the trainer is not liable. This case is compared to the case of disciplinary punishment like a normal beating which is carried out by the father, or teacher, or ruler where he is not liable for any injury which occurs. This is the opinion of al-Qāḍī.[138] On the other hand, if the same case comes up where it involves a mature person, the trainer is absolutely not liable insofar as he is not negligent because the mature person can take care of himself and his negligence which causes the death of himself will not be attributed to others. Otherwise, the trainer will be liable if the death happens owing to his negligence.[139] In brief, in both cases the liability of the trainer is upheld in the case of his negligence.

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[138] Al-Mughnī, vol.7, p.832; al-Mughnī wa al-Sharḥ al-Kabīr, vol.10, p.349.

[139] Al-Mughnī, vol.7, p.832.

CONCLUSION

In the classical period, Islamic lawyers did not deal with tort as a separate subject. Their approach to tort was on an *ad hoc* basis and they tended to consider law of tort within various other legal subjects scattered through the legal manuals. The aim of this thesis has been to trace the elements of tort within the general framework of Islamic law and to study it as a separate body of Islamic law.

When dealing with law of tort, the *fuqahā'* have relied upon the same sources of law which underlie the general body of Islamic law. These were based on the Qur'ān, the primary source of Islamic law; the Sunnah comprising the Ḥadīth- the words and acts of the Prophet; the consensus or *ijmā'* of legal scholars; and analogical reasoning or *qiyās*.

Suretyship (*ḍamān*) has been extensively studied by Muslim jurists. However, in the area of the law where *ḍamān* either meant compensation or implied compensation, the *fuqahā'* were, in fact, elaborating a method of dealing with tort. Thus, questions of liability, whether strict or vicarious, had to be discussed. This involved an analysis of the elements *al-taʿaddī*, *al-tafrīṭ*, *al-taʿammud*, *al-niyyah* as well as consideration of the rules of *mubāsharah* and *tasabbub*. In vicarious liability, the jurists had to determine where the guardians would be liable for the acts of his ward, and where employer had to bear the liability for the acts of his employee. This led to the need to elucidate whether the employee had vicarious liability and whether his position was regarded as an *amīn* or "trustee". As an *amīn*, an exclusive employee did not have to bear the burden of liability. However, it should be remembered that the principle and rule of liability of Islamic law of tort for damage or loss or injury was based on fault or mistake, whether

it was brought about through *al-taᶜaddī* or *al-tafrīṭ*.

The theory of liability, arising from torts against the person and the property, was fully elaborated and systematized by the *fuqahā'*. Since the earliest time, the problems and affairs regarding wrongs against individuals and against property have brought about detailed rules for civil responsibility. It is interesting to note that the doctrinal basis for principles of individual responsibility are wilful murder, murder by misadventure and manslaughter. But, nevertheless, the product of historical evolution by the *fuqahā'* can represent the application of principles which can very well fit contemporary needs, such as assault, battery, and false imprisonment. The concept of *ghaṣb* and *itlāf* was first codified systematically and applied according to the Ḥanafī school in the code of Majallat al-Aḥkām al-ᶜAdliyyah. The fact that all Muslim jurists of the *madhāhib* have discussed these topics and that the contemporary Muslim scholars have begun to systematize them shows the importance that they had and have in Islamic law.

Tort law also involves the responsibility of the owner of the premises and the animals. In their discussion of these topics, the *fuqahā'* put forward a variety of solutions which indicate that, at least in this area, *ijtihād* was and is an on-going subject. The *fuqahā'* also took account of the principles of juristic preference (*istiḥsān*) and public interest (*maṣlaḥah*). *ᶜUrf* or customary law also played an important role in tort law. Therefore, if a case happened is contrary to *ᶜurf*, liability will arise and the elements of *al-taᶜaddī* and *al-taqṣīr* will be examined. Because of that, the *fuqahā'* produced a legal maxim: *al-taᶜyīn bi al-ᶜurf ka al-taʿyīn bi naṣṣ* which means, a matter established by custom is like a matter established by law (Majallah, article 45). This was particularly the

case in the law governing liability for premises and liability for animals.

Wrongs and injuries arising from dangerous chattels *per se* and chattels *sub modo* were subject to ordinary rules of *Sharīᶜah* law. When damage occurred, compensation for the resulting loss or damage was governed by the Islamic law of damages as regards property, and by the principle of *ᶜāqilah* as regards persons irrespective of whether the injury resulted from dangerous chattels *per se* or *sub modo*. These two kinds of chattels are similar in giving rise to liability for its owner. Further, the jurists had a similar view concerning the collision of ships. If a collision happened due to natural causes, no liability will be referred to either masters of the ships, but if the collision happened due to *al-tafrīṭ* or *al-taᶜaddī*, the one against whom either of these elements is proved, will be liable.

Islamic law rests upon the principles of harmony and legality, but also upon the principle that a person must not interfere with the enjoyment of another. In the case of private nuisance, the Prophet ruled a basic principle which demanded that every person should not interfere with the right of enjoyment of the land by another. The tenor of the rule regulated by the Prophet in his Ḥadīth has been elaborated by the classical and contemporary *fuqahā'* in their manuals and as a result of that, many legal maxims established. Similarly, the community should and must demand right conduct and forbid any indecency or injury of its members if there is annoyance of the public interests. As far as the topic of nuisance is concerned, Islamic law has not lost sight of the value of the community in a headlong rush to protect the individual. The principles of harmony, legality, comfort, etc. stem from the concept of the individual, but ultimately protect the

community as a whole.

Fire and water are two things which can easily move from one place to another place naturally, if the owner of them does not take proper care to control them. The *fuqahā'* agreed that if a person lit a fire in his own land according to normal practice, then the fire trespasses to another's land without his negligence, will not make him liable. Otherwise, if that case happened in some manner not normal or the elements of *al-taᶜaddī* and *al-tafrīṭ* existed, he is liable. The position or judgement of water is similar to the position of fire. The *Sharīᶜah* system of liability for loss or damage in the cases of fire and water were based on fault, whether it was brought about through *al-taᶜaddī*, *al-tafrīṭ*, or *mujāwazat al-muᶜtād* (exceeding a normal practice) in using them, where it falls under *iᶜtidā'* and God strictly prohibits it indeed.

Upon examination, we found that the *Sharīᶜah* lays down rules regulating medical practice. The *Sharīᶜah* generally exempts the doctor from accountability for the consequences of the treatment. Thus, the doctor should be a qualified medical practitioner, should treat his patients in a good faith and with the intention of curing him, his treatment should conform to medical principles and he should undertake the treatment with the permission of the patients.

The *fuqahā'* have deliberated upon specific types of negligence in their manuals. The term of negligence in this thesis has two categories: (1) a mode or an element of liability in the law of tort which causes certain other torts; (2) negligence relating to carelessness in breach of a specific legal duty to take care. It is worth noting that the cases mentioned showed injuries resulting from acts or omissions constituted negligence. Even

though the element of negligence is an important matter, the *fuqahā'* have also ruled *al-ta^{c}addī* as a basis of liability for loss or damage and incorporated with negligence.

The thesis has tried to show that Islamic law, although it does not specifically and exclusively deal with the law of tort, has, in fact, laid down a basis for the subject to be treated as a legal entity and has developed the theories behind this in an independently Islamic approach.

BIOGRAPHICAL NOTES

ᶜABD ALLĀH AL-ZUBAYRĪ- He is Abū ᶜAbd Allāh al-Zubayr b. Aḥmad b. Sulaymān ibn ᶜAbd Allāh b. ᶜĀṣim b. Mundhir b. al-Zubayr b. al-ᶜAwwām al-Baṣrī, known as al-Zubayrī. He is a Shāfiᶜī scholar. He was a blind man, but wrote several works Islamic sciences. Among them are Kitāb Mukhtaṣar al-Fiqh, known as al-Kāfī, Kitāb al-Jāmiᶜ fī al-Fiqh, Kitāb al-Farā'iḍ, Kitāb al-Niyyah, Kitāb Sitr al-ᶜAwrah, Kitāb al-Hidāyah, Kitāb al-Ishtishārah wa al-Istikhārah, Kitāb Riyāḍat al-Mutaᶜallim and Kitāb al-Amān. He died after the year of 300H/912M and before 320H/932M. See al-Shīrāzī, Ṭabaqāt al-Fuqahā', p.117; Ibn Sirīn, al-Fihrisat, p.299; Kifāyat al-Akhyār, p.113.

ᶜABD ALLĀH B. ᶜATABAH- He is Abū ᶜUbayd Allāh ᶜAbd Allāh b. ᶜAtabah b. Masᶜūd al-Hadhalī. Ibn Saᶜd said: "He is a trustworthy scholar, *faqīh* and revered jurist". He died in 74H/693M. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.2, p.317.

ᶜABD AL-QĀDIR ᶜAWDAH- is an eminent and prominent contemporary Islamic jurist trained both in the Islamic law and the Western legal system. He was an active author and wrote several books, of which the most famous among scholars nowadays is two volumes al-Tashrīᶜ al-Jinā'ī al-Islāmī Muqāranan bi al-Qānūn al-Waḍᶜī. Others are Islām bayn Jahl Abnā'ih wa ᶜAjz ᶜUlamā'ih, al-Islām wa Awḍāᶜunā al-Siyāsiyyah, and al-Islām wa Awḍāᶜunā al-Qānūniyyah.

ᶜABD AL-RAZZĀQ- He is ᶜAbd al-Razzāq b. Humām b. Nāfiᶜ al-Ḥimyarī al-Ṣanᶜānī, born in 126H/743M. He was *mawlā* of the tribe of Ḥimyar and is known by the *kunyah* of Abū Bakr. He was one of Ḥadīth masters. He related Ḥadīths from Ibn Jurayj, Mālik, Maᶜmar, etc., and Aḥmad b. Ḥanbal, Isḥāq b. Ibrāhīm b. Mukhallid b. Rāhawayh, Ibn Maᶜīn, and others had learned them from him. Ibn ᶜAdī stated: "Many prominent Islamic scholars travelled to him (to learn Islamic sciences)". Abū Saᶜd al-Samᶜānī said: "There is no travel of people after the death of the Prophet unless to him". His famous works are Kitāb al-Sunan fī al-Fiqh and Kitāb al-Maghāzī. He died in 211H/826M at 85 years of age. See Ibn Nadīm, al-Fihrisat, p.318; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.2, p.509.

AL-ĀBĪ- He is Ṣāliḥ ᶜAbd al-Samīᶜ al-Ābī al-Azharī, one of the Mālikī jurists in the fourteenth century of the Hijrah. He wrote many works, among them are two commentaries: two volumes Jawāhir al-Iklīl ᶜalā Mukhtaṣar Khalīl, and al-Thamar al-Dānī Sharḥ Matn Risālah Abī Zayd al-Qayrawānī.

ABŪ BAKR- He is Abū Bakr ᶜAbd Allāh b. Abī Qahāfah ᶜUthmān b. ᶜĀmir b. ᶜAmrū b. Kaᶜab b. Saᶜd al-Taymī al-Qurashī, one of the greatest companions of the Prophet. He was born fifty-one years before the Hijrah (573M) in Mecca. He was a prominent and wealthy figure among the Quraysh, learned, noble and brave, and became the first adult male to accept Islām from the Prophet and the first of the four *Khalīfat al-Rāshidūn* (Rightly Guided Caliphs) after him. He forbade himself wine in the pre-Islamic period

and did not drink. A man who saw many remarkable events during the lifetime of the Prophet. He fought in the Muslim's battles, bore their hardships, and spent his wealth to establish Islām. ᶜUmar b. al-Khaṭṭāb once attested that if the faith of Abū Bakr were placed on one side of a scale and the faith of the entire Muslim community (*ummah*) on the other, Abū Bakr's faith would outweight it. He died in Medina in 13H/634M. See Khayr al-Dīn al-Ziriklī, al-Aᶜlām, vol.4, p.102; Keller, Reliance of the Traveller, p.1026; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.1, pp.236-237; al-Shīrāzī, Ṭabaqāt al-Fuqahā', pp.18-19; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, p.217.

ABŪ BARZAH AL-ASLAMĪ- He is Naḍlah b. ᶜUbayd b. al-Ḥārith, was a Companion of the Prophet. He died in 65H/685M. See al-Mawdūdī, Tafhīm al-Qur'ān, vol.5, p.315.

ABŪ DĀWUD- He is Abū Dāwud Sulaymān b. al-Ashᶜath b. Isḥāq b. Bashīr al-Azdī al-Sijistānī, born in 202H/817M in Sijistān, Persia. He was a Shāfiᶜī scholar and travelled to many countries to gain knowledge of the prophetic Ḥadīths. He became a *ḥāfiẓ* of Ḥadīths and the revered *Imām* in his time. His valuable work was al-Sunan and became one of six Sunan, and is known at present as Sunan Abū Dāwud. He died in Baṣrah in 275H/888M. See Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, p.283; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.3, pp.93-94; al-Subkī, Ṭabaqāt al-Shāfiᶜiyyah al-Kubrā, vol.2, p.293; Khayr al-Dīn al-Ziriklī, al-Aᶜlām, vol.3, p.122.

ABŪ ḤANĪFAH- He is Abū Ḥanīfah al-Nuᶜmān b. Thābit, born in 80H/699M in Kūfah. He was a scholar of Irāq and the foremost representive and exemplar of the school of juridicial opinion (*ra'y*). The Ḥanafī school, which he founded, has decided court cases in the majority of Islamic lands for the greater part of Islām's history, including the Abbasid and Ottoman periods, and maintains its pre-eminence in Islamic courts today. He was well-known for his piety (*waraᶜ*) and asceticism (*zuhd*). Though he had wealth from a number of shops selling cloth, to which he made occasion rounds to superintend their managers, he shunned sleep at night, and some called him "the Peg" because of him perpetual standing for prayer at night. He performed the dawn prayer for forty years with the ablution (*wuḍū'*) made for the nightfall prayer, would only sleep a short while between his noon and midafternoon prayers, and by the end of his life, had recited the Qur'ān seven thousand times in the place where he died. He would never sit in the shade of a wall belonging to someone ha had loaned money, saying: "Every loan that brings benefit is usury". He died in Baghdād in 150H/767M at seventy years of age. Books which are produced by him are al-Fiqh al-Akbar and al-Musnad. See al-Shaᶜrānī, al-Ṭabaqāt al-Kubrā, vol.1, pp.53-54; al-Shīrāzī, Ṭabaqāt al-Fuqahā', p.86; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.2, pp.119-125; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, p.219.

ABŪ HURAYRAH- He is Abū Hurayrah ᶜAbd al-Raḥmān b. Ṣakhr al-Dawsī, one of the Companions of the Prophet and the greatest of them in memorizing and relating Ḥadīths. He came to Medina when the Prophet was at Khaybar, and he became a Muslim in 7H/628M. In the reign of caliph ᶜUmar he was appointed as governor of Bahrain. He

lived most of his life in Medina and died there in 59H/678M or 58H/677M at 77 years of age. See Khayr al-Dīn al-Ziriklī, al-Aʿlām, vol.3, p.308; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, p.291; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.2, pp.306-307.

