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THE ISLAMIC LAW OF TORT

BY

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THESIS PRESENTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY
TO THE DEPARTMENT OF ISLAMIC AND MIDDLE EASTERN STUDIES
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THE UNIVERSITY OF EDINBURGH

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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 COMPARE (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, COMPARE and COMPARE. Chapter three examines the Sharī‘ah 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 Sharī‘ah.
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VERSE OF THE QUR'ĀN


ARTICLES OF THE MAJALLAH

The translation of articles of the Majallat al-Ahkām al-'Adliyyah, 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 Masīhā 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 Islama, except for which is transcribed as "j" rather than "dj" and which is reproduced as "q" instead of "k". Certain well-known words, proper names, and titles have been rendered in Westernised forms. The tā marbūqah has been written as "h" at the end of a word when it is not part of the idāfah construction, in which case it is written as "t". The transliterated Arabic words have been italiced.

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ض = ٍ

= bu

= bay

= baw

ع = ع
ABBREVIATIONS

Al-Ajwibah al-Khaflfah
Sayyid 'Abd Allāh Ḥusayn, al-Ajwibah al-Khaftaf fī Madhhab Abī Ḥanīfah.

Ashbāh.N
Ibn Nujaym, al-Ashbāh wa al-Naẓī'īr.

Ashbāh.S
al-Suyūṭī, al-Ashbāh wa al-Naẓī'īr.

Bādā'i'ī al-Ṣanā'ī'
al-Kāsānī, Bādā'i'ī al-Ṣanā'ī' fī Tartīb al-Sharī'ī'ī.

Badr al-Muttaqā
al-Ḥaṣkaṭī, 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-Muqtasid.

Bulugh al-Marām
Ibn Ḥajar, Bulūgh al-Marām min Jamʿ Adillat al-Ḥākīm.

Ḍamān al-Mutlifāt

Al-Durr al-Mukhtār

Al-Fatāwā al-Bazzāziyyah
Ibn al-Bazzāż al-Kardārī, al-Fatāwā al-Bazzāziyyah.

Fatāwā Qāḍīkhān
al-Farghānī, Fatāwā Qāḍīkhān al-Fatāwā al-Khāniyyah.

Fatāwā Ḥammādiyyah
al-Nakūrī, Fatāwā Ḥammādiyyah.
Al-Fatāwā al-Hindiyyah


Fatḥ al-Bārī

Ibn Ḥajar al-Ṣaqqālānī, Fatḥ al-Bārī bi Sharḥ al-Bukhārī.

Fatḥ al-Wahhāb

Abū Yaḥyā Zakariyyā al-Anṣārī, Fatḥ al-Wahhāb bi Sharḥ Minḥaj al-Ṭullāb.

Al-Fawākih al-Dawānī


Al-Fi’il al-Ḍārr


Al-Fiqh ‘alā Madhāhib al-Arba‘ah

al-Jazīrī, Kitāb al-Fiqh ‘alā Madhāhib al-Arba‘ah.

Al-Fiqh al-Manhajī


Al-Furūq

al-Qarāfī, al-Furūq.

Al-Hidayah


Al-Ikhtiyār li Ta’līl al-Mukhtār


I‘lām al-Muwaqqitīn


Al-Iqnā‘

Muḥammad al-Sharbīnī al-Khaṭīb, al-Iqnā‘ fī Ḥall Alfīz Abī Shujā‘.

Jāmi‘ al-Fuṣūlāyin

Ibn Qāḍī Samāwanah (Samāwah), Jāmi‘ al-Fuṣūlāyin.

Al-Jāmi‘ al-Ṣaghīr

Al-Kāfī

Kashshāf al-Qināʾ ʿan ....
al-Bahūtī, Kashshāf al-Qināʾ ʿan Matn al-Ightāʾ.

Kifāyat al-Akhyār

Lisān al-Ḥukkām

Al-Mabsūṭ
al-Sarakhsī, Kitāb al-Mabsūṭ.

Al-Maḥallī

Majallah
Majallat al-Aḥkām al-ʿAdliyyah.

Majallat al-Aḥkām al-Shariʿiyah

Majmaʿ al-Anhur
Dāmād Afandī, Majmaʿ al-Anhur fī Sharḥ Multaqā al-Abhur.

Majmaʿ al-Ḍamānāt
al-Baghdādī, Majmaʿ al-Ḍamānāt fī Madhhab al-Imām Aḥmad b. Ḥanīfah.

Matn al-Zubad

Manār al-Sabīl
Ibn %D4yān, Manār al-Sabīl fī Sharḥ al-Dalīl.

Minhāj al-Ṭālibīn
al-Nawawī, Minhāj al-Ṭālibīn wa ʿUmdat al-Muṣṭīn.

Minhaj al-Ṭullāb
Abū Yaḥyā Zakariyyā al-Anṣārī, Minhaj al-Ṭullāb.
<table>
<thead>
<tr>
<th>Arabic Title</th>
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<tr>
<td>Mishkāt al-Maşābīh</td>
<td>al-Tabrīzī, Mishkāt al-Maşābīh. (tr. James Robson)</td>
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<td>Al-Mughnī</td>
<td>Ibn Qudāmah, al-Mughnī.</td>
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<td>Al-Mughnī wa al-Sharḥ al-Kabīr</td>
<td>Ibn Qudāmah, al-Mughnī wa al-Sharḥ al-Kabīr.</td>
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<td>Al-Muḥallā</td>
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<td>Muntahā al-Irādāt</td>
<td>Ibn al-Najjār al-Futūḥī, Muntahā al-Irādāt.</td>
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<td>Al-Mustaṣfā</td>
<td>al-Ghazālī, <em>al-Mustaṣfā min 'Ilm al-Uṣūl</em>.</td>
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<td>Al-Muwatta'</td>
<td>Mālik b. Anas, <em>al-Muwatta'</em>.</td>
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<td>Salmond and Heuston</td>
<td><em>Salmond and Heuston on the Law of Torts</em>.</td>
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<td>Sharḥ al-ʿInāyah ʿalā al-Hidāyah</td>
<td>al-Bābartī, <em>Sharḥ al-ʿInāyah ʿalā ....</em></td>
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<td>al-Bahūṭī, <em>Sharḥ Muntahā al-Irāḍāt</em>.</td>
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Al-Sirāj al-Wahhāj
Tabṣirat al-Ḥukkām
Tabyīn al-Ḥaqāʾiq
Tafsīr al-Qurṭubī
Tāj al-ʿArūs
Takmilat Fath al-Qadīr
Al-Thamār al-Dānī
tUṣfāt al-Muḥṭāj
Al-ʿUddah Sharḥ al-ʿUmdah
ʿUmdat al-Fiqh
ʿUmdat al-Sālik wa ʿUmdat ...
Al-Umm
Al-Wajīz

al-Zaylaṭ, Tabyīn al-Ḥaqāʾiq Sharḥ Kanz al-Daqāʾiq.
al-Qurṭubī, al-Jāmiʿ li Aḥkām al-Qurʿān.
al-Zabīdī, Tāj al-ʿArūs min Jawāhir al-Qāmūs.
Qāḍī Zādah Afandī, Natāʿij al-Afkār fi Kashf al-Rumūz wa al-Asrār.
Ibn Ḥudāmah, ʿUmdat al-Fiqh fi Fiqh Imām al-Sunnah Ḥanbal al-Shaybānī.
Ibn al-Naqīb al-Misīṭ, ʿUmdat al-Sālik wa ʿUmdat al-Nāṣik.
Muḥammad b. Idrīs al-Shāfiʿī, al-Umm.
al-Ghazālī, al-Wajīz fi Fiqh Madhhab al-Imām al-Shāfiʿī.
INTRODUCTION

And if ye do catch them out, catch them out no worse than they catch you out.

Al-Qurān, 16:126

There should be neither harming nor reciprocating harm (lā ẓarar wa lā ẓirār).

Al-Muwatta', 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 Shari‘ah 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 Shari‘ah contains no laws regulating torts and wrongs. Some articles of the Majallat al-Ahkām al-Ṣadliyyah (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 Ḥanafi 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.

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-hudūd. In the punishments of hudūd 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 hudūd) remains the public right ordained by the Law-Giver, God.² Regarding the cases of tort against a man (private rights), the

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-ṣ-ādīl*. 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 *fuqahā'\(^2\)* 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 *ṣulṭ* (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-ṣ-āmīd*), manslaughter (*qatl shibh al-ṣ-āmīd*), homicide by misadventure (*qatl al-khāṣṣ*), 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-Islāmi* 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 Islam* (New Edition), vol.2, pp.340; Bahnasī, *al-Mawsū‘ah al-Jinā‘iyah ft al-Fiqh al-Islāmi*, vol.1, p.86 and vol.3, pp.52-53; Mohamed S. El-Awa, *Punishment in Islamic Law*, p.71; Amīn, *al-Ma‘ūliyyah al-Taqfīriyyah ‘an Fīl al-Ghayr*, p.37; Muḥammad Ṭāhir Sirāj, *Dāmān al-Udwān*, p.349-350. These tend to be fixed amount for specific injuries.