ABŪ MŪSĀ AL-ASHʿARĪ- He is Abū Mūsā ʿAbd Allāh b. Qays b. Sulaymān al-Ashʿarī, one of the Companions of the Prophet. He was born in Yemen 21 years before the Hijrah, and it is related that he had the most beautiful voice of any of the Companions in reciting the Qur'ān. He came to Mecca when Islām appeared and accepted it. The Prophet appointed him to govern Zabīd and ʿAdan in Yemen. In 17H/638M, ʿUmar made him governor of Baṣrah and then he conquered Ahwāz and Iṣbahān. In the caliphate of ʿUthmān, he was appointed as governor in Kūfah and continued his position until the caliphate of ʿAlī. He died in Kūfah in 44H/664M. Ibn al-Madīnī stated: "There are four *qāḍī* of *ummah*: ʿUmar, ʿAlī, Abū Mūsā and Zayd b. Thābit". Masrūq said of him: "Knowledge appears from six Companions of the Prophet, half of them are *ahl* al-Kūfah: ʿUmar, ʿAlī, ʿAbd Allāh, Abū Mūsā, Zayd b. Thābit....". See al-Shīrāzī, Ṭabaqāt al-Fuqahā', p.25; Khayr al-Dīn al-Ziriklī, al-Aʿlām, vol.4, p.114; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.1, pp.251-252.

ABŪ SAʿĪD AL-KHUDRĪ- He is Abū Saʿīd al-Khudrī Saʿd b. Mālik b. Sinān al-Anṣārī al-Khazrajī, one of the Medinan *Anṣār*, a Companion of the Prophet who was born ten years before the Hijrah. He constantly kept the company of the Prophet, and some 1,170 Ḥadīths were related by him. He participated in twelve of the Muslims' battles, and died in Medina in 74H/693M. See Khayr al-Dīn al-Ziriklī, al-Aʿlām, vol.3, p.87; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.1, p.271.

ABŪ THAWR- He is Abū Thawr Ibrāhīm b. Khālid b. Abī al-Yamān al-Kalbī al-Baghdādī, one of *a'immah al-mujtahidīn* and *fuqahā' al-muḥaqqiqīn*. He, in the beginning, followed the *madhhab al-ra'y* until al-Shāfiʿī arrived at Baghdād and contradicted him, then Abū Thawr turned from *al-ra'y* to al-Ḥadīth. He, therefore, is regarded by most *ʿulamā'* as one of al-Shāfi ī's disciples. He died in Baghdād in 240H/854M. See al-Shīrāzī, Ṭabaqāt al-Fuqahā', p.92; Muḥammad b. al-Ḥasan al-Ḥijawī, vol.3, pp.13-14; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, p.280.

ABŪ YŪSUF- He is Abū Yūsuf Yaʿqūb b. Ibrāhīm b. Ḥabīb b. Sa d b. Ḥamīd al-Anṣārī al-Kūfī al-Baghdādī, born in Kūfah in 113H/731M. He was the companion and student of Abū Ḥanīfah, and the first to propagate his school. He is one of the most brilliant judicial minds in Islamic history. He served as judge (*qāḍī*) in Baghdād during the caliphates of al-Mahdī and his son al-Hādī, and as head of the judiciary (*qāḍī al-quḍāh*) under the caliph Hārūn al-Rashīd. He was the first person nicknamed *qāḍī al-quḍāh*. He was the first to write works on the fundamentals of Ḥanafī jurisprudence, a *faqīh*, *ʿālim*, *ḥāfiẓ*, *mujtahid* with an extensive knowledge of Quranic exegesis. He, in the beginning, learned *fiqh* from Muḥammad b. ʿAbd al-Raḥmān, Abū Laylā and then moved to Abū Ḥanīfah and became the best student of his. He wrote many books in Ḥadīth and

fiqh. One of his famous book is Kitāb al-Kharāj. Others are Kitāb Ikhtilāf al-Amṣār, Kitāb al-Radd ᶜalā Mālik b. Anas, etc. He died in Baghdād in 182H/798M at sixty seven years of age. See Khayr al-Dīn al-Ziriklī, al-Aᶜlām, vol.8, p.193; al-Shīrāzī, Ṭabaqāt al-Fuqahā', p.141; Ibn Nadīm, al-Fihrisat, p.286; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.2, pp.510-512; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, pp.291-292; Keller, Reliance of the Traveller, p.1034.

AḤMAD B. ḤANBAL- He is Abū ᶜAbd Allāh Aḥmad b. Muḥammad b. Ḥanbal al-Shaybānī, *imām* of *ahl al-sunnah* and *imām* of *madhhab* of Ḥanbalī, born in 164H/780M in Baghdād, where he grew up as an orphan. For sixteen years he travelled in pursuit of the knowledge of Ḥadīth, to Kūfah, Baṣrah, Mecca, Medina, Yemen, Damascus, Morocco, Algeria, Persia, and Khurasān, memorizing one hundred thousand Ḥadīths, thirty thousand of which he recorded in his Musnad. He was among the most outstanding students of al-Shāfiᶜī, who when he left Baghdād for Egypt, said: "In departing from Baghdād, I have left no one in it more godfearing, learned in *fiqh*, abstinent, pious, or knowledgeable than Ibn Ḥanbal". Aḥmad b. Ḥanbal was imprisoned and tortured for twenty-eight months under the Abbasid caliph al-Muᶜtaṣim in an effort to force him to publicly espouse the Muᶜtazilah position that the Qur'ān was created, but he bore up unflinchingly under the persecution and refused to renounce the belief of *ahl al-sunnah* that the Qur'ān is the uncreated word of Allāh. When he died in Baghdād in 241H/855M, he was accompanied to his resting place by a funeral procession of eight hundred thousand men and sixty thousand women, marking the departure of the last of the four great *mujtahid imāms* of Islām. His famous work is al-Musnad. See Khayr al-Dīn al-Ziriklī, al-Aᶜlām, vol.1, p.203; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, p.221; al-Shīrāzī, Ṭabaqāt al-Fuqahā', p.101; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.3, pp.20-29.

ᶜALĪ- He is *Amīr al-Mu'minīn* Abū al-Ḥasan ᶜAlī b. Abī Ṭālib b. ᶜAbd al-Muṭṭalib al-Hāshimī al-Qurashī, the son of the Prophet's paternal uncle, the first child to accept Islām from the Prophet, and fourth of *al-Khulafā' al-Rāshidīn*, born of noble lineage in Mecca twenty-three years before the Hijrah and raised from the age of five by the Prophet, and then married his daughter Fāṭimah to him. He was one of the ten who were informed that they would enter paradise, as well as the first to pray behind the Prophet. He was one of the *ᶜulamā'* who being godfearing, courageous, ascetic, as well as an eloquent speaker, a wise and fair judge, a good poet, and was among the most learned of the Companions. He related hundreds of Ḥadīths from the Prophet. He had served as *khalīfah* for four years and nine months before he was assassinated while at prayer by a follower of Khawārij ᶜAbd al-Raḥmān b. Muljam in Kūfah in Ramaḍān in 40H/661M. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.1, pp.242-244; al-Shīrāzī, Ṭabaqāt al-Fuqahā, pp.22-23; Khayr al-Dīn al-Ziriklī, al-Aᶜlām, vol.4, p.295.

ᶜALĪ ḤAYDAR- He is ᶜAlī Ḥaydar Afandī, a Ḥanafī jurist in the thirteenth century of the Hijrah. He was a minister of justice of the Ottoman government, and also served as a teacher and *muftī* in the period of that government, as well as head of *maḥkamat al-*

tamyīz (court of cassation). He was the author of an outstanding commentary of Majallat al-Aḥkām al-ᶜAdliyyah, entitled Durar al-Ḥukkām Sharḥ Majallat al-Aḥkām al-ᶜAdliyyah (16 volumes, in 4 book bindings).

ᶜALĪ AL-KHAFĪF- He was a lecturer at Department of Law (Kulliyat al-Ḥuqūq), the University of Cairo. He produced some books especially in the area of *fiqh* such as two volumes work regarding the discussions of liability entitled al-Ḍamān fī al-Fiqh al-Islāmī, Aḥkām al-Muᶜāmalāt al-Sharᶜiyyah, etc. As memorial of his devotion to the University of Cairo, its authority has founded a library located at the department which he has served with the name of the Library of ᶜAlī al-Khafīf.

AṢBAGH- He is Abū ᶜAbd Allāh Aṣbagh b. al-Faraj b. Saᶜīd b. Nāfi al-Miṣrī al-Mālikī, one of the famous Mālikī scholars. He travelled to Medina to attend the lectures held by Mālik but, unfortunately, Mālik died. He learned *fiqh* from Ibn al-Qāsim, Ibn Wahb and Ashhab. He was knowledgeable in Islamic jurisprudence, especially on subjects relating to the Mālikī school and many scholars came to him to pursue knowledge, among them are Ibn al-Mawwāz and Ibn Ḥabīb. He wrote a few works: ten volumes al-Uṣūl, Tafsīr Ḥadīth al-Muwaṭṭaᶜ, twenty two kitāb Simāᶜuh min Ibn al-Qāsim, etc. He died in 225H/839M or 226H/840M, the first one is more likely. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.3, pp.114-115; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, p.293; Ibn Khallikān, Wafayāt al-Aᶜyān, vol.1, p.240; al-Shīrāzī, Ṭabaqāt al-Fuqahā', p.158.

ASHHAB- He is Abū ᶜAmrū Ashhab b. ᶜAbd al-ᶜAzīz b. Dāwud b. Ibrāhīm al-Qīsī al-ᶜĀmirī al-Miṣrī al-Mālikī, born in 145H/762M or 150H/767M or 140H/757M. He was a *faqīh* and learned *fiqh* from Mālik b. Anas and others in Cairo and Medina and then he was recognized as one of Mālik's companions. He was knowledgeable in Islamic sciences and a trustworthy scholar. Al-Shāfiᶜī states: "I do not know that there is one who cleverer in *fiqh* than Ashhab". Ibn ᶜAbd al-Barr maintains: "He is a *faqīh* and has a brilliant mind". There are different opinions among scholars about the position of Ashhab as to whether he is a *mujtahid muṭlaq* or *mujtahid muqallid.* This problem has also appeared to his friend Ibn al-Qāsim. Ibn ᶜAbd al-Barr reported from Muḥammad b. ᶜAbd al-Ḥakam who said that Ashhab is a hundred times more knowledgeable in *fiqh* than Ibn al-Qāsim, but Ibn Lubābah has rejected it by saying that Muḥammad b. ᶜAbd al-Ḥakam said that because Ashhab was his *Shaykh* and teacher. Ibn ᶜAbd al-Barr replies: "Ashhab and Ibn al-Qāsim are his *Shaykh* and he knows very well about both of them". He died in 204H/819M shortly after the death of al-Shāfiᶜī, at 64 years of age. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.2, p.524; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, p.293; al-Shīrāzī, Ṭabaqāt al-Fuqahā', p.155; Ibn Khallikān, Wafayāt al-Aᶜyān, vol.1, p.238; al-Bājī, Fuṣūl al-Aḥkām, p.149; Ibn Nadīm, al-Fihrisat, p.281.

ᶜAṬĀ'- He is Abū Muḥammad ᶜAṭā' b. Rabāḥ al-Jundī al-Yamānī, a prominent *fuqahā' al-tābiᶜīn* of Mecca and was a famous jurist in his time. He was *mawlā* of Quraysh. He was a trustworthy jurist, knowledgeable in *fiqh* and Ḥadīth. Abū Ḥanīfah said of him:

"I have never seen someone better than ᶜAṭā' b. Rabāḥ". He died in 114H/732M or 115H/733M. See al-Shīrāzī, Ṭabaqāt al-Fuqahā', p.57; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.2, p.363; Ibn Saᶜd, al-Ṭabaqāt al-Kubrā, vol.5, p.346; Kifāyat al-Akhyār, p.116; al-Mawdūdī, Tafhīm al-Qur'ān, vol.1, p.321.

AL-AWZĀᶜĪ- He is Abū ᶜAmrū ᶜAbd al-Raḥmān b. ᶜUmar b. Yaḥmad al-Awzāᶜī, born in Lubnān in 88H/706M. The word "Awzāᶜ" is related to banī Awzāᶜ b. Murthid in that time. He was the foremost jurist of Syria in the second century of Islām. He was a *mujtahid imām*, brilliant in *fiqh*, a master of Ḥadīth and knowledgeable in Qur'ān, as well as pious, ascetic and trustworthy. Ibn ᶜUyaynah states: "He is an *imām* in his epoch". Ibn Saᶜd maintains: "He is a trustworthy scholar". In his early life, he travelled in pursuing knowledge to al-Yamāmah, Mecca, Baṣrah, Damshiq, and then returned to Beirut, and died and was buried there in 157H/773M or 159H/775M. In Mecca, he learned Islamic sciences from ᶜAṭā' b. Abī Rabāḥ and Ibn Shihāb al-Zuhrī. His school of thought applies two principles together: *al-ra'y* and al-Ḥadīth. His school was practised in the area of Shām, Andalusia and Maghribī. He wrote a few works in *fiqh*, Ḥadīth, etc. Among them are Kitāb al-Sunan fī al-Fiqh and Kitāb al-Masā'il fī al-Fiqh. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.2, pp.436-437; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, pp.221-222; Ibn Nadīm, al-Fihrisat, p.318; Kifāyat al-Akhyār, p.89.

AL-BAGHDĀDĪ- He is Abū Muḥammad b. Ghānim b. Muḥammad al-Baghdādī, a Ḥanafī scholar in the thirteenth century of the Hijrah. He was a scholar who endeavoured to produce a very good compilation work from the ealier Islamic jurists in the area of "liability" which entitled Majmaᶜ al-Ḍamānāt fī Madhhab al-Imām Abī Ḥanīfah al-Nuᶜmān. This work had been completely compiled in the year of 1309H/1891M.

AL-BĀJĪ- He is Abū al-Walīd Sulaymān b. Khalaf b. Saᶜd b. Ayyūb b. Wārith al-Tujībī al-Mālikī al-Andalusī al-Bājī, born in 403H/1012M. He was a prominent *ᶜulamā'* of Andalusia in the middle of 5th century of the Hijrah. In pursuing knowledge, he travelled into most parts of the Middle-East between the year of 426H/1034M-439H/1047M. He went to Mecca, Baghdād, Kūfah, Shām, Cairo, etc. In his life, he wrote a number of works: al-Muntaqā, Fuṣūl al-Aḥkām, al-Tabyīn li Masā'il al-Muhtadīn, etc. He died in 494H/1100M or 474H/1081M or 473H/1080. See al-Bājī, Fuṣūl al-Aḥkām, pp.20-91; Sīdī Muḥammad al-Murīr, pp.294-295; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, pp.252-253.

AL-BARĀ' B. ᶜĀZIB- He is al-Barā' b. ᶜĀzib b. al-Ḥārith b. ᶜAdī al-Anṣārī al-Awsī al-Ṣaḥābī, a companion of the Prophet and died in 71H/690M or 72H/691M. See Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, p.296; al-Khuzrajī, Khulāṣat Tadhhīb Tahdhīb al-Kamāl, p.46; Kifāyat al-Akhyār, p.161.

AL-DUSŪQĪ- He is Abū ᶜAbd Allāh Muḥammad b. Aḥmad b.ᶜ Urfah al-Dusūqī al-Miṣrī al-Azharī, born at Dusūq. He was a Mālikī scholar, active in teaching Islamic jurisprudence and producing formal legal opinions. His famous works are Ḥāshiyah ᶜalā

al-Sharḥ al-Kabīr li al-Dardīr ᶜalā al-Mukhtaṣar and Ḥāshiyahᶜ alā al-Sâ d Sharḥ al-Talkhīṣ. He died in 1230H/1814M. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, p.353.

FAWZĪ FAYḌ ALLĀH- He is Muḥammad Fawzī Fayḍ Allāh, *ustādh* at Department of *Ḥuqūq* and Sharīᶜah, the University of Kuwait. Before working at that university, he served as *ustādh* and head department at Department of Fiqh al-Islāmī wa Madhāhibuh, the University of Damascus. He received his Ph.D from Department of Sharīᶜah, the University of al-Azhar in 1382H/1962M with a very good thesis entitled al-Mas'ūliyyah al-Taqṣīriyyah bayn al-Sharīᶜah wa al-Qānūn. He is also the author of a valuable work Naẓariyyat al-Ḍamān fī al-Fiqh al-Islāmī al-ᶜĀmm.