\(^4\) *Ḥukūmat al-ṣ-ādīl* is the compensation or *arsh* for injuries which are not prescribed by *ṣkar*, 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-Islāmi* wa Adillatuh, vol.6, p.298; Bahnasī, *al-Mawsū‘ah al-Jinā‘iyah ft al-Fiqh al-Islāmi*, vol.2, p.138-144; Amīn, *al-Ma‘ūliyyah al-Taqfīriyyah ‘an Fīl al-Ghayr*, p.37; Muḥammad Ṭāhir Sirāj, *Dāmān al-Udwān*, 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 *diyāh*, 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-τaʿaddī*) 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 *fuqaha'* or the founders of the legal schools such as Abū Ḥanīfah (d. 150H/767M), Mālik b. Anas (d. 179H/795M), al-Shafīʿ (d. 204H/820M) and Alī 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
Judud, 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 Qurʾān. The translation of Quranic verses is generally based on Abdullah Yusuf Ali: The Meaning of the Glorious Qurʾān (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. In addition, the researcher has consulted the modern exegesis Tafhīm al-Qurʾān 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 Dāwūd, al-Tirmidhī, al-Nasāʾī and Ibn Mājah. Other than those kutub al-sittah, there are a few popular kutub al-Ḥadīth which have been used: Muwatta’, al-Musnad, Sunan al-Dārimī, Bulugh al-Marām min Adillat al-Ahkām, Nayl al-Awtār and Subul al-Salām.

6 Such exegetes are al-Ṭabarī, al-Baghawi, al-Zamakhsharī, al-Qurtubi, Ibn Kathīr, al-Baydawī and Sayyid Qutb.
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 Nu'mān 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-Shāfīʿī (150-204H/767-820M) who founded the Shāfīʿī 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 *Sharīʿah* 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 *Sharīʿah*.

Further, there are several secondary sources which have been important references for this study. Among them are the works written by contemporary *fuqahāʾ*. 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 Allāḥ: Naẓariyyat al-Ḍamān fī al-Fiqh al-Islāmī*, ʿUthmān Maḥmūṣānī: *al-Naẓariyyah al-Āmmah li al-Mūjibāt wa al-ʿUqūd fī al-Sharīʿah al-Islāmiyyah, Aḥmad Fathī Bahnaṣī: al-Masʿūliyyah al-Jināʾīyyah fī al-Fiqh al-Islāmī*, Muḥammad Aḥmad Sirāj: *Ḍamān al-ʿUdwaṇ fī al-Fiqh al-Islāmī*, ʿAlī al-Khaṭīfī: *al-Ḍamān fī al-Fiqh al-Islāmī*, Jabbār Ṣābir Ṭahā: *Iqāmat al-Masʿūliyyah al-Madaniyyah ʿan al-ʿAmal Ghayr al-

In the early sixties, two works have appeared in the Arabic language focusing in general on analysing cases related to Islamic civil wrongs. Those theses are al-Masʿūliyyah al-Taṣṣīriyyah bayn al-Sharīʿah wa al-Qānūn written by Muḥammad FawzĪ Fayḍ Allāh (Unpublished Phd. Thesis, The University of al-Azhar, 1382H/1962M) and al-Masʿūliyyah al-Taṣṣīriyyah ʿan Fiʿl 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 ʾDāmān al-Mutilfat fī al-Fiqh al-Islāmī written by Sulaymān Muḥammad Alḥmad (Phd. Thesis, The University of al-Azhar, 1395H/1975M) and this thesis has been published by Maṭbaʿat al-Saʿādah, Cairo in 1405H/1985M. Apart from these theses, the researcher has also referred to a particular thesis on ghāṣb (usurpation) written by Yaḥyā Muḥammad ʿAbd Allāh on the title: al-Ghaṣb wa Ṭāḥārūh fī al-Sharīʿah al-Islāmiyyah wa al-Qānūn al-Madaniyyah al-Yamanī, Dirāsah Muqāranah bi al-Qānūn al-Madaniyyah al-Miṣrīyyah, (Unpublished Phd. Thesis, The University of ʿAyn 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 ʿabīb (doctor) written by Muḥammad Usāmah ʿAbd Allāh on the title: al-Masʿūliyyah

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 ʿAlī 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 Muwatta', 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 ʿusūl, 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

¹ Salmond and Heuston, p.14.
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.\textsuperscript{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".\textsuperscript{5}

The definition given by Harry Street is:

"A tort is a wrong, the victim of which is entitled to redress."\textsuperscript{6}

The first reported use of the word 'tort' is in the case of \textit{Boulston v. Hardy}.\textsuperscript{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


\textsuperscript{5} Arthur Underhill, \textit{Summary of the Law of Torts}, p.3.

\textsuperscript{6} Harry Street, \textit{The Law of Tort}, p.2.

equitable obligation.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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).\textsuperscript{11}

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

\textsuperscript{8} Salmond and Heuston, p.14.

\textsuperscript{9} Salmond and Heuston, p.9.

\textsuperscript{10} Redmond and Stevens, General Principles of English Law, p.206.

\textsuperscript{11} Mullis and Oliphant, Torts, p.1; Glanville Williams, Learning the Law, p.4.
to vindicate the plaintiff's rights.\textsuperscript{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.\textsuperscript{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:\textsuperscript{14}

\textbf{In criminal cases.}

The public prosecutor v.\textsuperscript{15} an accused.

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

2) --->released on probation.

3) --->discharged without punishment.

\begin{flushright}
\textsuperscript{12} Mullis and Oliphant, \textit{Torts}, p.1.
\textsuperscript{13} Winfield, \textit{The Law of Tort}, p.4.
\textsuperscript{14} Glanville Williams, \textit{Learning the Law}, pp.3-4.
\textsuperscript{15} Prosecutes.
\end{flushright}
In civil cases.

The plaintiff vs. 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.

'Tort and contract.  

[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*\(^1^9\) and the law of tort is *in rem*.\(^2^0\)

[b]- Tort cases were handled by the common law courts and trusts by the court of Chancery.\(^2^1\)

[c]- Compensation of tort is un liquidated damages but compensation of breach of trust is measured by the loss which the trust property has suffered.\(^2^2\)

**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

\(^1^9\) A right available against a definite person or persons.

\(^2^0\) A right available against the world at large. *Clerk and Lindsell on Torts*, p.7.

\(^2^1\) *Clerk and Lindsell on Torts*, p.7; *Salmond and Heuston*, p.14.

\(^2^2\) 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.\textsuperscript{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.\textsuperscript{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.

\textbf{ISLAMIC DEFINITION OF TORT.}

The root meaning of the word corresponding to "tort" literally is \textit{maqarrah}, \textit{qarar}, \textit{adhiyyah} and \textit{khasārah}. Tortious is \textit{multawin}, tortiously is \textit{bi al-tiwa'} and tortiousness is \textit{iltiwa'}.\textsuperscript{25} According to \textit{al-Mughnī al-Akhbār} dictionary, "tort" is \textit{fīl qarar}.\textsuperscript{26} The law dictionaries lay down that the meaning of tort is \textit{fīl al-qārār}.\textsuperscript{27}

From these dictionaries, the proper meaning of tort in Arabic is literally \textit{qarar} or \textit{fīl al-qārār}.

In \textit{Sharī'ah}, the Arabic word for tort generally is \textit{jināyah} and it is mostly applied

\textsuperscript{23} Glanville Williams, \textit{Learning the Law}, p.10-11.

\textsuperscript{24} W. V. H. Rogers, \textit{Winfield and Jolowicz on Tort}, pp.8 and 11.

\textsuperscript{25} George Percy Badger, \textit{An English-Arabic Lexicon}, p.1111.

\textsuperscript{26} Hasan Karmi, \textit{al-Mughnī al-Akhbār}, p.1487.

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 and give rise to liability for qisās or diyyah (compensation). However, some fuqahā’ prefer to use the word al-jīrāh instead of al-jināyah. Some of them used both these terms in their writing as a title of a topic.

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 sharī’ah which are committed against the human body (nafs) or property (ma‘l), 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 (mala‘ūrat) which prohibited by Sharī’ah and Allāh punishes (the man who has committed it) with a ḥadd or taṣ‘īr (discretionary punishment)." Muḥammad Abū ‘Zahrah explains that the word "ḥadd" in this context is prescribed punishment (al-suqūbūt

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29 Ajījola, Introduction to Islamic Law, p.125.


al-muqaddarah) which includes *qisāṣ* and *diyyāt.* Prohibited actions means commission of forbidden act or omission of commanding act. The *Sharī'ah* implies that the *jarīm*ah is wrongful act which constitutes an act forbidden by the *Sharī'ah.* 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. This term is also used for wrongful acts punishable by *ḥudud* or *qisāṣ.* 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 *qisāṣ* or *diyyah* (blood-money) or *arsh* (compensation). With regard to the legal terms of Islamic jurisprudence "*jināyah*" and "*jarīm*ah", it can be generally and safely asserted that "*jināyah*" is synonymous with "*jarīm*ah" and occasionally the word "*jarīm*ah" 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-taḍaddī* conveying the meaning of tort in general. *Al-Taḍaddī* connotes "transgression" or "trespass" which leads to any

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33 Muḥammad Abū Zahrah, *al-Jarīm*ah, pp.22.


injury to property, life, body and so on. 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.

Abd al-Qādir Āwdaḥ 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 *Sharī‘ah*, 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 (*uqūbah* *jinā‘iyah*) then he is liable to pay compensation (*ta‘wīd* *mā‘lī*). If the wrongful act entails criminal punishment, it is a criminal offence (*jarī‘ah*), 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 *fi‘l dārr*. It is not difficult to understand how to combine *jarī‘ah* and *al-fi‘l al-dārr* 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 *fi‘l dārr* (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 *fi‘l dārr* as well as *jarī‘ah*.

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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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).  

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

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 ta'addī 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-jamādā). These are either ghashb or ilāf.  

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

To quote Joseph Schacht:

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"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 (*ḥakīk adāmi*); 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 *Sharī'ah* irrespective of their being civil or criminal in nature.

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TORT IN THE QUR'ĀN AND ḤADĪTH.

The Shari'ah 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

Islam 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

47 Al-Qur'ān, 4:32.
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- Qurān, 4:29.


\(^{56}\) Bulugh 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.\textsuperscript{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".\textsuperscript{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 fujahā' have stated that the payment of money (diyāh) is the legal remedy for a tort action as well as the punishment of qiṣāṣ.\textsuperscript{59}

\textsuperscript{57} Salmond and Heuston, p.15.

\textsuperscript{58} Sahīh al-Bukhārī, vol.1, p.18.

\textsuperscript{59} In the Ḥanafī, Shāfī‘ī and Ḥanbalī schools, the topics of diyāh and qiṣāṣ have been discussed in sections of Kitāb al-Jināya and Kitāb al-Diyā. See al-Hidāyah, vol.4; al-Durr al-Mukhtār, vol.2; Radd al-Muhtaṣar, vol.6; al-Ikhtiyār li Ta‘līl al-Mukhtār, vol.5; Majma‘ al-Anhur, vol.2; al-Muhadhdhab, vol.3; Minhāj al-Tālibīn wa ma‘nā; Umdat al-Muṣfīr; Fath al-Wahhāb, vol.2; al-Mīzān al-Kubrā, vol.2; Sulaymān al-Jamāl, Hāshiyat al-Jamāl al- Ṭalābī, vol.5; al-Muṣaffah, vol.2; Sharḥ Muṣṭahfa al-Īrādāt, vol.3; al-Rawd al-Murbi; \textsuperscript{58} Umdat al-Fiqh; al-‘Uddah Sharh al-‘Umdah; al-Muṣnī; Kashshāf al-Qinā‘ an Matn al-Igānā, vols.5 and 6. Al-Shārā‘ī in his other book: Kitāb al-Tanbīh, puts the discussion of diyāh as one topic of Kitāb al-Jināya. 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"\(^\text{60}\) 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 (\textit{in jus}), not in its modern and corrupt sense of harm.\(^\text{61}\) 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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\(^{60}\) 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.\footnote{Salmond and Heuston, p.15.}

Thus, cases of *damnnum 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.\footnote{Salmond on Jurisprudence, pp.357-358.}

This is a principle which has been discussed by the Islamic jurists also. Al-Sarakhsī\footnote{AI-Mabsūt, vol.27, p.22. See also al-Hidāyah, vol.4, p.193; Fatawā Qāḍīkhān in the margin of al-Fatāwā al-Hindīyyah, vol.3, p.460.} has stated a general principle, that it is not wrongful if a person creates something in his own property.\footnote{Majallah, article 91. Al-Jawāz al-sharī‘ī yunāfī al-ğamān.} This rule is derived from a more general rule, that legal validity negates payment of damages.\footnote{Majallah, article 91; al-Hidāyah, vol.4, p.193; Fatawā Qāḍīkhān in the margin of al-Fatāwā al-Hindīyyah, vol.3, p.460; al-Fatāwā al-Hindīyyah, vol.6, p.45; al-Shaybānī, Kitāb al-Asl, vol.4, p.526; al-Shaybānī, al-Amārī, p.53; Tabyīn al-Haqā‘iq, vol.5, p.145. See also al-Mudawwana, vol.4, p.665.} 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.\footnote{Majallah, article 91; al-Hidāyah, vol.4, p.193; Fatawā Qāḍīkhān in the margin of al-Fatāwā al-Hindīyyah, vol.3, p.460; al-Fatāwā al-Hindīyyah, vol.6, p.45; al-Shaybānī, Kitāb al-Asl, vol.4, p.526; al-Shaybānī, al-Amārī, p.53; Tabyīn al-Haqā‘iq, vol.5, p.145. See also al-Mudawwana, vol.4, p.665.} 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
liability will be incurred by the trustee. 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.

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.

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. 'Izz al-Dīn b. 'Abd 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.\textsuperscript{70}

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

This is based on the more fundamental principle, that is, "a private injury is tolerated in order to ward off a public injury".\textsuperscript{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.\textsuperscript{74}

(b) It is for this reason that quacks are not allowed to practise.\textsuperscript{75}

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

\textsuperscript{70} al-Ṭīn b. ʿAbd al-Salām, \textit{Qawā'id al-Aḥkām fī Maṣāliḥ al-Anām}, vol.2, p.87.

\textsuperscript{71} Majallah, article 26; \textit{al-Hidāyah}, vol.3, p.281 and vol.4, p.195.

\textsuperscript{72} \textit{Al-Hidāyah}, vol.3, p.281; \textit{Ashbāh N}, p.87.


\textsuperscript{74} Majallah, article 1214; \textit{al-Hidāyah}, vol.4, p.195; \textit{Ashbāh N}, p.87; al-Zarqāʾ, \textit{Sharḥ al-Qawā'id al-Fiqhīyyah}, p.197.


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

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.

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." 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-Baghdadī 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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80 Salmond and Heuston, p.16.
ownership.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{85}

\textsuperscript{81} Majma' al-Damanāt, 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.

\textsuperscript{82} Majma' al-Damanāt, p.152; Ashbāh N, p.281. However, the decision in this case contradicts the decision made by the \\textit{fuqahā} who apply the rule of istiḥsān. It also contradicts article 1200 of the Majalla 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.

\textsuperscript{83} Majma' al-Damanāt, p.152.

\textsuperscript{84} Ashbāh N, p.281. There are, however, other opinions of the \\textit{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.

\textsuperscript{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." And, "In the presence of two evils the one whose injury is greater may be avoided by the commission of the lesser." 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.

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.

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.

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.

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87 Majallah, article 28; 'Alī al-Nadwī, al-Qawā'id al-Fiqhiyyah, p.388. Idhā ta'āraḍa maṣṣadatīn ra'īya d'żamūhumā ḡararan bi īrtikāb akhaffhumā.


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


e- The Shari'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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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:

\textsuperscript{92} Al-Waţīz, vol.1, p.213.

\textsuperscript{93} Salmond and Heuston, p.16.

\textsuperscript{94} Al-Karkhī, Usūl 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-Shafi’i 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-Sarakhsi 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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103 Mullis and Oliphant, *Torts*, p.75.
plaintiff's injury. In short, the fact of the accident raises an inference of negligence.\textsuperscript{104}

It can be clearly explained by referring to the case of \textit{Scott v. London & St. Katherine Docks Co.}:\textsuperscript{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 \textit{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 \textit{res ipsa loquitur} is the same in meaning as the maxim \textit{inna li al-ḥīlah min al-dalālah kamā li al-maqālah}\textsuperscript{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.


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

\textsuperscript{106} Al-Karkhī, \textit{Usūl 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{110}

(ii)- That the accident was due to the negligence of the defendant.\textsuperscript{111}

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

\textsuperscript{107} Al-Fatāwā al-Hindiyvah, vol.5, p.129.

\textsuperscript{108} Al-Mudawwanah, vol.4, p.666. See also Majallah, article 926.

\textsuperscript{109} Al-Mabsūt, vol.27, p.4.

\textsuperscript{110} Hādhā mimmā yumkin al-taḥarruz ‘anh.

\textsuperscript{111} Al-Mabsūt, vol.27, p.4. Wa innamā yasqufu li taqṣīr.
(i) That he exercised all reasonable care.\textsuperscript{112}

(ii) That the accident did not arise out of negligence.\textsuperscript{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.

\textsuperscript{112} Bi an yashudda al-šamli al-wajh lā yasquṭ.

\textsuperscript{113} Al-Mabaṭ, vol.27, p.4.
THE CONCEPT OF QAMĀN (LIABILITY) IN THE ISLAMIC LAW OF TORT.

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

Qamān also means ilitzām (obligation).² Ilitzām is used in a wider sense, that is as a synonym for al-qaqq al-shakhṣī, i.e. private right, for al-taghrīm, i.e. mulct, for al-mījib, i.e. obligating, for al-dayn, i.e. debt, for al-qamān, i.e. damages, etc.³

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

i- Suretyship (kafīlah).

ii- Compensation (gharāmah).⁴

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

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³ Amīn, al-Mas'ūliyyah al-Taqsīriyyah, p.16.

⁴ Damān al-Mutilfāt, 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 (td'wīd) due to injury (ḏarar) to another. ¹⁰

7- Ḍamān is liability (iltizām) to pay compensation to another due to destruction of property or loss of benefits (manāfī'). 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-Taṣṣīryah, p.69.
¹¹ Wahbah, Nagariyyat al-Damān, 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


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 Shāfiʿī 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 (idžirá) gives the legal permission to trespass upon another person's rights, but it does not dissolve the compensation (qamān) and does not void the other's rights.19 Īzz al-Dīn ʿAbd 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

14 Al-Qur'ān, 2:173.
18 Majallah, article 33. Al-Iḏžārāʾ lā yuḥṣil ṣaq al-ghayr. For detailed discussion of this maxim, see al-Zarqāʾ, Sharḥ al-Qawāʿid al-Fiqhīyyah, pp.213-214.
19 Al-Zarqāʾ, Sharḥ al-Qawāʿid al-Fiqhīyyah, p.213.
(muqrid) and debtor (muqtariq) at that time''.