AL-GHAMRĀWĪ- He is Muḥammad al-Zuhrī al-Ghamrāwī, one of the Shāfiᶜī jurists in the fourteenth century of the Hijrah. His famous works are two commentaries, one of Nawawī's work Minhāj al-Ṭālibīn, called al-Sirāj al-Wahhāj Sharḥ ᶜalā Matn al-Minhāj, and of Ibn al-Naqīb's work ᶜUmdat al-Sālik waᶜ Uddat al-Nāsik, entitled Anwār al-Masālik.

AL-GHAZĀLĪ- He is Abū Ḥāmid Muḥammad b. Muḥammad b. Muḥammad b. Aḥmad al-Ghazālī al-Ṭūsī, nicknamed *ḥujjat al-Islām* (proof of Islām). He is a Shāfiᶜī scholar and *ṣūfī* adept, born in Ṭūs, Irān in 450H/1058M or 451H/1059M. The outstanding scholar of his time and he was nicknamed as Shāfiᶜī the second for his knowledge. He was a brilliant intellectual in Islamic sciences and jurisprudence. His first study of Islamic jurisprudence was at Ṭūs and then he travelled in pursuing and teaching the knowledge to Baghdād, Damascus, Jerusalem, Cairo, Alexandria, Mecca, Medina and came back to his home town Ṭūs. Among his famous teacher is *Imām al-Ḥaramayn* al-Juwaynī, with whom he studied the Islamic sciences until al-Juwaynī's death. He became a knowledgeable scholar in Shāfiᶜī law at al-Juwaynī's hands. Al-Ghazālī debated with the scholars of Baghdād in the presence of the *wazīr* (minister) Niẓām al-Mulk, who was so impressed that he appointed him to a teaching post at the Niẓāmiyyah Academy (*al-Madrasah al-Niẓāmiyyah*) in Baghdād, where words of his brilliance spread and scholars journeyed to hear him. He died in Ṭabirān in Jamādī al-Ākhir, Monday 14, 505H/1111M at fifty-five years of age. His works are: Iḥyā' ᶜUlūm al-Dīn, al-Wajīz fī Fiqh Madhhab al-Imām al-Shāfiᶜī, al-Mustaṣfā mirf Ilm al-Uṣūl, al-Basīṭ, al-Wasīṭ, Bidāyat al-Hidāyah, etc. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, p.394; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, pp.280-281; al-Shīrāzī, Ṭabaqāt al-Fuqahā', pp.248-249; Khayr al-Dīn al-Ziriklī, al-Aᶜlām, vol.7, p.22.

HAMMĀM B. MUNABBIH- He is Abū ᶜUqbah Hammām b. Munabbih b. Kāmil al-Ṣanᶜānī al-Yamānī. He was a Ḥadīth master, and had related Ḥadīths from Abū Hurayrah, Muᶜāwiyah, Ibn ᶜAbbās and Ṭā'ifah. He died in 131H/748M. See Ṣafiyy al-Dīn al-Khuzrajī, Khulāṣat Tadhhīb Tahdhīb al-Kamāl, p.411.

AL-ḤASAN- He is Abū Saᶜīd al-Ḥasan b. Abī al-Ḥasan Yasār al-Baṣrī, born in Medina

in 21H/641M. He was known primarily for his piety, abstinence and assiduousness in *ʿibādah*, was a major theologian of Baṣrah during the last decades of the first century of Hijrah/seventh century of Masīḥī. He was the *Imām* of Baṣrah and scholar of the Islamic community of his time, a learned, eloquent and courageous scholar. He died in Baṣrah on late evening Thursday, and was buried on Friday, at the beginning of Rajab 110H/728M at 89 years of age. See al-Shīrāzī, Ṭabaqāt al-Fuqahā', pp.91-92; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.2, p.364; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, p.299.

AL-ḤASAN B. ZIYĀD- He is Abū al-Ḥasan ʿAlī b. Ziyād al-Tūnisī. He was a Mālikī jurist and learned successively al-Muwaṭṭa' from Mālik himself, and then taught it to his disciples in his time. He wrote some works of the Mālikī school, one of them is Khayr min Dīnih. He lived after the death of Mālik for about five years. See al-Shīrāzī, Ṭabaqāt al-Fuqahā', p.156.

AL-ḤAṢKAFĪ- He is Muḥammad b. ʿAlī b. Muḥammad ʁ. Alī al-Ḥuṣnī, was nicknamed ʿAlā' al-Dīn al-Ḥaṣkafī al-Dimashqī al-Ḥanafī. He was born in Damascus in 1025H/1616M. He was appointed as *imām* at Banī Umayyah mosque, and then as *muftī* in Damascus where he died there in 1088H/1677M at sixty-three years of age. His works, revered among contemporary scholars are al-Durr al-Mukhtār fī Sharḥ Tanwīr al-Abṣār and Badr al-Muttaqā fī Sharḥ al-Multaqā. See Khayr al-Dīn al-Ziriklī, al-Aʿlām, vol.7, p.188; al-Durr al-Mukhtār, vol.2, p.539; Majmaʿ al-Anhur, vol.2, p.783.

AL-ḤAṬṬĀB- He is a Abū ʿAbd Allāh Muḥammad b. ʿAbd al-Raḥmān al-Ḥaṭṭāb al-Raʿīnī al-Mālikī, born in Mecca 902H/1496M, his origin was from Maghrib and he is widely known among Islamic scholars as al-Ḥaṭṭāb. He was a *faqīh*, *ʿālim*, *ḥāfiẓ*, and *thiqah*. He was one of the most famous Mālikī jurists and the author of a commentary of Mukhtaṣar Khalīl which was entitled Mawāhib al-Jalīl li Sharḥ Mukhtaṣar Khalīl. He died in 953H/1546M. See Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, p.299; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, p.319.

AL-ḤILWĀNĪ- He is Shams al-A'immah ʿAbd al-ʿAzīz b. Aḥmad al-Ḥilwānī al-Bukhārī, a native of Bukhārā. He was *imām* of people of Bukhārā and the author of al-Mabsūṭ. He died in 448H/1056M. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, p.207.

IBN ʿABD AL-BARR- He is Abū ʿUmar Yūsuf b. ʿAbd Allāh b. Muḥammad b. ʿUmar b. ʿAbd al-Barr, born in Cordova (Spain) in 368H/978M. He was a *ḥāfiẓ* of Ḥadīth in his era. Al-Bājī said: "He is one who knows best the Ḥadīths among the people of the West, no body like him in Andalusia". Ibn Ḥazm stated: "I have never seen somebody better in *fiqh al-Ḥadīth* than him, so how can I be better than him". He was a Mālikī scholar and the author of a number of works, among them are Kitāb al-Istidhkār bi Madhāhib ʿUlamā' al-Amṣār, Kitāb al-Tuqaṣṣī li Ḥadīth al- Muwaṭṭa', Kitāb Ikhtiṣār al-Tamyīz li Muslim, al-Kāfī fī Fiqh Ahl al-Madīnah al-Mālikī, and more than twenty others works including

Ḥadīth, *fiqh*, biography of famous Muslims, canonical Quranic readings (*qirā'āt*), genealogy, and history. He died in Shāṭibah on Friday night at the end of Rabīᶜ al-Ākhir in 463H/1070M. See al-Kāfī, pp.5-7; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, pp.248-249; Khayr al-Dīn al-Ziriklī, al-Aᶜlām, vol.8, p.240.

IBN ᶜABDŪS- He is Abū ᶜAbd Allāh Muḥammad b. Ibrāhīm b.ᶜ Abdūs, one of very great companions of Saḥnūn and *imām* in his era. His origin was non-Arab (*al-ᶜajam*) and he was from *mawālī* of Quraysh. He was a scholar of the Mālikī school, trustworthy and very knowledgeable in *fiqh*. Ibn al-Ḥārith stated: "He is the one from whom one memorizes the school of Mālik and transmitters (*ruwāh*) of his companions". He wrote a number of works in the area of *fiqh*, *tafsīr* and Ḥadīth. Among them are an outstanding work entitled al-Majmūᶜah and four volumes Sharḥ Masā'il min al-Mudawwanah. He died in 260H/873M or 261H/874M. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.3, pp.120-121; al-Shīrāzī, Ṭabaqāt al-Fuqahā', p.161; al-Bājī, Fuṣūl al-Aḥkām, p.199.

IBN ᶜĀBIDĪN- He is Muḥammad Amīn b. ᶜUmar b.ᶜ Abd alᶜ Azīzᶜ Ābidīn, widely known as Ibn ᶜĀbidīn al-Ḥanafī, born in Damascus in 1198H/1784M. Originally a Shāfiᶜī follower, and then he changed his school and became the Ḥanafī scholar of his time. He wrote many works including *fiqh*, formal legal opinions, Quranic exegesis, etc. His most famous work is the eight volumes Ḥāshiyah Radd al-Muḥtār ᶜalā al-Durr al-Mukhtār. The other is Majmūᶜah Rasā'il. He died in Damascus in 1252H/1836M. See Khayr al-Dīn al-Ziriklī, al-Aᶜlām, vol.6, p.42.

IBN ABĪ FIRĀS- He is Abū al-Qāsim Khalaf b. Abī Firās, a Mālikī jurist in eight century of the Hijrah and the author of a work concerned exclusively with maritime law which was entitled Kitāb Akriyyat al-Sufun.

IBN ABĪ LAYLĀ- He is Abū ᶜAbd al-Raḥmān Muḥammad b. ᶜAbd al-Raḥmān b. Abī Laylā al-Anṣārī al-Kūfī, widely known as Ibn Abī Laylā, born in 74H/693M. He was knowledgeable in Islamic sciences and then appointed as a *qāḍī* in Kūfah during thirty-three years in two periods of the reign of the Umayyads and Abbasids. He died in Kūfah in 148H/765M. See Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, p.227; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.2, pp.485-486; al-Shīrāzī, Ṭabaqāt al-Fuqahā', p.85.

IBN ABĪ ZAYD AL-QAYRAWĀNĪ- He is Abū Muḥammad ᶜAbd Allāh ibn Abī Zayd al-Qayrawānī, was born in Qayrawān in the north-eastern part of Tunisia in the year 312H/924M, two generations after the death of Mālik b. Anas, the founder of the Mālikī school of law. In his own days he was held in great reverence. People referred to him as Mālik *al-ṣaghīr* (the little/junior Mālik) on account of his erudition in the sciences of Islām and depth of knowledge and apt explanations of the opinions of the Mālikī school. He substantiated this with quotations from the Muwaṭṭa'. He is supposed to have written more than hundred books. He was the author of al-Risālah- one of the most famous and

authentic sources of the Mālikī rites and legal system since he had received the knowledge from Mālik b. Anas by two transmissions, viz through two other great jurists, Ibn al-Qāsim and Saḥnūn. It is undoubtedly the most classical work. His other works are Kitāb al-Nawādir wa al-Ziyādāt ᶜalā al-Mudawwanah, Mukhtaṣar al-Mudawwanah, etc. He died in 389H/998M at seventy seven years of age. See al-Risālah, pp.iv-vi; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, pp.224-225.

IBN ᶜAQĪL- He is Abū Muḥammad Abū al-Wafā' ᶜAlī b. ᶜAqīl b. Muḥammad al-Ṭifarī al-Ḥanbalī al-Faqīh al-ᶜAqīlī, a *shaykh* of the Ḥanbalī jurists in Baghdād in his era. He, in the beginning of his life, followed the Muᶜtazilah ideas, and then changed to the *sunnī madhhab*. He wrote a few works, one of them is al-Funūn. He died in 513H/1119M. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, p.428.

IBN AL-ᶜARABĪ- He is Abū Bakr Muḥammad b. ᶜAbd Allāh b. Aḥmad, widely known as Ibn al-ᶜArabī al-Mūāfirī al-Ishbīlī al-Mālikī. He was born in Ishbīlī in 468H/1076M. He grew up in a religious family. His father who died in Alexandria in 493H/1099M was one of the *fuqahā'* of Ishbīliyyah. He learned Islamic sciences since he was young of age, then went to pursue knowledge to Cairo, Syria, Baghdād, and Hijāz, and then returned to his native city. He was educated by a number of the famous *fuqahā'* in his time like al-Ghazālī, al-Ṭurṭūshī, al-Ṣayrafī, al-Akfānī, al-Shāshī, etc., and was appointed to a position of the head judiciary in his city. Then, he resigned from that position and worked to spread the knowledge of Islām to the public. He was knowledgeable in *tafsīr*, Ḥadīth, *fiqh*, *uṣūl*, Arabic language and poetry. He wrote a number of works, among them are four volumes Aḥkām al-Qur'ān, ᶜĀriḍat al-Aḥwadhī Sharḥ al-Tirmidhī, al-Maḥṣūl fī Uṣūl al-Fiqh, Kitāb al-Siyāsiyyāt, Kitāb Aᶜyān al-Aᶜyān, 20 book bindings al-Inṣāf fī Masā'il al-Khilāf, Kitāb Mushkil al-Qur'ān wa al-Sunnah, etc. He died in 543H/1148M and was buried in city of Fās at 75 years of age. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, pp.259-260; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, pp.262-263; Ibn Farḥūn, al-Dībāj al-Madhhab, pp.281-282; Ibn Khallikān, Wafayāt al-Aᶜyān, vol.4, p.296; Ibn alᶜ Arabī, Aḥkām al-Qur'ān, vol.1, pp.4-7.

IBN ḌŪYĀN- He is Ibrāhīm b. Muḥammad b. Sālim b. Ḍūyān, was born in a village named al-Ras in Najd in 1275H/1858M. His schooling began early in life from noted teachers of that country, with the emphasis being placed on the science of *fiqh*. He soon became recognized as a learned man and a teacher, with his *fatwās* accorded the highest respect. He served in the position of *qāḍī*. Ibn Ḍūyān wrote many books on varied subjects, among which were those dealing with history, *fiqh*, etc. Among his works are Manār al-Sabīl fī Sharḥ al-Dalīl, Kashf al-Niqāb fī Tārīkh al-Aṣḥāb, Sharḥ al-Zad, etc. He was afflicted with blindness in his later years and died on the night of *ᶜīd al-fiṭr* in 1353H/1934M at seventy eight years of age. His famous teachers are ᶜAbd al-ᶜAzīz b. Māniᶜ, Muḥammad b. ᶜUmar b. Salīm and Ṣāliḥ b. Furnās. See Manār al-Sabīl, vol.1, p.2.

IBN ḤABĪB- He is Abū Marwān ᶜAbd al-Mulk b. Ḥabīb b. Sulaymān al-Andalūsī al-Qurṭubī al-Mardāsī al-Salamī, born at Nawāḥī, Ghurnāṭah (Granada) in Andalusia in 170H/786M. He followed the Mālikī school and was one of propagators the school of Mālik in Andalusia. He was a *faqīh*, knowledgeable in Ḥadīth (*muḥaddith*) and learned scholar about transmitters of Ḥadīths as well as a poet, *ṭabīb*, and author. He, in his early life, learned Islamic sciences in al-Bīrah and then continued it in Qurṭubah (Cordova). Afterwards, he went to Mecca for the *ḥajj* and studied the Mālikī school in Medina under supervision of the *fuqahā'* there before returning to his native country Andalusia, where he worked to spread out Mālik's opinions. He learned *fiqh* formally from Yaḥyā b. Yaḥyā, ᶜĪsā b. Dīnār, al-Ḥasan b. ᶜĀṣim, Maṭraf, Ibn al-Mājishūn, etc. He was the author of al-Wāḍiḥah. He died in Cordova in 238H/852M or 236H/850M. See Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, p.241; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.3, pp.116-117; al-Shīrāzī, Ṭabaqāt al-Fuqahā', p.164.