However, the Malikī 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.

With regard to the Ḥanafī and the Shāfiʿī 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).

Furthermore, the application of maxim: "Legal permission negates tortious liability", should provide the reasonable duty of care to preserve (salamah) another person from injury in using public property (amwāl āmmah). 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 Izz al-Dīn ʿAbd al-Salām, Qawā'id al-Aḥkām fī Maṣāliḥ al-Anām, vol.2, p.176; al-Nawawī, al-Majmūʿ, vol.9, p.43. There is, however, a weak opinion which considers that the person would not be liable. See also, ʿAbd al-Ḵarīm Zaidān, Majmūʿah Buhūth Fiqhiyyah, p.198.


22 Al-Ṣarāqī, Sharḥ al-Qawā'id 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.\(^2\)

That, in addition to the discussion of the exercise of legal right (\textit{istik\`aml al-\hspace{0.1em}\textit{haqq}}) 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 Ab\={u} \text{Han\`af}i in the popular opinion of his school, as well as al-Sh\={a}fi\={i} and the Z\={a}hir\={i}s.

Ab\={u} \text{Han\`af}i 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 (\textit{diy\`anah}) it will not be valid to damage another's property because it is prohibited by a \text{Had\`ith}:

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

The implementation of this \text{Had\`ith} is to all human beings without differentiating neighbour or not".\(^2\)

Al-Sh\={a}fi\={i} 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

\(^{2}\) Al-Mabs\={u}t, vol.27, p.23; al-Hidayah, vol.4, p.194; al-Ai\={w}ibah al-Khaff\={i}fah, p.388; al-Zarq\={a}, Sharh al-Qaw\={a}id al-Fiqhiyyah, p.450; Wahbah, \textit{Nazarivyat al-Dam\={a}n}, p.212.

\(^{2\text{a}}\) Al-Fata\={w}a al-Hindiy\={y}ah, vol.2, p.256; Taby\={i}n al-Haq\={a}iq, vol.4, p.196; al-Mabs\={u}t, vol.27, p.23; Sharh Fath al-Qad\={i}r, vol.5, p.506; Fat\={a}w\={a} Oad\={i}kh\={a}n in the margin of al-Fat\={a}w\={a} al-Hindiy\={y}ah, vol.2, p.284. For examples, see Majma\={a} al-Dam\={a}n\={a}, p.152; Wahbah, \textit{Nazarivyat al-Dam\={a}n}, 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

25 Al-Umm, vol.3, p.222. Al-Mawardī said: "If the owner of a house builds an oven in it and its smoke molests
the neighbour, then the muḫṭasīb 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 muḫṭasīb 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-Mawardī, al-
Aḥkām al-Sulānīyah, p.255.


27 Tabyīn al-Haqāiq, vol.4, p.196; Badā‘ī‘ al-Ṣanā‘ī‘, vol.6, p.258; Radd al-Muḥtār, vol.4, p.461; al-Mabsūt,
Al-Ḥaṣkafī also mentioned: "Someone is not prevented from exercising his legal right in his own property


29 Al-Qawānīn al-Fighiyah, p.370; al-Bajī, al-Muntaqa‘ Sharh Muwatṭa’, vol.6, p.40; Ibn Farhūn, Taḥṣirat

30 See articles 1192-1197.
Majallah has explained what grave injury (al-darar al-fihish) 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-hawaij al-astiyyah), 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 Hadīth 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

31 Al-Qur'ān, 4:36.
32 Sahīh Muslim, vol.1, p.31.
33 Sahīh 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

34 Șubḥī Maḥmaṣsānī, Transactions In The Sharīʿah, Law In The Middle East, p.186.


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". Badāʿī al-Sanāʿī, vol.6, p.264.
benefits of air, sunlight or light. 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 damān will be discussed as follows:

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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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 Shāfiʿī 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
1- Usurpation of another person's property (*g*haṣḥ).

2- Destruction or damage (*tala*af; *nuqṣān*).

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

**STRICT LIABILITY**

The *Sharīʿah* has confirmed that the rule of Strict Liability (*al-masʿūliyyah al-shakhṣīyyah*)
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 Qurʾān,
the Traditions of the Prophet and Muslim jurists' opinions.

The Qurʾān 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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40 The term emerges in the modern books of *fiqh* as in 'Abd al-Qādir 'Awddah, *al-Tashrīʿ al-Jinaʿ*, vol.1, p.394,
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*, *damān al-
ṣīr al-shakhṣī* which renders the same meaning.

41 Al-Qurʾān, 6:164; 35:18.

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."\(^{49}\)

\(^{43}\) Al-Qur'ān, 42:42.

\(^{44}\) Al-Qur'ān, 45:15.

\(^{45}\) Al-Qur'ān, 2:286.

\(^{46}\) Al-Qur'ān, 74:38.


\(^{48}\) 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."  

In another Ḥadīth, he said:

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

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 (tafrī'ī) or transgression (al-ta'addī) on his part. 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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52 The element of intention (niyyah) can be connected to the element of transgression (ta'addī) 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 fighārah do not consider the niyyah as an element of liability either in mistake (khafū‘) or intention (al-amd) actions. Al-Muwatta‘, p.614; Muṣṭafā b. Abī Ṭālib al-Qurānī, al-Fī ṭ al-Dārrī, p.78-79; Majma‘ al-Dārī, p.146; Asbāh N, p.171. For detail see Wahbah, al-Fiqh al-Islāmī wa Adillatuh, vol.5, pp.748-749.

his intention."\textsuperscript{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.\textsuperscript{55}

This statement can be related to the Islamic maxim:

"Injury is to be removed."\textsuperscript{56}

This means that grave (\textit{fā'ishi}) 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.\textsuperscript{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.\textsuperscript{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

\begin{footnotes}
\item[54] Sahīh al-Bukhārī, vol.1, p.3-4.
\item[55] For detail, see examples in Majallah, article 912, 913 and 914.
\item[56] Ashbāh S, p.92; Ashbāh N, p.85; Majallah, article 20. Al-\textit{Darār yuzal}. For detail discussion of this maxim, see al-Zarqā', Sharḥ al-Qawā'id al-Fiqhīyyah, pp.179-183; al-Nadwī, al-Qawā'id al-Fiqhīyyah, pp.287-293.
\item[57] Majallah, article 1200; al-Qawā'īn al-Fiqhīyyah, p.224.
\item[58] Majallah, article 31; Muğafā b. Āḥmad al-Zarqā', al-Madkhal al-Fiqhlī, vol.2, pp.981-982, no.587. Al-\textit{Darar yudfā' bi qadr al-imkān}.
\end{footnotes}
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

59 Majallah, article 1212.


62 Majallah, article 30. Darʿu al-mafāsid ʿalā min jall al-maṣāliḥ.


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 (qāmin) 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

65 Majallah, article 89. Yudāf al-fī l ilā al-fī lā al-āmir mā lam yakun mujbiran.

66 Majallah, article 92. Al-Mubāshīr qāmin wa in lam yata’ammad.

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

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

69 Majallah, article 912.


71 Majallah, article 913.

72 Majallah, article 914.

73 Al-Fatāwā al-Hindiyah, vol.6, pp.45-47; al-Ajwibah al-Khāsīfah, p.390; Mughnī al-Muhtāj, vol.4, p.83. According to the Ḥanafi jurists, the decision of the case above is made in accordance with the rule of istihbān.
8- Furthermore, Ibn Qudāmah records:

"The ajār 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."

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-ta'addī (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*.¹⁵

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

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

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

"A mubāshir (direct tortfeasor) is liable even though he does not trespass
(yata'add/al-ta'addī)."

Similarly, the Majallah states: "A mubāshir who does an act, even though not
intentionally (yata'ammad) is liable." The words "even though not intentionally (wa in
lam yata'ammad)" can be replaced by the words "even though he does not trespass (wa
in lam yata'add)". 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 (fi milkihī am fi ghayr milkihī), the liability is upon him. In short, the elements
of al-ta'addī and tā ammud are not considered as a condition in the mubāsharah tort
actions. For example:

author notes that the verb ta'addī, 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-Haqā'iq, vol.5, p.149.


80 Majallah, article 92. Al-Mubāshir ġāmin wa in lam yata'ammad.

81 Wahbah, Nazariyyat al-Damanān, p.196.

82 Al-Muwatta', p.614; Wahbah, Nazariyyat al-Damanān, p.196; al-Zarqā', Shah al-Qawā'id 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-ta‘addī* 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-ta‘addī* (trespass) is considered as a condition for liability. The Majallah records:

"A *mutasabbib* is not liable to any loss caused unless intentionally (*ta‘ammud)*."

The words "unless intentionally (*illā bi al-ta‘ammud)*" could be replaced by the words "unless with trespass (*illā bi al-ta‘addī)*. *Al-Ta‘addī* is a condition for liability

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⁸⁶ *Majallah*, article 915. It is similar to the example of a person sitting down on the garment of another person and suddenly the other person stands up and causes a tear to his cloth, the person who sat down on it is liable. *Majmā‘ al-Ḍāmānāt*, p.152.

⁸⁷ *Majallah*, article 93. *Al-Mutasabbib lā yaḍmanu illā bi al-ta‘ammud*. 
in tortfeasor by indirect cause\textsuperscript{88} whether the element of intention (\textit{qaṣd}) existed or not.\textsuperscript{89} But, there are opinions which consider that the conditions of liability for the \textit{mutasabbib} are:

i- \textit{Al-Mutā'ammid (al-ta' ammud)}.

ii- \textit{Al-Mu'tadī (al-ta' addī)}\textsuperscript{90}

Most of the \textit{fuqahā'} prefer to use \textit{al-mutā'addī (al-ta' addī)} as the condition, because the element of \textit{al-mutā'ammid (al-ta' ammud)} is included in \textit{al-mutā'addī (al-ta' addī)}. Indeed, if the element of \textit{al-ta'addī} does not exist as an element of tort action by the \textit{mutasabbib}, the liability (\textit{qamān}) is not adjudged upon him.\textsuperscript{91} So, the word \textit{al-ta'ammud} in the maxim above is construed as \textit{al-ta'addī}. It is in conformity with a few statements by the \textit{fuqahā'}. Al-Sarakhsī stated:

"The liability is not upon a \textit{mutasabbib} when the element of \textit{mutā'addin (al-ta'addī)} did not exist in his tort action."\textsuperscript{92}

Al-Zayla’ī mentioned:

"\textit{Tasbīb} requires the existence of the element of \textit{al-ta'addī} in it. Otherwise, in \textit{al-mubāsharah}, is not required \textit{al-ta'addī}."\textsuperscript{93}

Al-Baghdādī recorded:

\begin{itemize}
\item \textsuperscript{88} Majallah, article 924. \textit{Yushtarāṭu al-ta'addī li yakūna al-tasabbub miṣjiban li al-qamān}....
\item \textsuperscript{89} Wahbah, \textit{Nazariyyat al-Damān}, p.198.
\item \textsuperscript{92} \textit{Al-Mabsūl}, vol.27, p.22. \textit{Al-Mutasabbib idhā lam yakun mutā'addīyan lā yakūn ḍāminan}.
\item \textsuperscript{93} Tabyīn al-Ḥaqīq, vol.5, p.149. \textit{Tasbīb wa fīh yushtarāṭ al-ta'addī....wa fī al-mubāsharah lā yushtarāṭ}.
\end{itemize}
"Mutasabbib is not liable unless he is al-mutaddī." 94

Ibn ṢĀbidṬn indicated:

"Al-Mutasabbib is liable when he is mutaddīn." 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-ta'addī (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-ta'addī.

2- If a mutasabbib collects and pours water on his land in some manner which is not normal (khilāf al-tā'īḍah), and the water escapes (ta'addā) onto another person’s land and damages something there, he is liable, because, the element of al-ta’addī existed. But, if he pours it in the normal manner (tasbī al-tā’īḍah) 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-ta’addī. 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,


and an animal of another falls therein and is destroyed, he is not liable, because, the element of *al-ta‘addāt* is not in the latter, while in the former there is.  

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-ta‘addāt* 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.  

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

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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 "*āqilah" 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 "*āqilah" according to their madhhab.

In the Shāfi‘ī school, "*āqilah" means a group of men who are *mukallaf* and who have a right to inherit from the murderer by means of relation (*nasab*) or *walīd* (emancipation from slavery). Thus, the "*āqilah" of the murderer are his agnates (*‘aqabah*). Al-Shāfi‘ī himself said: "I do not know if there is a disparity (of opinion among the *fuqahā*) that al-‘*āqilah* is al-‘*aqabah*. ‘*Āqabah* includes all the kinsmen and relations on the father's side (al-‘*qarabah min qibal al-‘*ab*)." See Mughnī al-Muhtāj, vol.4, p.95, Nihāyat al-Muhtāj, vol.7, p.370. Therefore, the "*āqilah* 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 Ahkāmuhā fī al-Shafī‘ī wa al-Qānūn, p.469.

They are liable for the *diyāh* 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 'Abd al-Qādir 'Awadah, al-Tashrī‘ 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 "*āqilah" because the Prophet did not impose the liability of *diyāh* 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 *diyāh* for the victim is upon the "*āqilah* (not upon her husband and son). This is also an opinion in the Ḥanbalī school. If the son is excluded from the *diyāh*, 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 *diyāh*. See Mughnī al-Muhtāj, vol.4, p.95; Nihāyat al-Muhtāj, vol.7, pp.369-370; al-Muḥadhdhab, vol.2, p.228; al-Mughnī, vol.7, p.784; Nayl al-Awtār, vol.7, p.81; 'Abd al-Qādir 'Awadah, al-Tashrī‘ al-Jinā‘ī, vol.2, p.195.

No such responsibility ever attaches to a poor man (fāqīr), a slave (raqi‘) even though he is *mukallaf* (i.e. buying his freedom on the basis of a written contract), a minor (gabīd), and an insane person (majnūn). They are excluded from the "*ṣāli‘ah", as are women. A Muslim "*ṣāli‘ah" is not responsible for a kāfir offender, nor a kāfir ‘*ṣāli‘ah* for a Muslim offender; but a Jew may be responsible for a Christian offender, and vice versa. Dhimmi is not responsible for kābirds, and vice versa because there is no right of inheritance between both sides. See Minhāj al-Ṭālibīn in the margin of Mughnī Muhtāj, vol.4, p.99; 'Abd al-Qādir 'Awadah, al-Tashrī‘ al-Jinā‘ī, vol.1, p.673 and vol.2, p.195; Muḥammad al-Khaḍrawī, al-Muṣūliyyah al-Jinā‘īyyah, p.140; The Encyclopaedia of Islam, vol.1, p.338; Brunschwig, "Considerations Sociologiques Sur Le Droit Musulman Ancien," Studia Islamica, vol.3, p.69.


They are not responsible for *diyāh* because they are regarded as ineligible people to give help and to bear the burden of *diyāh*. See Mughnī al-Muhtāj, vol.4, p.99; Muḥammad al-Khaḍrawī, al-Muṣūliyyah al-Jinā‘īyyah, p.140.

The Ḥanafī and the Mālikī schools basically agree with the Shāfi‘ī school in respect of the signification of "*ṣāli‘ah", but they stipulate that ancestors and descendants can be a member of "*ṣāli‘ah" 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 'an fi'l al-ghayr", "damān fi'l al-ghayr", "damān fi'l al-ākharīn", damān al-shakhṣ fi'l al-tābi'iīn", and "damān al-shakhṣ fi'l al-khāṣīrīn lirīqa batihim". All the terms, generally, give the same signification as "vicarious liability".

The technical term of fiqh "al-ṣāqilah" applies to those people who can bear the responsibility of diyah (blood-money) on behalf of others. The diyah is imposed on the ṣāqilah for no fault of their own and as a help and compassion for the tortfeasor. The word diyah is a term exchangeable for 'aql (blood-money) in this context meaning prevention (mar't). It is used in the case of homicide by misadventure (qatīl al-khata') and manslaughter (qatīl shibh al-amd).

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 (mūdi'), or usurper (ghāṣib). This

regarded as eligible people to be requested for help, equal to the others, ṣāqilah. 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'ī al-Ṣanā'ī, vol.7, p.256; 'Abd al-Qādir 'Awdah, al-Tashrīḥ al-Jinā'ī, vol.2, p.195.


is because the animal is in their ownership or possession.\textsuperscript{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.\textsuperscript{104}

The major evidence for allowing exception to the notion of individual responsibility (\textit{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 \textit{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.\textsuperscript{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".\textsuperscript{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

\textsuperscript{103} Mughnī al-Muhtāj, vol.4, p.86 and p.204.

\textsuperscript{104} With this appearance, it could be related to the Latin legal maxim: \textit{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.

\textsuperscript{105} Sahīh al-Bukhārī, vol.3, p.439.

\textsuperscript{106} Nayl al-Awtār, vol.5, p.324.
at night, its liability shall be borne by their owners."  

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 (taṣarruf′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.

2. If a father handed his small son to a skilful swimmer to teach the child how to swim and the child drowned, 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.

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 (qiyās) and not the child.

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

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108 Majma′ al-Ḍamānāt, p.458.


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.\textsuperscript{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.\textsuperscript{112}

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

1- **Liability of guardian (waļī)** 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 (ṣabīl) destroys the property of another, compensation (qaman) 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 (waļī)." 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.\textsuperscript{113}

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


\textsuperscript{112} Majma' al-Damānāt, p.458.

he is liable".\(^\text{114}\)

\(^\text{114}\) Abd al-Qādir Awdh 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 hadd offence, he will not be subjected to the hadd, and if he kills or wounds any person, he will neither be subjected to the qisāṣ nor will he be liable to ta'zīr. Nevertheless, 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 Sharī'ah guarantees the security of life and property and nobody is allowed to infringe them. The damān is neither negated nor invalidated by any excuse admissible under the Sharī'ah, although punishment may be nullified".\(^\text{115}\)

According to the uṣūliyyīn: "In the rights of men (al-ṣibād) pertaining to damages and compensation, the obligation is also upon a minor. The objective concerned is property and its duty is borne by deputysipship".\(^\text{116}\)

\(^\text{114}\) Majallah, article 960, Tarāṣir al-Hukkām, vol.2, p.249; Badū‘i’ al-Sanā‘ī‘, vol.7, p.171. It is because of the fact that the liability here is covered under al-aḍḥām al-waqfīyyah (declaratory laws) in which the elements of ‘uql (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 bālīgh. 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 al-‘alā al-Madhāhib al-Khamshah, pp.630-631.