IBN ḤAJAR AL-HAYTHAMĪ- He is Shihāb al-Dīn Abū al-ᶜAbbās Aḥmad b. Muḥammad b. ᶜAlī b. Ḥajar al-Haythamī al-Sa dī al-Anṣārī al-Makkī, born in 909H/1504M in Abū al-Haytham, western Egypt. He was the Shāfiᶜī scholar of his time. He was educated at al-Azhar University, and among his foremost teachers are Zakariyyā al-Anṣārī, ᶜAbd al-Ḥaqq al-Sanbāṭī, Nāṣir al-Dīn al-Ṭablāwī and Abū al-Ḥasan al-Bakrī. Then he moved to Mecca where he wrote major works in Shāfiᶜī jurisprudence, Ḥadīth, tenets of faith, education, Ḥadīth commentary, and formal legal opinions (*fatāwā*). His most famous works include Tuḥfat al-Muḥtāj bi Sharḥ al-Minhāj a commentary on Nawawī's Minhāj al-Ṭālibīn (10 volumes), al-Zawājir ᶜan Iqtirāf al-Kabā'ir,al-Ṣawāᶜiq al-Muḥarriqah fī al-Radd ᶜalā Ahl al-Bidᶜ wa al-Zindiqah, Sharḥ al-Hamziyyah, and al-Manḥ al-Makkiyyah. After a lifetime of outstanding scholarship, he died and was buried in Mecca in 974H/1567M. In another view, he died in 973H/1566M. See Khayr al-Dīn al-Ziriklī, al-Aᶜlām, vol.1, p.234; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, pp.242-243; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, p.420.

IBN ḤĀJIB- He is Abū ᶜAmr ᶜUthmān b. Abī Bakr al-Ruwaynī al-Miṣrī al-Dimashqī, then al-Iskandarī al-Kurdī, known as Ibn Ḥājib. He was a jurist of the Mālikī school. He was an eminent jurist, as a *faqīh*, a grammarian, a philologist, and a reader of the Qur'ān. He wrote several works, among them are Kāfiyah in grammar, and Shāfiyah in *ṣaraf*, and a few works in the area of canonical readings of Qur'ān, *uṣūl* and *fiqh*. He died in 646H/1248M. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, pp.270-271.

IBN ḤAZM- He is Abū Muḥammad ᶜAlī b. Aḥmad b. Saᶜīd b. Ḥazm al-Qurṭubī al-Andalusī al-Ẓāhirī, one of the famous *imāms* in Andalus, born in Cordova (in present day Spain) in 384H/994M. He is the greatest scholar of Andalusia in his era, knowledgeable in Ḥadīth sciences and brilliant in Islamic jurisprudence. He, in the beginning, followed the Shāfiᶜī school, and a student of al-Shāfiᶜī who accepted only the Qur'ān, Ḥadīth and *ijmāᶜ* as sources of evidence in Islamic law, denying the validity of

analogical reasoning (*qiyās*). He, then, followed Dāwud al-Ẓāhirī. Though he wrote works on poetry, history, logic, biography, grammar and fundamentals of Islamic law, his the most famous book is entitled al-Muḥallā- an eleven volume work on his own school of jurisprudence. In his works, he attacked the opinions of the founders of other schools. The scholars of his time agreed that Ibn Ḥazm was misguided, warned their rulers against the strife he was causing, and the common people from approaching him, and he was exiled and fled to Lablah in the Andalusian countryside, where he died in 456H/1064M. His works other than al-Muḥallā are: al-Īṣāl ilā fahm al-Khiṣāl al-Jāmiᶜah li Jumal Sharā'iᶜ al-Islām fī al-Wājib wa al-Ḥalāl wa al-Ḥarām wa al-Sunnah wa al-Ijmāᶜ, Ibṭāl al-Qiyās wa al-Ra'y, al-Ijmāᶜ wa Masā'iluh ᶜalā Abwāb al-Fiqh. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.3, pp.44-45; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, pp.245-246; Khayr al-Dīn al-Ziriklī, al-Aᶜlām, vol.4, p.254.

IBN ḤIBBĀN- He is Abū Ḥāmid Muḥammad b. Aḥmad b. Ḥibbān al-Tamīmī, born in Bust (in present day Afghanistān). He was a Shāfiᶜī scholar and Ḥadīth master (*ḥāfiẓ*). He was known as "the senior Shāfiᶜī" (al-Shāfiᶜī *al-kabīr*). In his search for knowledge of Ḥadīth, he travelled to Khurasān, Syria, Egypt, Irāq, the Arabian Peninsula, and Nishapur before returning to his native city, after which he served as a judge for a period in Samarkand. He was knowledgeable in medicine, astronomy, history and Islamic Jurisprudence. He wrote al-Anwāᶜ wa al-Taqāsim, also known as al-Musnad al-Ṣaḥīḥ, etc., and died in Bust in 354H/965M. See Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, p.241; Khayr al-Dīn al-Ziriklī, al-Aᶜlām, vol.6, p.78; al-Subkī, Ṭabaqāt al-Shāfiᶜiyyah al-Kubrā, vol.3, p.131.

IBN JUZAYY- He is Abū al-Qāsim Muḥammad b. Aḥmad b. Muḥammad b. ᶜAbd Allāh b. Yaḥyā b. ᶜAbd al-Raḥmān b. Yūsuf b. Juzayy al-Kalabī al-Ghurnāṭī (Granada- in present day Spain) al-Mālikī. He was born in 693H/1293M. He was a Mālikī scholar and was knowledgeable in Quranic exegesis, Ḥadīth, *uṣūl* and Arabic lexicology. He learned the knowledge of Qur'ān, of *fiqh*, of Ḥadīth and of Arabic literature from Ibn al-Kamād, Abū Jaᶜfar ibn al-Zubayr, Abū ᶜAbd Allāh b. Rashīd, al-Ḥaḍramī, Ibn Abī al-Aḥwaṣ, Ibn Burṭāl, Abū ᶜĀmir b. Rabīᶜ al-Ashᶜarī, etc. of *ᶜulamā'* and *fuqahā'* in his epoch. He died in 741H/1340M at forty-eight years of age. In his life, he wrote several books, among them are: al-Qawānīn al-Fiqhiyyah, Wasīlat al-Muslim fī Tahdhīb Ṣaḥīḥ Muslim, al-Tanbīh ᶜalā Madhhab al-Shāfiᶜiyyah wa al-Ḥanafiyyah wa al-Ḥanbaliyyah, al-Nūr al-Mubīn fī Qawāᶜid ᶜAqā'id al-Dīn, Taqrīb al-Wuṣūl ilā Ilm al-Uṣūl, al-Mukhtaṣar al-Bāriᶜ fī Qirā'ah Nāfiᶜ, Uṣūl al-Qurrā' al-Sittah Ghayr Nāfiᶜ, al-Fawā'id al-ᶜĀmmah fī Laḥn al-ᶜĀmmah, al-Tashīl li al-ᶜUlūm al-Tanzīl, etc. See Khayr al-Dīn al-Ziriklī, al-Aᶜlām, vol.5, p.325; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, p.237; al-Qawānīn al-Fiqhiyyah, p.5.

IBN KINĀNAH- He is ᶜUthmān b.ᶜ Īsā b. Kinānah, one of the famous *fuqahā'* of Medina. He followed the Mālikī school and one of Mālik's companions. He was educated *fiqh* by Mālik and attended his lecture until his death. He died two or three years after the death of Mālik. See al-Shīrāzī, Ṭabaqāt al-Fuqahā', p.152; al-Bājī, Fuṣūl al-

Aḥkām, p.140.

IBN MĀJAH- He is Abū ᶜAbd Allāh Muḥammad b. Mājah b. Yazīd al-Rubᶜī al-Qazwīnī, of Qazvin, Persia, born in 209H/824M. He was a Ḥadīth master and very knowledgeable scholar of Quranic exegesis. He travelled in pursuit of knowledge of Ḥadīth to Baṣrah, Baghdād, Syria, Cairo, Ḥijāz, Rayy, etc. He wrote al-Sunan, one of the six Sunan (al-Sunan al-Sittah) which was recognized among Islamic scholars as Sunan Ibn Mājah. He died in 273H/886MM. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.3, p.93; Khayr al-Dīn al-Ziriklī, al-Aᶜlām, vol.7, p.144.

IBN AL-MĀJISHŪN- He is Abū Marwān ᶜAbd al-Malik b. ᶜAbd al-ᶜAzīz b. ᶜAbd Allāh b. Abī Salamah al-Mājishūn al-Madanī al-Tamīmī al-Faqīh, known as "senior *faqīh* of the Mālikī school (*faqīh Mālikī kabīr*), and a trustworthy scholar. He was educated in Islamic jurisprudence by Mālik, his father, and others. He was a leadingman of knowledge and of formal legal opinions in Medina in his life of time. Many famous scholars learned the Islamic sciences from him, such as Aḥmad b. al-Muᶜadhdhal, Saḥnūn, Ibn Ḥabīb, and others. He died in 212H/827M or 213H/828M or 214H/829M. See Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, p.228; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.3, pp.111-112.

IBN MASᶜŪD- He is Abū ᶜAbd al-Raḥmān ᶜAbd Allāh b. Masᶜūd b. Ghāfil b. Ḥabīb al-Hadhalī, a native of Mecca. One of the greatest Companions of the Prophet and very close to him. He was among the earliest converts to Islām, the first to recite the Qur'ān aloud in Mecca, and a trusted servant of the Prophet who kept his secrets, carried his sandals, and accompanied him while travelling or at home. He loved perfume and when he left home, people would tell where he had passed by the beautiful scent. He was among the great scholars of the Companions, he related 848 Ḥadīths, and died in Medina in 32H/653M at about 60 years of age. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.1, pp.245-247; al-Shīrāzī, Ṭabaqāt al-Fuqahā', pp.24-25; Khayr al-Dīn al-Ziriklī, al-Aᶜlām, vol.4, p.137.

IBN AL-MUNDHIR- He is Abū Bakr Muḥammad b. Ibrāhīm b. al-Mundhir al-Nīsābūrī, a great Shāfiᶜī jurist and revered *ḥāfiẓ*. He was a *mujtahid* and *imām* as well as a knowledgeable and pious scholar. Al-Subkī stated: "There four Muḥammads: Muḥammad b. Naṣr, Muḥammad b. Jarīr al-Ṭabarī, Muḥammad b. al-Mundhir, and Muḥammad b. Khuzaymah, and they achieved the level of *mujtahid* (*ijtihād*)". He wrote several works: Kitāb al-Sunan, Kitāb al-Ijmāᶜ, and Kitāb al-Ishrāf fī al-Ikhtilāf. Al-Shīrāzī stated: "He wrote on the subject of *ikhtilāf al-ᶜulamā'* what no person had written like". He heard and learned Ḥadīths from Muḥammad b. Maymūn, Muḥammad b. Ismāᶜīl al-Ṣā'igh, al-Rabīᶜ b. Sulaymān, etc. He died in Mecca in 309H/921M or 310H/922M or 316H/928M. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.3, p.98; al-Shīrāzī, Ṭabaqāt al-Fuqahā, p.118; Kifāyat al-Akhyār, p.71.

IBN NĀFIᶜ- He is Abū Muḥammad ᶜAbd Allāh b. Nāfiᶜ, known as al-Ṣā'igh. He was

mawlā of Banī Makhzūm. He learned *fiqh* from Mālik and his companions for 40 years and served as *muftī* in Medina after Mālik. He was an illiterate scholar. Ashhab stated: "Every lecture of Mālik which I attended, Ibn Nāfiᶜ had attended it too". Ashhab helped him to write everything and he had an outstanding work, that was a commentary on the Muwaṭṭa' which was related by Yaḥyā b. Yaḥyā al-Laythī. He died in 186H/802M in Medina. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.2, pp.521-522; al-Bājī, Fuṣūl al-Aḥkām, p.152.

IBN NĀJĪ- He is Abū al-Qāsim b. ᶜĪsā b. Nājī, a Mālikī scholar in ninth century of the Hijrah. He was a *faqīh*, *ḥāfiẓ*, *zāhid* and *warᵃ*. He wrote several works, the most famous of which was a commentary of al-Risālah, work of Ibn Abī Zayd al-Qayrawānī, entitled Sharḥ ᶜalā Matn al-Risālah. This work was published by Dār al-Fikr together with Sharḥ ᶜalā Matn al-Risālah written by Zarrūq. The other is al-Ziyādāt ᶜalā Maᶜālim al-Īmān fī Rijāl al-Qayrawān. He died in 837H/1433M. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, p.301.

IBN NUJAYM- He is Zayn al-Dīn b. Ibrāhīm b. Muḥammad, widely known as Ibn Nujaym. He is a Ḥanafī scholar, born in Cairo in 925H/1519M. He was educated in *fiqh* by Qāsim b. Qaṭlūbaghā, al-Burhān al-Karkhī, al-Amīn b. ᶜAbd al-ᶜĀl al-Ḥanafī, Sharaf al-Dīn al-Balqīnī, Aḥmad b. Yūnus- known as Ibn al-Shalabī, Abū Fayḍ al-Salamī and Nūr al-Dīn al-Daylamī al-Mālikī. Beside that, he was a *faqīh* and also was an active person in practising *taṣawwuf*. He learned and acquired *al-ṭarīqah al-ṣūfiyyah* from al-Shaykh Sulaymān al-Khuḍayrī. There are different opinions about the date of death of Ibn Nujaym. His son Aḥmad said that he died in 970H/1562M. His student al-Shaykh Muḥammad al-ᶜAlamī and others said that he died on Wednesday morning 8 Rajab 969H/1561M and was buried nearby al-Sayyidah Sakīnah bint al-Ḥusayn b. ᶜAlī. He produced a number of works in Ḥanafī jurisprudence. Among them are al-Ashbāh wa al-Naẓā'ir, al-Baḥr al-Rā'iq Sharḥ Kanz al-Daqā'iq, al-Fatāwā al-Zayniyyah, Taᶜlīq ᶜalā al-Hidāyah, Ḥāshiyah ᶜalā Jāmi al-Fuṣūlayn, al-Fawā'id al-Zayniyyah fī Fiqh al-Ḥanafiyyah, al-Rasā'il al-Zayniyyah fī Fiqh al-Ḥanafiyyah, etc. See Khayr al-Dīn al-Ziriklī, al-Aᶜlām, vol.3, p.104; Ibn Nujaym, al-Ashbāh wa al-Naẓā'ir, pp.5-6 and 15-16.

IBN QĀḌĪ SAMĀWANAH/AKHŪ ZĀDAH- He is ᶜAbd al-Ḥalīm b. Muḥammad, known as Akhū Zādah. He was born, grew up and died in Constantinople. He was a Ḥanafī jurist, knowledgeable in *fiqh*, and was appointed to a position in the judiciary. He wrote several works, among them are Sharḥ al-Hidāyah, Taᶜlīqāt ᶜalā Sharḥ al-Miftāḥ, Jāmiᶜ al-Fuṣūlayn, al-Durar wa al-Gharar, al-Ashbāh wa al-Naẓā'ir, Risālah Tafsīriyyah, etc. He died in 1013H/1604M. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, p.219.