The fuqahā’ mentioned: "If people under interdiction as minors and lunatics destroy something, whether property or life, they are liable".\textsuperscript{117}

However, some of the Mālikī jurists opined that a minor (ṣabīṭ), if he has not reached the age of discretion (ghayr mumayyīz), is not liable if he destroyed or caused damage to another person’s property or body because that the damage caused by the ṣabīṭ is compared to the damage caused by animals of their own accord.\textsuperscript{118}

Ibn Nujaym stated: "A minor is responsible for his acts, and is liable from his property for what he has destroyed".\textsuperscript{119}

Briefly speaking, the jumhūr have mentioned that all people are liable in their capacity of destruction (ahliyyat al-itlāf). The condition of "aql (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-wujiib) and to bear any obligation towards others pertaining to property (māliyyah). 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


\textsuperscript{118} Al-Qawānīn al-Fiqhiyyah, p.218; Dāmān al-Mutfīfīt, p.234; Badā’ī’ al-Ṣanā’ī’, vol.7, p.168; Muḥābat, vol.1, p.223.

\textsuperscript{119} Ashbāb N, p.332; Wahbah, Nazariyyat al-Damān, p.254.
minor, whether he is a free man or a slave. However, a minor is not liable to be subjected to bodily punishment (‘uqūbah badaniyyah). This is the opinion of the Ḥanafīs, the Shāfi‘īs, the Ḥanbalīs and the jumhūr of the Mālikīs.\textsuperscript{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 (ṣafīh), 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,\textsuperscript{121} all those persons who have been cited may be described as "having the legal capacity (ahliyyat al-wujiib)" which is in every human being.\textsuperscript{122}

Although, the fuqahāʾ opine that a minor himself (ṣabīr or ṣaghīr) is liable for his tort action against another's property, not his guardian (wali), 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.\textsuperscript{123}

\textbf{For example:} If a person (father) gives a knife to a minor and the minor kills another person, his ʿaqilah 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


\textsuperscript{121} ‘Abd al-Wahāb Khalālī, Ilm Usūl al-Fiqh, p.136; Mohammad Hashim Kamali, Principles of Islamic Jurisprudence, p.351.

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

\textsuperscript{123} Fawzī Fayḍ Allāh, Nazariyyat al-Damān, p.172; Wahbah, Nazariyyat al-Damān, p.254.
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.\textsuperscript{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.\textsuperscript{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 (\textit{ighrā'}) or command (\textit{amr}) of his parents.\textsuperscript{127}


\textsuperscript{126} Amīn, al-Maṣʿūliyyah al-Taṣrīriyyah, p.134; al-Fatāwā al-Hindiyyah, vol.6, p.33; Ashbāh N, p.310.

\textsuperscript{127} Fawzī Fayḍ Allāh, Nazariyyat al-Ḍamān, p.172; Wahbah, Nazariyyat 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.\textsuperscript{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 (taf'addat) 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.\textsuperscript{129}

In cases of a command by someone to a minor (gabī) to destroy another's property or to kill a person, a minor is liable, however that liability is returned (yurjat) to the commander (āmir).\textsuperscript{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 āqilah of the minor, not upon the commander because the accident is separate (munfaṣīl) from the command.\textsuperscript{131}


\textsuperscript{130} For detailed discussions and examples, see Tabyīn al-Haqā‘īq, vol.6, p.159; Ashbāh, Ṣ, p.113; Majma‘ al-Damānāt, p.162; Mūjahāt, p.228; al-Fatāwā al-Hindiyyah, vol.6, p.30.

\textsuperscript{131} Majma‘ al-Anhur, vol.2, p.664; Mūjahāt, 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.\textsuperscript{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.\textsuperscript{133}

In relating to \textit{mubāsharah} (direct cause) and \textit{tasabbub} (indirect cause), a minor is not excused in any \textit{mubāsharah} tort actions whether he attained \textit{tamyź} or not. Whereas, in cases of \textit{tasabbub} tort actions, only the minor who has attained \textit{tamyź} is liable, \textit{ghayr mumayyiz} is free from any liability.\textsuperscript{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.\textsuperscript{135}

\textit{Al-Sarakhsī} noted:

"\textit{Musabbib} (a minor), if he transgressed (\textit{muta'addian}) causing injury to another person, is liable and \textit{diyāh} (blood-money) is upon his \textit{ʻaqilah}. For instance, if a minor is a digger of a well or puts (\textit{waṭāq}) 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

\begin{itemize}
\item Majmaʿ al-Damānī, p.423; Fawzī Fayḍ Allāh, \textit{Nazarīyyat al-Dāmān}, p.173.
\item Amīn, \textit{al-Maṣūliyyah al-Taṣlīyyah}, pp.141-144.
\end{itemize}
properly". 136

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

In another example, al-Sarakhsi 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 *‘aqilah* of the minor. But, if the minor did not know how to ride properly owing to his young age (*li šigharihi*) 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.


ii- Ajīr mushtarak (independent contractor or general agent).  

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

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, and his wages are paid when the work is done.

For example: Porters (ḥammāl), brokers (dallāl), tailors (khayyāq), clockmakers (ṣāfātī), jewelers (ṣāiğh), cab drivers (aşhāb ‘ajalāt al-kirā), harbour boatmen (aşhāb al-zawā’īq) and village shepherds (rā’ī 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 (ṣāhīb al-‘arabah) or a boatman (ṣāhīb za‘uraq) who gives his services on hire to one employer only for a specific period,

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becomes during that period an exclusive employee (*ajār khaṣṣ*).\textsuperscript{145}

**Ajār Khaṣṣ**

*Ajār khaṣṣ* 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.\textsuperscript{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’dhīn*) of the owner of the property.\textsuperscript{147}

Indeed, the action of *ajār khaṣṣ* or *tilmīd* (worker) is attributed (*yudāf*) to his *ustādh* (master/principal/employer). If the *ajār khaṣṣ* or *tilmīd* 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 (*manfa‘ah*) 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 *sharī‘* permits

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\textsuperscript{146} Majallah, article 425; al-Durr al-Mukhār, vol.2, p.297.

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". 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.

2- The occurrence of an injury (qarar) 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 ajār khāṣṣ or a tilmīḏ, the ustāḏd is not vicariously liable for any liability.

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

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149 Majma' al-Ḍamānāt, p.158.


express authority.\textsuperscript{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.\textsuperscript{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 (manāfiʿ) 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 (qāmin) or surety (kaftīl) for the employee.\textsuperscript{154}

The benefit (manfa'ah) of the service of ajīr khāṣṣ belonging exclusively to the employer,\textsuperscript{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".\textsuperscript{156} That is

\textsuperscript{152} Majmāʿ al-Ḍamānāt, p.43; Jāmiʿ al-Fuṣūlāyn, vol.2, p.130; Damān al-Mutlīfāt, p.648.

\textsuperscript{153} Majmāʿ al-Ḍamānāt, p.43; Wahbāh, Nazariyyat al-Ḍamān, pp.256-257; Damān al-Mutlīfāt, p.649.


\textsuperscript{156} Majallāt, 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". 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 matbūr (employer) asks his ṭābi (employee) for any work, and between them there existed a contract of employment ("aqd ʾijārah), and injury (qarar) 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 ḱāṣṣ 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 ḱāṣṣ), without his

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-ghumr", both phrases meaning that whosoever gets the benefit also has to shoulder the liability. See, Sunan Ibn Mājah, vol.2, p.754; Ibn Qayyim, Ilām al-Muwaqqitīn, vol.2, p.20; Ashbāh S, p.136; Ashbāh N, p.151.

158 Abū Yūsuf, Kitāb al-Kharāj, p.322; Majmā al-Ḍamānāt, p.159; Mūjābāt, vol.1, p.230.

159 Wahbah, Nazarīyyaṭ 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".  

Although, in some cases, the ajīr kūṣṣ 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. In these cases, the employer is in the position of vicarious liability.

The fuqahā' of the Ḥanafī school, the Mālikī school, the Shāfī‘ī school,
the Ḥanbalī school\textsuperscript{165} and Ibn Ḥazm\textsuperscript{166} unanimously agreed that the \textit{ajīr khāṣṣ} is \textit{amīn} and his hand is called "the hand of \textit{amanah}" (\textit{yad amānah}). He does not bear any liability unless in case of transgression (\textit{al-taḍḍāfī}) and intention (\textit{ta'amūd}), or in case of carelessness (\textit{ihmāl}) and negligence (\textit{tafrīfī}). In short, he will be held liable in cases in which he transgresses (\textit{taḍḍāfā}) or he is negligent (\textit{farratā}).

The \textit{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 \textit{fiqh} which could be related to that rule, namely:

i- Liability of a coercer (\textit{mukrih}) for his coercion of another person (the coercion of \textit{mulji}).

ii- Liability of a commander (\textit{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.\textsuperscript{167}

vi- The liability of an owner for his building,\textsuperscript{168} etc.

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\textsuperscript{166} Al-Muhallā, vol.8, p.201.

\textsuperscript{167} This topic will be discussed under the title of "Liability for Animals".

\textsuperscript{168} This topic will be discussed under the title of "Liability for Premises".
ASSAULT AND BATTERY

Assault and battery in Arabic means "rtida' ma'a al-‘dhā' al-badan wa al-‘darb" (transgression which occurs together with bodily harm and beating). In the Sharī'ah, 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". This verse depicts the unique distinction of man and makes him superior in this respect to all other animate beings.

The Qur'ān says again:

"We have indeed created man in the best of moulds".
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 Sahīh al-Bukhārī, vol.8, p.43; Sahīh Muslim, vol.4, p.1378.

⁶ Sahīh Muslim, vol.4, p.1380.

⁷ Sahīh 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-Maraīm, 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 Ya‘lā 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 ḥājdī. 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

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 Sahīh Muslim, vol.3, p.897.

11 Sahīh Muslim, vol.3, p.897.

12 Abū Yūsuf, Kitāb al-Kharāj, p.230.
The above quotations mentioned that battery is an unlawful action. It is prohibited by Islam and actionable by the defendant.

Islam 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. 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. 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*.

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

16 Mukhtaşar, p.273; *al-Dardīr*, *al-Sharḥ al-Saghīr* 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.\footnote{17}

The author of the Mukhtasar 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.\footnote{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:

\begin{enumerate}
\item 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-
\end{enumerate}


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-Shāfi‘ī, al-Ghazālī and
Ibn Qudāmah opine that the thrower is not liable. 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 Al-Mughnī, al-Nasā’ī and Ibn Qudāmah declared to be sound, "Neither diyah
nor qisās is fixed for him".

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.

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

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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 mut'a'addin 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


I.JanTfah, al-Shafi'i, Aḥmad b. Ḥanbal and al-Ghazālī, the person who has pulled away his hand is not liable.\textsuperscript{28} This is because, according to them, the Prophet invalidated the payment of *diyah* in this case. ʿImrān b. Ḥuṣayn reported: "Yāfī lā b. Munyāh 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".\textsuperscript{29} In another Ḥadīth, Ṣafwān b. Yaʿlā b. Umayyah reported from his father: "I participated in the expedition of Tabūk with the Prophet.... Ṣafwān said that Yaʿlā 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".\textsuperscript{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.\textsuperscript{31}

\begin{enumerate}

\item \textsuperscript{29} Sahih Muslim, vol.3, p.897; Sunan al-Dārīmī, vol.2, p.195. See also al-Umm, vol.6, pp.43-44; al-Kāfī, p.607.

\item \textsuperscript{30} Sahih Muslim, vol.3, p.897. See also al-Umm, vol.6, pp.43-44.

\item \textsuperscript{31} Ṭabsīrat al-Hukkām, vol.2, p.251.
\end{enumerate}
6)- If a person injures (or threatens) another person with a knife, he is liable.\textsuperscript{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.\textsuperscript{33} Similar is the case of throwing away rubbish or the peel of watermelon in the way.\textsuperscript{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.\textsuperscript{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.\textsuperscript{36}

9)- If a person pierces another with a needle and he is injured, the piercer is liable.\textsuperscript{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

\textsuperscript{32} Mughni\textsuperscript{\textregistered} al-Muhtaj, vol.4, p.88.

\textsuperscript{33} Mughni\textsuperscript{\textregistered} al-Muhtaj, vol.4, p.87; al-Dard\textsuperscript{\textregistered}, al-Shah\textsuperscript{\textregistered} al-Sagh\textsuperscript{\textregistered} in the margin of Bulghat al-S\textlig{}ik, vol.2, p.384.

\textsuperscript{34} Al-Waj\textsuperscript{\textregistered}z, vol.2, p.150; al-Shir\textlig{}az\textsuperscript{\textregistered}, Kit\textlig{}ab al-Tanbih\textsuperscript{\textregistered}, p.127; al-Muhadhdhab, vol.3, p.206; Fath al-Wahhab, vol.2, p.175; Kis\textlig{}yat al-Akh\textlig{}yar, p.613; Minhaj al-Talib\textlig{}n wa Umdat al-Muft\textlig{}n, p.284; Minhaj al-Tullab printed with Minhaj al-Talib\textlig{}n wa Umdat al-Muft\textlig{}n, p.284; al-Mahall\textlig{} printed with H\textlig{}ashiyat\textlig{}n Qalyub\textlig{}i wa Umayrah, vol.4, p.150.

\textsuperscript{35} Mughni\textsuperscript{\textregistered} al-Muhtaj, vol.4, p.84; H\textlig{}ashiyat\textlig{}n Qalyub\textlig{}i wa Umayrah, vol.4, p.148 and p.150.

\textsuperscript{36} Majma\textsuperscript{\textregistered} al-Dam\textlig{}an\textlig{}t, p.165.

\textsuperscript{37} Al-Waj\textsuperscript{\textregistered}z, 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-mubiishir*. There are legal maxims to uphold and clearify this case. One of them is: "In the presence of *al-mubiishir* and *al-mutasabbib*, the first alone is responsible (*idhâ ijtâmâa al-mubiishir wa al-mutasabbib yu’dâf al-ḥukm ilâ al-mubiishir)*. Another one is: "*Al-Mubâsharah* has priority over *al-sabab* (*al-mubâsharah muqaddimah ‘alâ al-sabab)*".38

The examples which are illustrated by the *fuqahâ* 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

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

"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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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".\textsuperscript{40}

Al-Sarakhsi\textsuperscript{\textsuperscript{I}} 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".\textsuperscript{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 Had\textsuperscript{T}ths of the Prophet which have described the same sense of the case:

a)- Hish\text{"}am b. \text{"}Hak\text{"}im b. \text{"}Hiz\text{"}am 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 \textit{jizyah}". Thereupon, Hish\text{"}am said: "I bear testimony to the fact that I heard the Prophet saying: God would torment those who torment people in the

\textsuperscript{40} Al-Hidayah, vol.4, p.194. See also al-Fat\text{"}aw\text{"} al-Hindiyah, vol.6, p.43; al-Jami\text{"} al-Sagh\text{"}r, p.515; al-Shayb\text{"}ni\text{"}, al-Am\text{"}li\text{"}, pp.51-52; al-Durr al-Mukht\text{"}ar printed with Radd al-Mukht\text{"}ar, vol.6, p.595; al-Durr al-Mukht\text{"}ar, vol.2, p.463; Radd al-Mukht\text{"}ar, vol.6, p.595; al-Kanawi\text{"}, al-Naf\text{"}i\text{"} al-Kah\text{"}r printed with al-Jami\text{"} al-Sagh\text{"}r, p.515; al-Jami\text{"} al-Sagh\text{"}r in the margin of Kit\text{"}ab al-Khar\text{"}aj, p.119; Mu\text{"}\text{"}n al-Hukk\text{"}am, p.211.

\textsuperscript{41} Al-Mabs\text{"}it, vol.26, p.188.
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

\(^{42}\) Sahīh Muslim, vol.4, p.1378.

\(^{43}\) Sahīh Muslim, vol.4, p.1378. Abū Yūsuf also describes in his writing as follows: Abū Yūsuf says; Hishām b. ‘Urwh related to us from his father from Sa‘īd b. Zayd that (Sa‘īd 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 (ashykhunū) related to us from ‘Urwh from Hishām b. Ḥakīm b. Ḥizām that he saw Ṭyād b. Ghanam makes the dhimmīs stand in the sun for non-payment of jizyah. He said:" O Ṭyād!, What is this? The Prophet said those who torture people in this world will be tortured in the Hereafter". Abū Yūsuf says; Hishām b. ‘Urwh related to us from his father that ‘Umar 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. ‘Umar asked, "What do they say and what is their excuse (‘udhur) 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 Abīd Al瞒mad ʿAlī, pp.251-252.

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

45 *Al- Qurān*, 67:15.

46 *Sunan Abī Dāwūd*, vol.3, p.314.
persons should be released.\textsuperscript{47}

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

"No one can be imprisoned in Islām without due course of justice".\textsuperscript{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".\textsuperscript{49}

In the Shāfi‘ī 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".\textsuperscript{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


\textsuperscript{48} Al-Muwatta', p.510.

\textsuperscript{49} Abū Yūsuf, Kitāb al-Kharāj, p.356.

\textsuperscript{50} Al-Māwardī, al-Aḥkām al-Ṣultāniyyah, pp.219-220.
should also be released".  

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".  

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 shari'ah or not?. If it comes from shari'ah, 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".

Underlining the notifications of Quranic verse, Ḥadīth and Islamic jurists above, imprisonment without justice or excuse is prohibited in Islam 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:

"Islam 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 Islam".

51 Al-Wajīz, vol.2, p.239.


53 Ibn Qayyim, al-Turuq al-Hukmiyyah, p.93.

54 Al-Mawdūdī, Human Rights in Islam, 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-Khattābī explained in his Maḥālim al-Sunan that in Islām there are only two kinds of imprisonment:

a)- Imprisonment under order of the court (ḥabs ʻuqūbah), 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 istiżhār).

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 ʻābiq (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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\(^{56}\) Ibn Qayyim, al-Ṭuruq al-Hukmiyyah, p.102.

\(^{57}\) Ibn Qayyim, al-Ṭuruq al-Hukmiyyah, p.102.

\(^{58}\) Al-Khattābī, Maḥālim 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 taʿzīr (discretionary punishment) and rad f (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 Shāfiʿīs. 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-habs al-sharī) 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

59 Al-Qarāfī, al-Furūq, vol.4, p.79; al-Shāhī, al-Iʿtīṣām, vol.2, p.120. See also Wahbah, al-Fīqīh al-ʾIslāmī wa Adillatuḥ, 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 Umar 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. ʿAbd Allah al-Zubayrī, one of al-Shafiʿī’s companions says that the maximum period of imprisonment is one month for investigation (al-kashf) and for acquittal (al-istibra'). Others say it is undetermined and should be left up to the imām's view and his independent reasoning (ijtihad), the last is more likely" 61

Basically, the imprisonment is a taʿzīr 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.