IBN AL-QĀSIM- He is Abū ᶜAbd Allāh ᶜAbd al-Raḥmān b. al-Qāsim b. al-Khālid b. Junādah al-ᶜAtqī al-Miṣrī al-Mālikī, born in 132H/749M. He was knowledgeable in Islamic sciences: *fiqh*, Ḥadīth and its narrators, etc. He was personally pious, ascetic and godfearing. He had learned Islamic subjects from *Imām* Mālik for twenty years, and

continued his teacher's task when he died. There are different opinions on whether Ibn al-Qāsim a *mujtahid muṭlaq* or *mujtahid muqallid*. According to Abū Zayd b. al-Imām, he is a *mujtahid muqallid* who followed Mālik b. Anas like Muḥammad b. al-Ḥasan al-Shaybānī followed Abū Ḥanīfah in the Ḥanafī school and al-Muzanī followed al-Shāfiᶜī in the Shāfiᶜī school. But, according to Abū Mūsā ᶜImrān al-Mushdhālī al-Bijā'ī, he is a *mujtahid muṭlaq* by reason that he had different opinions from Mālik. If he is a *mujtahid muqallid*, this situation would not happen. This view has been supported by Muḥammad b. ᶜAbd al-Salām al-Hawarī, a *qāḍī* in Tūnis. He died in Cairo in 191H/806M at 63 years of age. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.1, pp.516-519; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, pp.269-270; al-Shīrāzī, Ṭabaqāt al-Fuqahā', p.155.

IBN QAYYIM- He is Shams al-Dīn Abū ᶜAbd Allāh Muḥammad b. Abī Bakr b. Ayyūb b. Saᶜd al-Zarᶜī al-Dimashqī al-Ḥanbalī, widely known as Ibn Qayyim al-Jawziyyah. He was born in Damascus in 691H/1292M. He was a Ḥanbalī scholar. He was knowledgeable in Ḥadīth science, *fiqh*, Arabic grammar, *tafsīr* and *uṣūl*. He was educated by the famous Islamic scholar Ibn Taymiyyah and totally followed his opinions and ideas. He was imprisoned with his teacher Ibn Taymiyyah in the citadel of Damascus and suffered with him until Ibn Taymiyyah's death in 728H/1328M, when he was released. He thereafter worked to spread and popularize his teacher's ideas until he died in Damascus in 751H/1350M. He wrote a number of works, among them are Zād al-Maᶜād fī Hady Khayr al-ᶜIbād, al-Ṭuruq al-Ḥukmiyyah fī al-Siyāsah al-Sharᶜiyyah, Iᶜlām al-Muwaqqiᶜīn ᶜan Rabb al-ᶜĀlamīn, al-Tibyān fī Iqsām al-Qur'ān, Kitāb al-Rūḥ, etc. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, p.436; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, pp.271-272; Khayr al-Dīn al-Ziriklī, al-Aᶜlām, vol.6, p.56.

IBN QUDĀMAH- He is Abū Muḥammad ᶜAbd Allāh b. Aḥmad b. Muḥammad b. Qudāmah b. Miqdām b. Naṣr b. ᶜAbd Allāh b. Ḥudhayfah b. Muḥammad b. Yaᶜqūb b. al-Qāsim b. Ibrāhīm b. Ismāᶜīl b. Yaḥyā b. Muḥammad b. Sālim b. ᶜAbd Allāh ibn Amīr al-Mu'minīn ᶜUmar al-Khaṭṭāb, nicknamed Muwaffaq al-Dīn Ibn Qudāmah al-Jamāᶜīlī al-Maqdisī, born in Shaᶜbān 541H/1146M in Jamāʿīl, Palestine (Bayt al-Maqdis). A famous Ḥanbalī jurist. He was educated in Damascus, and was the author of the nine volume al-Mughnī on Ḥanbalī jurisprudence as well as a comparative study among the other *madhāhib*. He was also the author of al-Muqniᶜ, ᶜUmdat al-Fiqh, al-Kāfī fī al-Fiqh, Rawḍat al-Nāẓir fī Uṣūl al-Fiqh, etc. and more than twenty works of Islamic law, theology, Ḥadīth, Quranic exegesis, biography, legal opinion, tenets of faith and geneology. He travelled to Baghdād in between 560-561H and lived there four years before returning to Damascus, where he died on Saturday, the day of *ᶜīd al-fiṭr* in 620H/1223M. See al-Muqniᶜ, pp.5-9; Khayr al-Dīn al-Ziriklī, al-Aᶜlām, vol.4, p.67.

IBN RAJAB- He is Zayn al-Dīn Abū al-Faraj ᶜAbd al-Raḥmān b. Shihāb al-Dīn b. Aḥmad b. ᶜAbd al-Raḥmān b. al-Ḥasan b. Muḥammad b. Abī al-Barakāt Maśʿūd al-Salāmī al-Baghdādī al-Dimashqī al-Ḥanbalī, widely known as Ibn Rajab, born in

736H/1335M in Baghdād. He, in the beginning, learned Ḥadīth from his grandfather ᶜAbd al-Raḥmān b. al-Ḥasan and his father Shihāb al-Dīn Aḥmad who was born in Baghdād in 706H/1306M. Then, he travelled, in pursuit of the knowledge to Damascus in 744H/1343M and to Cairo before the year 754H/1353M. He was educated in Ḥadīth by a number of prominent scholars of his era. Among them are Shams al-Dīn Abū ᶜAbd Allāh Muḥammad b. Abū Bakr b. Ayyūb al-Zarᶜī, well-known as Ibn Qayyim al-Jawziyyah (d. 751H/1350M), *Qāḍī al-Quḍāh* Abū al-ᶜAbbās Aḥmad b. al-Ḥasan b. ᶜAbd Allāh, well-known Ibn Qāḍī al-Jabal (d. 771H/1369M), Ṣafīy al-Dīn Abū al-Faḍā'il ᶜAbd al-Mu'min b. Abd al-Ḥaqq b. Abd Allāh al-Baghdādī al-Ḥanbalī (d. 739H/1338M), etc. He is a *ḥāfiẓ*, *faqīh* as well as being an ascetic and pious. He wrote many books including Quranic exegesis, Ḥadīth, Islamic jurisprudence, admonition (*waᶜẓ*), virtues (*faḍā'il*), etc. Among them are Tafsīr Sūrat al-Naṣr, Iᶜrāb al-Basmalah, Iᶜrāb Umm al-Kitāb, Tafsīr Sūrat al-Fātiḥah, Tafsīr Sūrat al-Ikhlāṣ, Fatḥ al-Bārī bi Sharḥ Ṣaḥīḥ al-Bukhārī, Sharḥ Jāmiᶜ al-Tirmidhī, al-Qawāᶜid fī al-Fiqh al-Islāmī, al-Istikhrāj fī Aḥkām al-Kharāj, Jāmiᶜ al-ᶜUlūm wa al-Ḥukm, etc. He died in 795H/1392M in Damascus and was buried nearby the grave of Abū Faraj ᶜAbd al-Wāḥid b. Muḥammad al-Shīrāzī who died in Dhū al-Ḥijjah 486H/1093M. See Jāmiᶜ al-ᶜUlūm wa al-Ḥukm, vol.1, pp.25-52; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, p.440.

IBN RUSHD- He is Abū al-Walīd Muḥammad b. Aḥmad b. Muḥammad b. Aḥmad b. Rushd al-Andalusī al-Mālikī al-Qurṭubī, known as Ibn Rushd al-Ḥafīd. He was born at Cordova in the year 520H/1126M, the same year that his grandfather died. He is famous in the Medieval West under the name of Averoes, belonged to an important Spanish family. His grandfather (d. 520H/1126M), who had the same name and with reference to whom Ibn Rushd is known as the grandson (*al-ḥafīd*). He was a well-known Mālikī jurist, a *qāḍī*, and the *imām* of the Great Mosque of Cordova. His father too was a *qāḍī*. Ibn Rushd himself is better known as a philosopher or even as a physician, although he has been a *qāḍī* most of his life. In his youth, he received an excellant education in *fiqh*, Ḥadīth, *kalām*, medicine, Arabic literature and *uṣūl*. Some of his well-known teachers are Muḥammad ibn Rizq, Ibn Bashkuwāl, Abū Jaᶜfar Hārūn al-Tajallī, and Abū Marwān ibn Jurrayūl. He died at Marrākush on 9 Ṣafar 595H/10 September 1198M and his body was taken to Cordova for burial. His famous legal work is Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid. See Muḥammad b. al-Ḥasan al-Hijawī, al-Fikr al-Sāmī, vol.4, p.267; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, pp.330-331; Ibn Farḥūn, al-Dībāj al-Madhhab, pp.284-285.

IBN SAᶜD- He is Abū ᶜAbd Allāh Muḥammad b. Sâ d b. Manī al-Zuhrī. He was a historian, traditionist and secretary of al-Wāqidī. He was the author of fifteen volumes al-Ṭabaqāt al-Kubrā, a major biographical dictionary of the early period of Islām. He died in 230H/844M. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.3, pp.81-82; al-Mawdūdī, Tafhīm al-Qur'ān, vol.1, p.322.

IBN SHĀS- He is Abū Muḥammad ᶜAbd Allāh b. Najm b. Shās al-Jadhāmī al-Saᶜdī al-Faqīh al-Mālikī, a knowledgeable scholar about the Mālikī school and its principles,

and the author of an outstanding work al-Jawāhir al-Thamīnah fī Madhhab ᶜĀlam al-Madīnah. He died in 610H/1213M. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, p.269; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, p.256.

IBN SHUBRUMAH- He is Abū Shubrumah ᶜAbd Allāh b. Shubrumah al-Ḍabī al-Kūfī. He was one of the *fuqahā'* of *tābiᶜīn*, born in 92H/710M. It was reported by Anas, Abū al-Ṭufayl, al-Shaᶜbī, etc. that Ibn Shubrumah was a *faqīh* as well as brilliant (*ᶜāqilan*), honest (*ᶜafīfan*), trustworthy (*thiqah*) and well-mannered scholar. He was also a poet. Al-Thawrī states: "Our *fuqahā'* are Ibn Abī Laylā and Ibn Shubrumah". He learned *fiqh* from al-Shaᶜbī. Ḥammād b. Zayd describes him as brilliant in *fiqh* as: "I have never known that there is a *kūfiyyan* (an inhabitant of Kūfah) cleverer in *fiqh* than Ibn Shubrumah". He died in 144H/761M. See al-Shīrāzī, Ṭabaqāt al-Fuqahā', p.85; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.2, pp.482-483.

IBN SURAYJ- He is Abū al-ᶜAbbās Aḥmad b. ᶜUmar b. Surayj, a scholar of the Shāfiᶜī school. Al-Shīrāzī stated in his Ṭabaqāt: "He was one of the great Shāfiᶜī jurists (*ᶜuẓamā' al-Shāfi iyyīn*) and *imām* of Muslims (*a'immat al-Muslimīn*), and was nicknamed "The Bright Fire" (*al-bāz al-ashhab*)". He served as *qāḍī* at Shīrāz and surpassed in talent all al-Shāfiᶜī pupils even al-Muzanī. He was an active defender of the Shāfiᶜī school and refuted its adversaries. He studied Islamic sciences under Abū al-Qāsim al-Anmāṭī, and then many *fuqahā'* came and learned from him. Therefore, through his medium, Shāfiᶜī doctrines were spread into many countries." His teachers other than al-Anmāṭī are al-Zaᶜfarānī, Abū Dāwud al-Sijistānī, etc. He died in Baghdād on 25 of the Jamādī al-Awwal in 306H/918M or on Monday 25 of the Rabīᶜ al-Awwal, and was buried in the court of his house at the Suwajjat Ghālib which is on the west bank of the Tigris, near the suburb of al-Karkh at 57 years of age. See Ibn Khallikān, Wafayāt al-Aᶜyān, vol.1, pp.100-102; al-Shīrāzī, Ṭabaqāt al-Fuqahā', p.118; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.3, pp.155-156.

IBN TAYMIYYAH- He is Taqīy al-Dīn Abū al-ᶜAbbās Aḥmad b. ᶜAbd al-Ḥalīm b. ᶜAbd al-Salām ibnᶜ Abd Allāh b. al-Khiḍir b. Alī b. Abd Allāh b. Taymiyyah al-Ḥarrānī, born in Ḥarrān, east of Damascus, in 661H/1263M. He moved to Damascus with his father and his family and learned the Islamic sciences from a number of teachers there, and became a famous Ḥanbalī scholar in Quranic exegesis, Ḥadīth, jurisprudence and legal opinions. He was imprisoned during much of his life in Cairo, Alexandria, and Damascus for his writings. Scholars of his time accusing him of believing Allāh to be a corporeal entity because of what he mentioned in his al-ᶜAqīdah al-Ḥamāwiyyah and al-Wasīṭiyyah and other works. He died in Damascus in 728H/1328M. In his life, he wrote a lot of books on Islamic jurisprudence, theology, economic, Ḥadīth, Quranic exegesis, etc. Among them are Fatāwā Ibn Taymiyyah, al-Qiyās fī al-Sharᶜī al-Islāmī, al-Ḥisbah fī al-Islām, etc. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, pp.433-435; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, p.232.

IBN AL-UKHUWWAH- He is Ḍiyā' al-Dīn Muḥammad b. Muḥammad b. Aḥmad al-

Qurashī al-Shāfiᶜī, widely known as Ibn al-Ukhuwwah. He was an Egyptian and a Shāfiᶜī scholar. He wrote a work for the guidance of persons invested with the office of the *ḥisbah* or charged with the duty of maintaining public law and order, and the supervision of market dealers and tradesmen. This work was named Maᶜālim al-Qurbah fī Aḥkām al-Ḥisbah, and Reuben Levy had edited and translated it, and it had been published by Messrs Luzac & Co., London in 1357H/1938M. He died on 2nd Rajab 729H/1328M. See Ibn al-Ukhuwwah, Maᶜālim al-Qurbah (tr. by Reuben Levy), pp.xvi-xvii.

IBN ᶜURFAH- He is Abū ᶜAbd Allāh Muḥammad b. Muḥammad b. ᶜUrfah al-Warghamī al-Tūnisī al-Mālikī, born in 716H/1316M. He was a follower of the Mālikī school, a *muftī* and a *khaṭīb* (preacher) at Zaytūniyyah mosque. He was pre-eminent scholar of Mālikī jurisprudence in the area of Africa in his epoch, who wrote several works, among them are Mukhtaṣar fī al-Fiqh and al-Ḥudūd al-Fiqhiyyah. He died in 803H/1400M. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, pp.293-294; Ibn Farḥūn, al-Dībāj al-Madhhab, p.337.

IBN ᶜUTTĀB- He is Abū ᶜAbd Allāh Muḥammad b.ᶜ Uttāb al-Qurṭubī, a *shaykh* of *muftī*s in Cordova and an eminent *imām* in his time. He was a *faqīh* and a knowledgeable scholar about Ḥadīth. He learned *fiqh* from a number of famous *ᶜulamā'*, among them are Ibn al-Fakhkhār, Ibn al-Aṣbagh al-Qurashī, al-Qāḍī Ibn Bashīr, etc. He taught Islamic sciences to people of Andalusia and therefore many people travelled to him to hear them. He died in 462H/1069M or 463H/1070M at about 80 years of age. See Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, p.261; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, pp.247-248.

ᶜIMRĀN B. ḤUṢAYN- He is Abū Nujayd ᶜImrān b. Ḥuṣayn b. ᶜUbayd b. Khalaf al-Islāmī al-Khuzāᶜī, one of the Companions of the Prophet. He was one of the *ᶜulamā'* and *fuqahā'* among the Companions and was appointed as a *qāḍī* in Kūfah. He related 130 Ḥadīths from the Prophet, and was sent by ᶜUmar b. al-Khaṭṭāb to the people of Baṣrah to teach them the Islamic jurisprudence. He died in 52H/672M. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.2, p.312; Aḥmad b. Ḥanbal, al-Musnad, vol.4, p.426; Ibn Saᶜd, al-Ṭabaqāt al-Kubrā, vol.4, p.287; al-Shīrāzī, Ṭabaqāt al-Fuqahā',p.33.

ᶜIZZ AL-DĪN ᶜABD AL-SALĀM- He is Abū Muḥammad ᶜIzz al-Dīn ᶜAbd al-ᶜAzīz b. ᶜAbd al-Salām b. Abū al-Qāsim b. al-Ḥasan al-Dimashqī al-Sulamī, nicknamed the *sulṭān* of scholars (*sulṭān al-ᶜulamā*). He was born in Damascus in 577H/1181M. He is a learned person (*ᶜāliman*), piety (*waraᶜan*), and ascetic (*zāhidan*), a Shāfiᶜī scholar and *mujtahid*. He was educated in Damascus, went to Baghdād in 599H/1202M, and then returned to his native city, where he first taught and gave the Friday sermon at the *Zāwiyah* of al-Ghazālī, and then at the Great Umayyah Mosque. He learned *fiqh* from Ibn ᶜAsākir and *uṣūl* from al-Āmidī. He produced a number of brilliant works in Shāfiī jurisprudence, Quranic exegesis, sufism, government, *uṣūl*, though his main and enduring contribution was his masterpiece on Islamic legal principles Qawāᶜid al-Aḥkām fī

Maṣāliḥ al-Anām (The bases of legal rulings in the interests of mankind). It is recorded that he follows Abū al-Ḥasan al-Shādhilī in *ṭarīqah ṣufiyyah*. He died in Cairo on Jamādī al-Awwal 660H/November 1262M. See Khayr al-Dīn al-Ziriklī, al-Aʿlām, vol.4, p.21; al-Shīrāzī, Ṭabaqāt al-Fuqahā', p.267; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, pp.403-404; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, pp.260-261.

JĀBIR B. ʿABD ALLĀH- He was a Companion of the Prophet, and transmitted a very large number of Ḥadīths from him. He died in 78H/697M. See al-Mawdūdī, Tafhīm al-Qur'ān, vol.1, p.322.

AL-KARKHĪ- He is Abū al-Ḥasan ʿUbayd Allāh b. al-Ḥasan al-Karkhī, born in 260H/873M. He was a chief of the Ḥanafī scholars in Irāq and was considered a *mujtahid*. He died in Shaʿbān 340H/951M. He wrote several books: Kitāb al-Mukhtaṣar fī al-Fiqh, Mas'alah fī al-Ashribah wa Taḥlīl Nabīdh al-Tamr, and Sharḥ al-Jāmiʿ al-Kabīr and al-Jāmiʿ al-Ṣaghīr of Muḥammad b. al-Ḥasan al-Shaybānī. See Ibn Nadīm, al-Fihrisat, p.293; al-Shīrāzī, Ṭabaqāt al-Fuqahā', p.148; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.3, p.109.

AL-KĀSĀNĪ- He is Abū Bakr b. Masʿūd b. Aḥmad al-Kāsānī al-Ḥanafī, nicknamed *mulk al-ʿulamā'* (the reign of scholars). He is the author of the outstanding work Badā'iʿ al-Ṣanā'iʿ fī Tartīb al-Sharā'iʿ and the commentator of Tuḥfat al-Fuqahā' written by his *shaykh*, ʿAlā al-Dīn Muḥammad b. Aḥmad al-Samarqandī. He died in 587H/1191M. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, p.210.

KHALĪL B. ISḤAQ- He is Abū al-Mawaddah Ḍiyā' al-Dīn Khalīl b. Isḥaq b. Mūsā b. Shuʿayb, was renowned as al-Jundī, was nicknamed as Ḍiyā' al-Dīn. According to Ibn Ḥajar, his real name was Muḥammad, and the name "Khalīl" was merely a qualifying term signifying "friend". Khalīl, is commonly known throughout North Africa as "Sīdī Khalīl". He was one of the most famous Mālikī scholar in his era until now. His birth and place of learning was in Cairo. Then he taught Islamic law, Ḥadīth and Arabic grammar. Through his teaching as well as his sound judgement and wisdom of which he gave great proof in all questions of law, Khalīl acquired a great reputation and erudition and rose to the first rank among the *ʿulamā'* of Egypt. Khalīl was the author of several works. He composed six volumes of commentators upon Ibn al-Ḥājib, named al-Tawḍīḥ. He wrote a guide for the proper observances of the pilgrimage, a biography of his teacher, al-Manūfī who died in 749H/1348M, and a commentary upon a portion of al-Mudawwanah. But, his work which the most widely circulated and the most revered is the Mukhtaṣar. He devoted twenty-five years to its composition. He is died in 776H/1374M or 769H/1367M or 767H/1365M. According to al-Sawdānī, the first one is correct. He was buried at al-Qarāfah al-Kubrā in Cairo, nearby the grave of his teacher al-Manūfī. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, pp.287-288; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyyah, pp.301-302; Mukhtaṣar, pp.3-7.

AL-KHAṬṬĀBĪ- He is Abū Sulaymān Ḥamd b. Muḥammad b. Ibrāhīm b. Khaṭṭāb al-Khaṭṭābī al-Bustī al-Shāfiᶜī, born in Bust, Afghānistān in 319H/931M or 317H/929M. He is a scholar of *fiqh*, Ḥadīth and Arabic language. He studied Ḥadīth in Mecca, Baṣrah, Baghdād and Nishapur, and later taught many students including the Ḥadīth master (*ḥāfiẓ*) al-Ḥākim. He wrote a number of works in *fiqh* and Ḥadīth, but the best known is the four volume commentary on the Sunan Abī Dāwud: Maᶜālim al-Sunan Sharḥ Sunan Abī Dāwud. Others are Gharīb al-Ḥadīth, Aᶜlām al-Ḥadīth, etc. He died in Bust in 388H/998M. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.3, pp.163-164; Khayr al-Dīn al-Ziriklī, al-Aᶜlām, vol.2, p.273; al-Subkī, Ṭabaqāt al-Shāfiᶜiyyah al-Kubrā, vol.3, p.282; Kaḥḥālah, Muᶜjam al-Mualliflīn, vol.2, p.61.

AL-LAYTH- He is Abū al-Ḥārith/al-Ḥarth al-Layth b. Saᶜd b. ᶜAbd al-Raḥmān al-Fahmī al-Aṣbahānī al-Miṣrī, born in Qalqashandah, a village in Cairo in 94H/712M. He was one of Mālik's companions and followed his school of thought. He was a knowledgeable scholar in his era, a *faqīh*, *imām* and leader of scholars in Cairo. Al-Shāfiᶜī said of him: "Al-Layth has more knowledge in *fiqh* than Mālik, but Mālik's companions made it disappear". He wrote a few works in the area of history and *fiqh*. Some of them are Kitāb al-Tārīkh and Kitāb Masā'il fī al-Fiqh. He died in Cairo in Shaᶜbān 175H/791M on Thurday and was buried on Friday. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.2, pp.439-440; Ibn Nadīm, al-Fihrisat, p.281; Kifāyat al-Akhyār, p.218; al-Shīrāzī, Ṭabaqāt al-Fuqahā', pp.75-76; Ibn Khallikān, Wafayāt al-Aᶜyan, vol.3, pp.280-281.

MAḤMAṢṢĀNĪ- He is Ṣubḥī Rajab Maḥmaṣṣānī, is an eminent Islamic jurist trained both in the Islamic law and the Western legal system. He served as an attorney and a judge, and also as a professor at the Law Faculty of Beirut. He wrote a number of outstanding works. Among them are: al-Naẓariyyah al-ᶜĀmmah li al-Mūjabāt wa al-ᶜUqūd fī al-Sharīᶜah al-Islāmiyyah, Falsafat al-Tashrīᶜ fī al-Islām, Muqaddimah fī Iḥyā' ᶜUlūm al-Sharīᶜah, al-Mujāhidūn fī Ḥaqq, al-Mujtahidūn fī al-Qaḍā', Turāth al-Khulafā' al-Rāshidīn fī al-Fiqh wa al-Qaḍā', al-Awzāᶜī wa Tᶁālīmuh al-Qānūniyyah wa al-Insāniyyah, al-Qānūn wa al-ᶜAlāqāt al-Dawliyyah fī al-Islām, etc. See Falsafat al-Tashrīᶜ fī al-Islām, back cover.

MĀLIK B. ANAS- He is Abū ᶜAbd Allāh Mālik b. Anas b. Mālik al-Aṣbaḥī al-Ḥimyarī al-Madanī, born in Medina in 93H/712M. He was known as the *Imām* of Medina, and was renowned for his piety, sincerity, faith, and godfearingness. His piety was such as that he was never too proud to say he did not know when asked about matters he was not sure of, and he would not relate a Ḥadīth without first performing ablution. He was the author of Muwaṭṭa', the greatest Ḥadīth collection of its time, nearly every Ḥadīth of which was accepted by al-Bukhārī in his Ṣaḥīḥ. Al-Shāfiᶜī used to say of it: "After the Book of Allāh, no book has appeared on earth that is sounder than Mālik's". He wrote outstanding works in *fiqh*, Ḥadīth, etc. like Muwaṭṭa' and Risālah fī al-Waᶜẓ. He died in Medina in 179H/795M and was buried at Baqīᶜ. See al-Shīrāzī, Ṭabaqāt al-Fuqahā', pp.53-54; Ṣafiyy al-Dīn al-Khuzrajī, Khulāṣat Tadhhīb Tahdhīb al-Kamāl, p.366; Sīdī

Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, pp.219-220; Khayr al-Dīn al-Ziriklī, al-Aʿlām, vol.5, p.257.

MAʿMAR- He is Abū ʿUrwah Maʿmar b. Rāshid al-Azdī al-Baṣrī al-Yamanī. He was a *mawlā* to the tribe of Azd and a native of Baṣrah but he settled in Yemen. He learned Ḥadīths from al-Zuhrī, and among his students were al-Thawrī, Ibn ʿUyaynah and Ibn Mubārak. He died in the month of Ramaḍān 153H/September 770M. See Ibn Khallikān, Wafayāt al-Aʿyān, vol.1, p.24; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.2, p.489.

AL-MARGHĪNĀNĪ- He is Burhān al-Dīn Abū al-Ḥasan ʿAlī b. Abī Bakr b. ʿAbd al-Jalīl al-Rushdānī al-Farghānī al-Marghīnānī, born in 511H/1117M. He went to Mecca for *ḥajj* and visited the grave of Prophet in 544H/1149M. He learned Islamic sciences from a number of venurable scholars: Najm al-Dīn Abū Ḥafaṣ ʿUmar al-Nasafī, Ḥisām al-Dīn ʿUmar b. ʿAbd al-ʿAzīz, Ḍiyā' al-Dīn Muḥammad b. al-Ḥusīn, Qawwām al-Dīn Aḥmad b. ʿAbd al-Rashīd al-Bukhārī, etc. He wrote several books in Islamic jurisprudence. One of his famous book is four volumes al-Hidāyah Sharḥ Bidāyat al-Mubtadī. The author took about thirteen years to complete this book, and the first person who read it was al-Kardarī. The others of his works are: Majmūʿ al-Nawāzil, al-Tajnīs wa al-Mazīd, al-Farā'iḍ, al-Muntaqā, Bidāyat al-Mubtadī, Kifāyat al-Muntahā, and Manāsik al-Ḥajj. He died in 593H/1196M at eighty two years of age. See al-Hidāyah, vol.1, pp.3-5; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, p.210.

MAṬRAF- He is Abū Muṣʿab Maṭraf b. ʿAbd Allāh b. Maṭraf b. Sulaymān b. Yasār al-Madanī al-Mālikī, born in 139H/756M. He was a deaf person. He learned *fiqh* from his maternal uncle (*khāl*) Mālik b. Anas, ʿUbayd Allāh b.ʿ Umar,ʿ Abd aʿ- Azīz b. al-Mājishūn, Ibn Abī Ḥāzim, Ibn Dīnār, Ibn Kinānah, Ibn al-Mughīrah, etc. He and Ibn al-Mājishūn were recognized as two active *fuqahā'* who lived in same era to propagate the ideas of Mālik in Medina, and many scholars travelled to pursue knowledge of them. He died in 220H/835M at 81 years of age. See al-Shīrāzī, Ṭabaqāt al-Fuqahā', p.153; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.3, p.114; al-Bājī, Fuṣūl al-Aḥkām, p.142.

AL-MAWĀQ- He is Abū ʿAbd Allāh Muḥammad b. Yūsuf b. Abī al-Qāsim al-ʿAbdarī al-Gharnāṭī, widely known as al-Mawāq. He was a Mālikī jurist and the author of a commentary on Mukhtaṣar Khalīl entitled al-Tāj wa al-Iklīl li Mukhtaṣar Khalīl which was printed together with Mawāhib al-Jalīl, written by al-Ḥaṭṭāb. He died in the month of Rajab 897H/1491M. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, p.311.

AL-MĀWARDĪ- He is Abū al-Ḥasan ʿAlī b. Muḥammad b. Ḥabīb al-Baṣrī al-Baghdādī al-Shāfiʿī, well-known as al-Māwardī. He was born in Baṣrah in 364H/974M. He was appointed as the head of the judiciary under the Abbasid caliph al-Qā'im b. Amr Allāh and he was one of the foremost Shāfiʿī scholar in his era, and published a number

of books in Islamic jurisprudence, Quranic exegesis, principles of law and politics. His famous work which is still being used among scholars all over the world is al-Aḥkām al-Sulṭāniyyah wa al-Wilāyah al-Dīniyyah. He, in the beginning of his life, learned the subject of *fiqh* from Ibn al-Qāsim al-Ṣaymarī al-Qushayrī in Baṣrah, and then travelled to Baghdād and continued his study under the supervision of Abū Ḥāmid al-Asfirānī/al-Asfirāīnī there. He died in Baghdād in 450H/1058M on Tuesday, end of the Rabīᶜ al-Awwāl at eighty six years of age. Other famous works of his are al-Ḥāwī, Adab al-Dunyā wa al-Dīn, Tafsīr al-Qur'ān, al-Iqnāᶜ fī al-Madhhab, Qānūn al-Wizārah, and Siyāsat al-Mulk. See Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, p.282; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, pp.387-388; al-Shīrāzī, Ṭabaqāt al-Fuqahā', p.230; Khayr al-Dīn al-Ziriklī, al-Aᶜlām, vol.4, p.327; al-Subkī, Ṭabaqāt al-Shāfiᶜiyyah al-Kubrā, vol.5, p.267.

AL-MAWDŪDĪ- He is Sayyid Abul Aᶜlā Mawdūdī, born in 1321H/1903M. He was the most outstanding Islamic thinker and writer of his time. He started his public career as early as 1337H/1918M. He devoted his entire life to expounding the meaning of Islām and to organizing a collective movement to establish the Islamic order. In his struggle, he had to pass through all kinds of suffering. Between 1368H/1948M-1387H/1967M, he was imprisoned in different prisons in Pakistan. In 1373H/1953M, he was also sentenced to death by a Martial Court for writing a seditious pamphlet, but, however this sentence was later commuted to life imprisonment. In 1360H/1941M, he founded Jamāᶜat Islāmī, of which he remained *Amīr* until 1392H/1972M. In his life, he wrote more than one hundred books including politics, human rights, Quranic exegesis, Ḥadīth, *ᶜilm kalām*, etc. Among them are : Tafhīm al-Qur'ān, The Islamic Law and Constitution, Towards Understanding Islām, Islamic Way of Life, Human Rights in Islām, The Prophet of Islām, etc. He died in 1400H/September 1979M. See al-Mawdūdī, Tafhīm al-Qur'ān, vol.1, p.xix; al-Mawdūdī, Human Rights in Islām, p.42.

MUḤAMMAD AL-SHARBĪNĪ AL-KHAṬĪB- He is Shams al-Dīn Muḥammad b. Aḥmad al-Sharbīnī al-Qāhirī al-Shāfiᶜī. A Shāfi ī scholar and knowledgeable in Quranic exegesis as well as pious and ascetic. He studied in Cairo under al-Shaykh Aḥmad al-Burulsī, nicknamed as ᶜUmayrah, as well as Nūr al-Dīn al-Maḥallī, Shams al-Dīn al-Ramlī, and others who authorized him to give formal legal opinions (*iftā'*) and teaching (*tadrīs*). He educated a multitude of scholars and his works won recognition among scholars all over the world, among the most famous of his works are four volumes Mughnī al-Muḥtāj ilā Maᶜrifat Maᶜānī Alfāẓ al-Minhāj, two volumes al-Iqnāᶜ fī Ḥall Alfāẓ Abī Shujāᶜ, four volumes al-Sirāj al-Munīr fī al-Iᶜānah ᶜalā Maᶜrifat Baᶜḍ Kalām Rabbinā al-Ḥakīm al-Kabīr, Sharḥ Shawāhid al-Qaṭr, Manāsik al-Ḥajj and Taqrīrāt ᶜalā al-Muṭawwal fī ᶜIlm al-Balāghah. He died in Cairo in 977H/1570M. See Mughnī al-Muḥtāj, vol.4, p.548; Khayr al-Dīn al-Ziriklī, al-Aᶜlām, vol.6, p.6.

AL-MUNDHIRĪ- He is Zakīy al-Dīn Abū Muḥammad ᶜAbd al-ᶜAẓīm b. ᶜAbd al-Qawī b. ᶜAbd Allāh b. Salamī al-Mundhirī al-Miṣrī al-Shāmī. He was descended from a family which dwelt in Syria, but he himself was born in Egypt, in the month of Shaᶜbān

581H/November 1185M. He was a jurist who attained a profound knowledge of the Qur'ān, Ḥadīth, Arabic literature, jurisprudence, and composed a Muᶜjam and other important works. He wrote also an abridgement of the *imām* Muslim's Ḥadith, a summary of Ḥadīths published by Abū Dāwud which was named as Mukhtaṣar Sunan Abī Dāwud, and a valuable treatise entitled al-Targhīb wa al-Tarhīb. He died in Egypt in 656H/1258M. See Ibn Khallikān, Wafayāt al-Aᶜyān, vol.1, pp.154-155; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, p.403.

MUṢṬAFĀ AL-ZARQĀ'- He is Muṣṭafā b. Aḥmad b. Muḥammad b. ᶜUthmān al-Zarqā', born and grew up in a religious family. His father Aḥmad b. Muḥammad b. ᶜUthmān al-Zarqā' who was born in 1285H/1868M and died in 1357H/1938M was an outstanding, reputable and revered Islamic scholar in his era in Syria. He was knowledgeable in Islamic jurisprudence especially in the Ḥanafī school of law and wrote a valuable book on Islamic legal maxims: Sharḥ al-Qawāᶜid al-Fiqhiyyah. Muṣṭafā is his son who inherits his brilliant intellect in Islamic sciences. He was at Damascus University as a lecturer for Western Civil law and Islamic Jurisprudence, and then moved to Jordan and had served as a lecturer there at the Department of Sharīᶜah, the Jordan University until now. He has written a number of famous books among Muslim scholars, they are: al-Fiᶜl al-Ḍārr wa al-Ḍamān fīh, three volume of al-Madkhal al-Fiqhī al-ᶜĀmm, etc.

AL-NAKHAᶜĪ- He is Abū ᶜImrān Ibrāhīm b. Yazīd b. Qays al-Aswad ʁ. Umar b. Rabīᶜah b. Ḥārithah b. Saᶜd ibn Mālik b. al-Nakhaᶜ al-Kūfī, well-known as al-Nakhaᶜī which was attributed to a famous *qabīlah* in Yemen. He was the most prominent jurist of Kūfah in the second generation of Islām. He was a knowledgeable Islamic scholar in *uṣūl al-fiqh* and Ḥadīth, as well as pious, godfearing and ascetic. He died in 95H/713M or 96H/714M. See Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, p.282; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.2, pp.357-358; al-Shīrāzī, Ṭabaqāt al-Fuqahā', p.83.

AL-NASĀ'Ī- He is Abū ᶜAbd al-Raḥmān Aḥmad b. ᶜAlī b. Shuᶜayb b. ᶜAlī b. Sinān b. Baḥr al-Nasā'ī al-Khurāsānī. He was born in Nasā, Persia in 215H/830M. He was a Shāfiᶜī scholar and a *qāḍī*, one of a Ḥadīth master (*aḥad al-a'immah al-ḥuffāẓ*), a reliable and pious person. Educated in Ḥadīth by scholars like Qutaybah b. Saᶜīd, Isḥaq b. Rāhawayh, Abū al-Qāsim Ṭabaranī and others during travelling to Khurasān, Iraq, Syria, Egypt and the Arabian Peninsula. He wrote several valuable works like Sunan al-Nasā'ī or al-Mujtabī (one of the *kutub al-sittah*), Kitāb al-Ḍuᶜafā' wa al-Matrūkīn and al-Khaṣā'iṣ i.e. Khaṣā'iṣ Amīr al-Mu'minīn ᶜAlī b. Abī Ṭālib. He died in Mecca in 303H/915M or 304H/916M and was buried between al-Ṣafā and al-Marwah. He was the last person who died among the authors of *kutub al-sittah*. See Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, pp.323-324; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.3, p.96; al-Subkī, Ṭabaqāt al-Shāfiᶜiyyah al-Kubrā, vol.3, pp.14-16.

AL-NAWAWĪ- Abū Zakariyyā Muḥy al-Dīn Yaḥyā b. Sharaf b. Murrī b. Ḥasan b. Ḥusīn b. Muḥammad al-Nawawī al-Ḥizāmī al-Shāfiᶜī, born in Nawā, a village in Shām,

a part of Damascus in 631H/1233M. He is one of the most famous scholars of the Shāfiᶜī school. A Ḥadīth master, biographer, lexicologist, and *ṣūfī*. He went to Damascus with his father in 649H/1251M to study Islamic sciences. He memorized the text of Abū Isḥāq al-Shīrāzī's al-Tanbīh in four months, then the first quarter of al-Muhadhdhab in eight months. After that, he accompanied his father on the *ḥajj*, then visited Medina, and then returned to Damascus, where he assiduously devoted himself to mastering the Islamic sciences. He taught Shāfiᶜī law, Ḥadīth, fundamental jurisprudence, Arabic, and other subjects. He learned from more than twenty-two scholars of his time, including Abū al-Maᶜānī Isḥaq al-Maghribī, Kamāl al-Dīn al-Arbalī, ᶜAbd al-Raḥmān ibn Qudāmah al-Maqdisī, and others at a period of his life time in which, as al-Dhahabī notes: "His dedication to learning, night and day, became proverbial". Spending all his time in either worship or gaining knowledge, he took some twelve lessons a day, only dozed off in the night at moments when sleep overcame him, and drilled himself on the lessons he learned by heart while walking along the street. He wrote a number of great works in Shāfiᶜī jurisprudence, Ḥadīth, history and legal opinions, among the best known of which are his Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn, which has become a main reference for the Shāfiᶜī school. Others the famous are: Sharḥ Ṣaḥīḥ Muslim, Riyāḍ al-Ṣāliḥīn, al-Adhkār, al-Arbaᶜīn, al-Irshād fī ᶜUlūm al-Ḥadīth, al-Taqrīb, al-ᶜUmdah fī Taṣḥīḥ al-Tanbīh, al-Īḍāḥ fī al-Manāsik, al-Fatāwā, al-Majmūᶜ Sharḥ al-Muhadhdhab, etc. He lived simply, and it is related that his entire wardrobe consisted of a turban and an ankle-length shirt (*thawb*) with a single button at the collar. After a residence in Damascus of twenty-seven years, he returned the books he had borrowed from a charitable endowment, bade his friends farewell, visited the graves of his teachers who had died, and departed, going first to Jerusalem and then to his native Nawā, where he became ill at his father's home and died at fourty-four years of age on 27 Rajab 676H/1277M at Wednesday night. He was young of age but great in benefit to Islām and Muslims. See Mughnī al-Muḥtāj, vol.4, pp.545-547; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, p.406; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, pp.324-325; al-Shīrāzī, 'Ṭabaqāt al-Fuqahā', pp.268-269; Khayr al-Dīn al-Ziriklī, al-Aᶜlām, vol.8, p.149.

AL-QĀḌĪ- He is Muḥammad b. al-Ḥusīn b. Muḥammad b. Khalaf b. Aḥmad b. al-Farrā' al-Qāḍī al-Ḥanbalī, widely known as Abū Yaᶜlā. He was born in Muḥarram 380H/March 990M. He was a *faqīh* of the Ḥanbalī school and a knowledgeable Muslim scholar in his era. He was a scholarly person in Quranic subjects, Ḥadīth, legal opinion and debate as well as ascetic, pious and godfearing. He was a famous *qāḍī* in his epoch and produced reputable formal legal opinions. He wrote a number of outstanding works, among them are: al-Aḥkām al-Sulṭāniyyah, Aḥkām al-Qur'ān, Īḍāḥ al-Bayān, Masā'il al-Imān, al-Muᶜtamad, al-Raddᶜ alā al-Ash ariyyah, Kitāb al-Ṭibb, etc., and died in Ramaḍān 458H/December 1065M at 78 years of age. See Abū Yaᶜlā, al-Aḥkām al-Sulṭāniyyah, pp.15-16.

AL-QADŪRĪ- He is Abū al-Ḥasan Aḥmad b. Muḥammad al-Qadūrī, a great Ḥanafī scholar in the fifth century. He was the author of Mukhtaṣar, renowned as Mukhtaṣar al-Qadūrī among Muslim scholars. It is in fact a commentary of Mukhtaṣar al-Karkhī. He

was also the author of al-Tajrīd: a work explaining the different opinions between Abū Ḥanīfah and al-Shāfiᶜī, al-Taqrīb al-Kabīr, and al-Taqrīb al-Ṣaghīr. He died in Baghdād in 428H/1036M. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, p.206.

AL-QARĀFĪ- He is Shihāb al-Dīn Abū al-ᶜAbbās Aḥmad b. Idrīs b. ᶜAbd al-Salām ibn ᶜAbd al-Raḥmān al-Ṣunhājī al-Bahnasī al-Miṣrī, widely known as al-Qarāfī. He was one of the famous Mālikī scholars and was knowledgeable in Islamic sciences: *fiqh*, *uṣūl* and also in logical sciences (*al-ᶜulūm al-ᶜaqliyyah*). A Shāfiᶜī jurist ᶜIzz al-Dīn ᶜAbd al-Salām was under him as a student and learned a few subjects of Islamic sciences. He died in 684H/1285M and was buried in Qarāfah. His works are: al-Dhakhīrah, al-Furūq, Sharḥ al-Tahdhīb, al-Tanqīh fī al-Uṣūl, Sharḥ al-Jallāb fī al-Fiqh, and Sharḥ Maḥṣūl al-Rāzī. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, p.273; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, pp.319-320.

AL-RAMLĪ- He is Shams al-Dīn Muḥammad b. Abī al-ᶜAbbās Aḥmad b. Ḥamzah b. Shihāb al-Dīn al-Ramlī al-Miṣrī al-Anṣārī, renowned as "al-Shāfiᶜī *al-ṣaghīr*" (the junior al-Shāfiᶜī). He was recognized as reformer (*mujaddid*) in tenth century of the Hijrah. He studied Islamic sciences under the supervision of Zakariyyā al-Anṣārī, al-Burhān b. Abī Sharīf, Aḥmad b. al-Najjār al-Ḥanbalī, etc. He wrote a number of works, among them are the eight volume Nihāyat al-Muḥtāj ilā Sharḥ al-Minhāj, Sharḥ al-Bahjah, ᶜUmdat al-Rābiḥ, Sharḥ Mansik al-Nawawī, Sharḥ al-Zubad, etc. He died in 1004H/1595M at 85 years of age. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, pp.420-421.

ṢAFWĀN B. YAᶜLĀ B. UMAYYAH- He is Ṣafwān b. Umayyah b. Khalaf b. Wahb, a companion of the Prophet. He entered Islām after the conquest of Mecca. He related thirteen Ḥadīths from the Prophet, and died in Mecca in 41H/661M. See Khayr al-Dīn al-Ziriklī, al-Aᶜlām, vol.3, p.205; Ṣafīy al-Dīn Aḥmad b. ʿAbd Allāh al-Khuzrajī, Khulāṣat Tadhhīb Tahdhīb al-Kamāl, p.174.

SAḤNŪN- He is Abū Saᶜīd ᶜAbd al-Salām b. Sa ʿīd Saḥnūn al-Tanūkhī al-Mālikī, nicknamed as Saḥnūn, born in 160H/776M. His first study of Islamic sciences was under the traditional scholars of Qayrawān of his day, among them were Abū Khārijah, Bahlūl, ᶜAlī b. Ziyād, Ibn Ghānim, Ibn Abī Karīmah, etc., and then he learned under the supervision of Ibn al-Qāsim, Ibn Wahb, Ashhab, after which he succeeded to the leadership of scholarship (*al-riʾāsah al-ᶜilm*) of the West and head of the judiciary in Qayrawān. He produced a very valuable work in the Mālikī school, well-known as al-Mudawwanah al-Kubrā, through which the opinions of Mālik spread out into Africa and the West. He died in 240H/854H, and left a son who had followed his steps to be a famous Islamic jurist, and his name is Muḥammad b. Saḥnūn. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.3, pp.117-118; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, p.310; al-Shīrāzī, Ṭabaqāt al-Fuqahāʾ, p.160.

SAMURAH B. JUNDAB- He is Samurah b. Jundab b. Hilāl al-Fazārī al-Ṣaḥābī, a companion of the Prophet and a native of Baṣrah. Ibn ᶜAbd al-Barr stated: "He is one of the *ḥuffāẓ* (of Ḥadīths)". He died in Baṣrah, but according to another opinion, he died in Kūfah in 58H/677M or 59H/678M. See Ṣafīy al-Dīn al-Khuzrajī, Khulāṣat Tadhhīb Tahdhīb al-Kamāl, p.156.

AL-SARAKHSĪ- He is Shams al-A'immah Abū Bakr Muḥammad b. Aḥmad b. Sahl al-Sarakhsī al-Ḥanafī. He was a great Ḥanafī scholar, *mujtahid*, judge, and the author of the encyclopaedia al-Mabsūṭ (the Extensive), whose thirty volumes he dictated to students from an underground cell where he was imprisoned in Uzjand near Fergana (in present day Uzbeck) for advising a local chief in the matter of religion. This thirty volumes of al-Mabsūṭ has nowadays been published in Beirut and Cairo in fifteen bindings. He wrote a number of outstanding works in the Ḥanafī jurisprudence and methodological principles of *fiqh*, among them are Sharḥ al-Siyar al-Kabīr and Uṣūl al-Sarakhsī. He died in Fergana in 483H/1090M. See Khayr al-Dīn al-Ziriklī, al-Aᶜlām, vol.5, p.315; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, p.209.

AL-SHAᶜBĪ- He is Abū ᶜAmrū ᶜĀmir b. Sharāḥīl b. ᶜAbd al-Shaᶜbī al-Ḥimyarī al-Kūfī, widely known as al-Shaᶜbī, born in 19H/640M. He was one of the *ᶜulamā' al-tābiᶜīn* and was one of the famous scholars of Ḥadīth in Kūfah in his time. Al-Zuhrī states: "There are four scholars: Saᶜīd b. al-Musayyab in Madīnah, ᶜĀmir al-Shaᶜbī in Kūfah, al-Ḥasan b. Abī al-Ḥasan in Baṣrah, and Makhūl in Shām". He was a knowledgeable scholar. Abū al-Ḥuṣayn describes him: "I have never seen someone who is cleverer than al-Shaᶜbī". He died in 103H/721M or 104H/722M or 107H/725M or 110H/728M. See al-Shīrāzī, Ṭabaqāt al-Fuqahā', p.82; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.2, p.358; Kifāyat al-Akhyār, p.78.

AL-SHĀFIᶜĪ- He is Abū ᶜAbd Allāh Muḥammad b. Idrīs b. alᶜ Abbās bᶜ Uthmān b. Shāfiᶜī b. al-Sā'ib b. ᶜUbayd b. ᶜAbd Yazīd b. Hāshim b. al-Muṭṭalib b. ᶜAbd al-Manāf al-Qurashī al-Makkī al-Shāfiᶜī. Thus, he was descended from the great-grandfather of the Prophet. He was born in 150H/767M in Gaza, Palestine. He is the *mujtahid* of his time, one of the most brilliant and original legal scholar mankind has ever known. He brought to Mecca as an orphan when two years old and raised there by his mother in circumstance of extreme poverty and want. He memorized the Qur'ān at the age of seven, the Muwaṭṭa' of Mālik b. Anas at ten, and was authorized to give formal legal opinion (*fatwā*) at the age of fifteen by his shaykh, Muslim b. Khālid al-Zinjī, the *muftī* of Mecca. He travelled to Medina and studied under Mālik, and then to Baghdād, where he was the student of Muḥammad b. al-Ḥasan al-Shaybānī, the colleague of Abū Ḥanīfah. In Baghdād, al-Shāfiᶜī produced his first school of jurisprudence (*al-madhhab al-qadīm*). And then al-Shāfiᶜī travelled with his books and belongings to Cairo and produced his second school of thought, i.e. *al-madhhab al-jadīd*. He studied and taught Islamic subjects in Cairo until his death at fifty-three years of age in 204H/820M. His first work is al-Risālah and then al-Umm. See Khayr al-Dīn al-Ziriklī, al-Aᶜlām, vol.6, p.26; al-Shaᶜrānī, al-ᶜabaqāt al-Kubrā, vol.1, pp.50-52; Sīdī Muḥammad al-Murīr, al-Abḥāth

al-Sāmiyah, pp.220-221; al-Shīrāzī, Ṭabaqāt al-Fuqahā', pp.71-73.

AL-SHAYBĀNĪ- He is Abū ᶜAbd Allāh Muḥammad b. al-Ḥasan al-Farqad al-Shaybānī, born in Wasīṭ, Irāq in 132H/749M. The word "al-Shaybānī" was attributed to a famous tribal group "Shaybān". He was grew up in Kūfah where he first met Abū Ḥanīfah, learned Islamic jurisprudence from him and joined his school of thought. He was also educated in Islamic jurisprudence by Abū Yūsuf. He was a *mujtahid* and learned Ḥadīth from Masᶜar, Sufyān al-Thawrī, Mālik b. Dīnār, Mālik b. Anas, al-Awzā ī, Rabī ah, Abū Yūsuf, etc. Then he became one of the greatest figures in the history of Islamic jurisprudence. He moved to Baghdād and was appointed by Hārūn al-Rashīd to the position of the judiciary. He had powerful intellect about Qur'ān and Ḥadīth, Arabic language and its grammar, and mathematics. He died in 189H/804M or in another view 187H/802M in Rayy, Baghdād at 55 years of age. He wrote a large number of works: al-Jāmiᶜ al-Ṣaghīr, al-Jāmiᶜ al-Kabīr, al-Amālī, Kitāb al-Aṣl known as al-Mabsūṭ, al-Siyar al-Kabīr, al-Āthār, al-Ḥujjah or al-Ḥujaj, al-Muwaṭṭa', etc. See al-Jāmiᶜ al-Ṣaghīr, p.34; al-Shīrāzī, Ṭabaqāt al-Fuqahā', p.142; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.2, pp.512-514; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, p.314; Khayr al-Dīn al-Ziriklī, al-Aᶜlām, vol.6, p.80.

AL-SHIBRĀMALSĪ- He is Abū al-Ḍiyā' Nūr al-Dīn ᶜAlī b. ᶜAlī al-Shibrāmalsī al-Qāhirī. His most famous work is Ḥāshiyah, a commentary of the work of al-Nawawī's Minhāj al-Ṭālibīn wa ᶜUmdat al-Muftīn. His Ḥāshiyah has been printed with Nihāyat al-Muḥtāj written by al-Ramlī and Ḥāshiyah written by al-Maghribī al-Rashīdī and published in eight volumes. He died in 1087H/1676M.

AL-SHĪRĀZĪ- He is Ibrāhīm b. ᶜAlī b. Yūsuf al-Fayrūzabādī al-Shīrāzī, known by the surname of Abū Isḥāq, nicknamed as Jamāl al-Dīn, widely known as Abū Isḥāq al-Shīrāzī, born in Fayrūzabād, Persia in 393H/1003M. He is one of the most popular scholars in the Shāfiᶜī school, a teacher and debater. He studied in Shīrāz and Baṣrah before coming to Baghdād. In Shīrāz, he learned *fiqh* from Abū ᶜAbd Allāh al-Bayḍāwī (d. 424H/1032M), Abū Aḥmad ᶜAbd al-Wahhāb b. Muḥammad b. Rāmīn al-Baghdādī (d. 430H/1038M), etc., and in Baṣrah from al-Jazarī. He went to Baghdād in 415H/1024M at 22 years of age and learned *fiqh*, *uṣūl*, Ḥadīth, etc. from a number of scholars there, and he displayed his genius in Islamic jurisprudence, becoming the *muftī* of the Islamic community of his time. He was also appointed as the *Shaykh* of the al-Niẓāmiyyah Academy which the *wazīr* Niẓām al-Mulk built in Baghdād to accommodate Abū Isḥāq's students. He wrote many works, among the most famous of them is his al-Muhadhdhab fī Fiqh al-Imām al-Shāfiᶜī which took him fourteen years (from 455H-469H) to produce, and which has been commented on by al-Nawawī and known as al-Majmūᶜ Sharḥ al-Muhadhdhab. Others are al-Tanbīh fī al-Fiqh, al-Tabṣirah, al-Nukat fī al-Khilāf, al-Lumaᶜ wa Sharḥuh, al-Maᶜūnah, al-Mulakhkhiṣ/al-Talkhīṣ, Ṭabaqāt al-Fuqahā', Nashḥ Ahl al-ᶜIlm, etc. He died at Wednesday night on 12 Jamādī al-Ākhir 476H/1083M at 83 years of age, and Abū al-Wafā' b. ᶜAqīl al-Ḥanbalī managed his body. See al-Muhadhdhab, vol.1, pp.3-11; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-

Sāmī, vol.4, pp.390-391; al-Shīrāzī, Ṭabaqāt al-Fuqahā', pp.5-7.

SHURAYḤ- He is Abū Umayyah Shurayḥ b. al-Ḥarth al-Kindī, was a famous judge of the first century of Hijrah. He was appointed as a *qāḍī* by Caliph ᶜUmar b. al-Khaṭṭāb in Kūfah. He served in that position for long period of time, seventy five years, until al-Ḥajjāj asked him to resign from that position. Al-Shaᶜbī states: "He is the cleverest person among people in giving judgement and also an eloquent poet". He died in 80H/699M or 87H/705M. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.2, pp.314-315; al-Shīrāzī, Ṭabaqāt al-Fuqahā', pp.80-81.

AL-ṬAḤĀWĪ- He is Abū Jaᶜfar Aḥmad b. Muḥammad b. Salāmah b. ᶜAbd al-Mālik al-Azdī al-Ṭaḥawī, born in 238M/852M or 229H/843M. Al-Ṭaḥāwī means native of Ṭaḥā, which is a town in Upper Egypt and al-Azdī signifies sprung from Azd, a great and renowned tribe in Yemen. He was a scholar of the Ḥanafī school and became head of the Ḥanafī jurists in Egypt. He had been a follower of the Shāfiᶜī school, and taken lessons from al-Muzanī- a student of al-Shāfiᶜī. Even though he differed in opinion from al-Muzanī, he was the son of the sister of al-Muzanī. According to him, he preferred Abū Ḥanīfah's doctrines because he saw his uncle (al-Muzanī) pore over the works of Abū Ḥanīfah. He wrote a number of instructive books, such as Ikhtilāf al-ᶜUlamā', Aḥkām al-Qur'ān, Maᶜānī al-Āthār, al-Shurūṭ, etc. He died in Cairo on Thursday 1st of Dhū al-Qaᶜdah 321H/933M and was buried in the Qarāfah where his tomb can still be seen. See Ibn Khallikān, Wafayāt al-Aᶜyān, vol.1, pp.107-110; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.3, p.108; al-Shīrāzī, Ṭabaqāt al-Fuqahā', p.148.

ṬĀWUS- He is Abū ᶜAbd al-Raḥmān Ṭāwus b. Kaysān al-Yamānī al-Jundī al-Anbādī al-Khulānī al-Hazānī al-Ḥumayrī al-Fāsī, one of *tābiᶜīn* who was knowledgeable of *fiqh* and Ḥadīth, and was known for his boldness in admonishing the rulers. Ibn ᶜAbbās stated: "I suppose that Ṭāwus is one of inhabitants of paradise". ᶜAmr b. Dīnār said: "I have never seen someone like him". He died in Mecca 106H/724M or 105H/723M. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.2, p.369; al-Mawdūdī, Tafhīm al-Qur'ān, vol.1, p.324; al-Shīrāzī, Ṭabaqāt al-Fuqahā', p.65; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, pp.314-315.

AL-THAWRĪ- He is Abū ᶜAbd Allāh Sufyān b. Saᶜīd b. Masrūq al-Thawrī al-Kūfī, born in 75H/694M or 77H/696M or according to Ibn Khallikān, he was born in 95H/713M or 96H/714M or 97H/715M. He was one of the most outstanding scholars of Ḥadīth in the second century of Islām, as well as knowledgeable in *fiqh*, pious and godfearing. His father began educating him while young and he studied under nearly six hundred *shaykhs* like Abū Isḥāq al-Sabīᶜī, al-Aᶜmash, etc., the most important of whom were those who transmitted Ḥadīths from Companions of the Prophet like Abū Hurayrah, Jarīr b. ᶜAbd Allāh, Ibn ᶜAbbās, and others. A number of principal *Imāms* took Ḥadīths from him, such as Jaᶜfar al-Ṣadīq, Abū Ḥanīfah, al-Awzāᶜī, Shuᶜbah, Ibn Jurayḥ, Mālik and others. He died in 161H/777M in Baṣrah. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.2, pp.438-439; Khayr al-Dīn al-Ziriklī, al-Aᶜlām, vol.3, pp.104-105;

al-Shīrāzī, Ṭabaqāt al-Fuqahā', pp.85-86.

ᶜUMAR B. AL-KHAṬṬĀB- He is *Amīr al-Mu'minīn* Abū Ḥafṣ ᶜUmar b. al-Khaṭṭāb ibn Nufayl al-Qurashī al-ᶜAdawī, born forty years before the Hijrah (584M) in Mecca. He was one of the greatest companions of the Prophet, as renowned for his tremendous personal courage and steadfastness as for his fairness in giving judgements. He converted to Islām five/six years before the emigration to Medina at twenty six years of age. He was stabbed by a slave al-Shaqīy Fayrūz Abū Lu'luah ᶜAbd al-Mughīrah b. Shuᶜbah while performing the dawn prayer and died three nights later in 23H/644M. See Sīdī Muḥammad al-Murīr, al-Abḥāth al-Sāmiyah, p.218; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.1, pp.237-241; al-Shīrāzī, Ṭabaqāt al-Fuqahā', pp.19-21; Khayr al-Dīn al-Ziriklī, al-Aᶜlām, vol.5, pp.45-46.

WAHBAH- He is Wahbah al-Zuḥaylī, an outstanding contemporary *ᶜulamā'* in this era and the author of a number of books on various subjects of the Islamic sciences including *fiqh*, *uṣūl al-fiqh*, Quranic exegesis, etc. He is currently a lecturer at the Faculty of *Sharīᶜah*, University of Damascus. He pursued his Phd. degree at Cairo University and achieved success with first class in the year of 1382H/1963M with an excellent thesis: Āthār al-Ḥarb fī al-Fiqh al-Islāmī: Dirāsah Muqāranah. His Phd. thesis has been published by Dār al-Fikr, Damshiq. His other works are eight volumes al-Fiqh al-Islāmī wa Adillatuh, Naẓariyyat al-Ḍamān, Naẓariyyat al-Ḍarūrah al-Sharᶜiyyah, al-Wasīṭ fī Uṣūl al-Fiqh, al-Nuṣūṣ al-Fiqhiyyah al-Mukhtārah, Niẓām al-Islām, al-ᶜAlāqāt al-Dawliyyah fī al-Islām, Tafsīr al-Munīr, etc.

YAḤYĀ B. MAᶜĪN- He is Abū Zakariyyā Yaḥyā b. Maᶜīn b.ᶜ Awn al-Murrī al-Baghdādī al-Ḥāfiẓ, a native of Baghdād and a celebrated *ḥāfiẓ*. He was a transmitter of Ḥadīths of the highest authority, deeply learned and noted for the exactitude of his information. A number of the most eminent Islamic jurists learned Ḥadīths from him and taught them on his authority. Among them were al-Bukhārī, Muslim, Abū Dāwud, and others. Aḥmad b. Ḥanbal declared: "Every Ḥadīth which is not known to Yaḥyā b. Maᶜīn is not a Ḥadith". Ibn Maᶜīn heard Ḥadīths delivered by Abd Allāh b. al-Mubārak, Sufyān b. ᶜUyaynah and others of the same class. He went to Mecca and made the *ḥajj*, after which, he returned to Medina and died there on the 22nd of Dhū al-Ḥijjah 233H/28 Julay 847M and was buried in the Baqīᶜ cemetery. When he died, he left one hundred and thirty cases filled with books and four water-jar stands also filled with books. See Ibn Khallikān, Wafayāt al-Aᶜyān, vol.4, pp.24-27; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.3, pp.82-83.

AL-ZAYLAᶜĪ- He is Fakhr al-Dīn ᶜUthmān b.ᶜ Alī al-Zaylaᶜī al-Ḥanafī, one of the famous Ḥanafī scholars. He went to Cairo in 705H/1305M, taught and produced his legal opinions there. He died in Cairo in 743H/1342M. Among his outstanding works are Tabyīn al-Ḥaqā'iq Sharḥ Kanz al-Daqā'iq and Barakat al-Kalām ᶜalā Aḥādīth al-Aḥkām. See Khayr al-Dīn al-Ziriklī, al-Aᶜlām, vol.4, p.273.

ZUFAR- He is Abū al-Huzayl Zufar b. al-Huzayl b. Qays al-Kūfī al-ᶜAnbarī al-Bazātī al-Tamīmī al-Baṣrī, born in 110H/728M. He was a great disciple of Abū Ḥanīfah and acknowledged that *al-qiyās* was a source of *ḥukm*. He was, in the beginning, *ahl al-Ḥadīth* and then became *ahl ra'y*. He died in 158H/774M at 48 years of age. See al-Shīrāzī, Ṭabaqāt al-Fuqahā', pp.141-142; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.2, p.514.

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