60 Ibn Qayyim, al-Turuq al-Hukmiyyah, pp.102-103.

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


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 Shāfi‘ī jurist al-Mawdūdī:

"There are two opinions about the minerals which are hidden in the land (al-mā'ādin al-ba[jnah),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-Mā'ādin al-ba[jnah (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-mā'ādin al-żīhirah 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-Mawdūdī, al-Ahkām al-Sultāniyyah, p.197. Al-Nawawī also states on the same topic that al-mā'ādin al-żīhirah 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 ḥiyār (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 Hadīth reported by several people that the Prophet awarded to Bilāl b. al-Ḥārith al-Muṣṭaṭfā 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-Ṣhīrāzī elaborates this issue talking [(in the chapter of zakāh on ma‘dīn (mine) and rīkāz (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 Malikī school, Ibn Rushd notes:

"The ‘ulāma’ 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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⁷ Reported by Kathīr b. ʿAbd Allāh b. Ṭāhir b. Māzāhīr who received it from his father who received it from his grand father. This Ḥadīth can also be seen in al-Muwaṭṭa', p.133.


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 Rajah states:

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

In general, Al-Jamāb b. Ābd 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 Ţāhirī 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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13 Al-Qawānīn al-Fiqhīyyah, p.217.


15 Majallat al-Aḥkām al-Sharī’iyah, article 1674, p.507.
not claim any ownership of such items discovered in a private property".\textsuperscript{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......... ".\textsuperscript{17}

Based on the Ḥadīth, the Ḥanafī, the Shāfiʿī, the Mālikī, the Ḥanbalī, the Zāhirī 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.

\textbf{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

\textsuperscript{16} Al-Muhallā, vol.8, p.238.

\textsuperscript{17} Schacht, \textit{An Introduction to Islamic Law}, p.136.
it. 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.

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".

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.

**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.


20 See Majallah, article 1195.

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

\(^{22}\) Salmond and Heuston, p.48.


\(^{24}\) Majallah, article 96. Lā yajāz li aḥad‘an yataṣṣarrafī milk lighayrih bi lā idhnih.

obliged to remove such matter, and to evacuate the land.

It can also be seen in Muktaṣar:

"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 .Dropout, 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 substance29 to cross the boundary of the plaintiff’s land could be related analogously in Iṣlām, 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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is the case in irrigation by water when it trespasses the boundary of a neighbour's land.\textsuperscript{31}

\textbf{Trespass \textit{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.\textsuperscript{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 \textit{ab initio}.\textsuperscript{33}

In Islām, the discussion of trespass \textit{ab initio}, in general, could be recognized in the application of a legal maxim which enunciates: "Legal permission negates tortious
liability".\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{34} Majallah, article 91.

\textsuperscript{35} Majallah, article 605.

\textsuperscript{36} Majallah, articles 545 and 546. See also articles 548, 549, 550 and 551.

to do so, should not abuse or go beyond such authority or go outside his given authority. He is considered a trespasser or transgressor (*mutadaddin*) if he has done so.

**TRESPASS AND CONVERSION OF GOODS**

In Islam, 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 Islam 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-ṭaṣarruf*) 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-ṭaṣarruf*) 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.
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 hadd cases) to the use and possession of his property. The elimination of the power by the ways above, in Islam, is regarded as ghašb.

Ghašb etymologically comes from gha-ša-ba which means usurp or seize wrongfully. In its literal sense, it means taking another's property wrongfully, unjustly or by violence. It is also taking another's property wrongfully (zulman) and publicly (jihāran/mujāharah). Also, it means the taking of property from another by means of overcoming or conquest.

In legal terminology, it will be listed in accordance with the Islamic schools:
In the Hanafi 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.\textsuperscript{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.\textsuperscript{45}

[3] Taking and holding the property of another without his permission.\textsuperscript{46}

However, they define the words in the following way:

"Property" excludes the carcass and the like.\textsuperscript{47} However, the carrion of fish and of grasshoppers is considered as property.\textsuperscript{48} But the word, in general, can be said to include property usurped or not.\textsuperscript{49}

"Valuable" excludes the property which is valueless in Islām like wine and pig in the


\textsuperscript{46} Majallah, article 881. Akhdh māl aḥad wa qabṭih bi dān idhmīh.


\textsuperscript{48} Radd al-Muḥtār, vol.6, p.178.

possession of a Muslim.  

"Inviolable" excludes the property of ḥarbīn because it is not covered under the terms of inviolable property (ghayr muḥtaram).

"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.

"Openly" excludes theft because theft is a clandestine act.

"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". The later opinion is preferable.

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In the Shāfi‘ī school

[1] The act of encroachment with aggression upon the right of another.\textsuperscript{55}

They define these terms in the following way:

"Encroachment" occurs by way of force (\textit{qahr}) and an act of conquest.\textsuperscript{56}

"Upon the right" includes valuable and worthless property like the \textit{dhimmī}'s wine, dog, skin of carcass and dung.\textsuperscript{57}

"With aggression" is when it occurs wrongfully or unjustly (\textit{zulman}) and is a transgression (\textit{al-ta'addī}).\textsuperscript{58}

In the Māliki school


[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 (ta'daddian) without the use of arms (ḥīrābah).60


[4] Taking another's property by aggression ('udwānān) and force (qahran) without the use of arms (ḥīrābah).62

They define these terms in the following way:63

"Taking another's property" means encroachment (istīlā)' which includes ghāshb 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-d'yīn al-mādiyāh), 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


excludes the thing borrowed (musta'ūr) and the gift, by reason of the fact that they are taken voluntarily (ikhtiyār).

"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


With the definitions of *ghaṣb* above, the Shafi'i and the Hanbalī 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-ikhtisāṣa*) like the right of impeding (*ḥaqq al-taḥajjur*) which means the development of waste land (*ḥiyā 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. 

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68 Ḫudhā'ī Muḥammad ibn Mūsa, *al-Ṣūrāl* 2:275; Al-Qādī Ibrāhīm, *al-Sa`fī`ī* vol.5, p.145; Sharḥ Muṣṭafā al-Ḥādī, vol.2, p.399; Kashfsāf `al-Ḥāfiẓ `an Matn al-Iṣna`ī, vol.4, p.76; Al-Rawd al-Murbi, p.330; Wahbah, *al-Fiqh al-Īslāmī wa Adillatuh*, vol.5, p.709. According to the fuqaha, *māl mutaqawwam* is *māl* which is permitted by *shari'a* to utilize in a normal situation and obtained by endeavour (*ahab al-shi`rī` al-intifāḥ bih fī ḥāl al-s`aḥ wa ikhtiyār wa ḥāṣah bi al-s`aḥ*). Included are *manqiil*, *`aqīr*, food, etc., which it is permissible to enjoy according to Islamic law. This *māl* is given protection by *shari'a* and the liability, therefore, will be imposed on anyone who has destroyed it. See, Muhammad Yūsuf Mūsā, *al-Fiqh al-Īslāmī* vol.103. In the Majallah, *māl mutaqawwam* is enacted as follows: [1] The thing the benefit of which is permissible by law to enjoy (*mā yubīb al-intifāḥ bih*). [2] The thing which is possessed (*al-māl al-muḥraz*). 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-ḥiyā`ah bi al-s`aḥ*).  
2- Its benefit is permissible by *sharī`ah* in normal situation (not forced by necessity).

If anything cannot acquire two or one of the conditions above, the *fuquahā* will put it under *māl ghayr mutaqawwam*.

*Māl ghayr mutaqawwam* can be divided into two parts: [1] *Māl* that is permitted to be used according to *sharī`ah* 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 *sharī`ah* 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'an 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 *sharī`ah* 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 determination of ghaṣb

1- Abu Ḥanīfah and his student Abū Yusuf 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.


2- The Shafi'i, Malik and Hanbali schools, including Muhammad b. al-Hasan al-Shaybani71 disagreed with the opinion of Abū Ḥanīfah and Abū Yūsuf. They, excluding Muhammad b. al-Hasan al-Shaybani, asserted that the establishment of an invalid possession by an unauthorized person without its owner's permission is enough to constitute the tort of ghāṣb. They do not impose the elimination of the possession of the rightful owner as a condition of ghāṣb. On the other hand, Muhammad b. al-Hasan al-Shaybani stipulates the elimination of the possession of the rightful owner as a condition of ghāṣb. 

Al-Istīla' (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 ghāṣb 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 ghāṣb, for the right of the owner to possession is interrupted, while in the view of the former, it does not amount to ghāṣb 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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destroyed. 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* 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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must return it to its owner in its original state (‘ayn) 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 Ḥanafīyyah, or movable and immovable property according to the fuqahā' other than the Ḥanafīyyah) whether as a

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result of his transgression or not, whether by another's action or by itself, 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 (ta‘adhdhur) or necessity (darūrah).

This rule is in conformity with a legal maxim: "When the giving of the original thing has not been possible, its price is given".

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-qāḍā/yawm al-qaqa’).

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80 Majallah, article 53. Idhā baṣal al-aṣl yuqūf ilā al-badal.
Abū Yūsuf maintains that he becomes responsible for the value that the
thing bore upon the day of ghāšb. 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-inqīṭāf).

In the Mālikī school, the usurper becomes responsible for the value on the day
he usurped it.

In the Shāfiʿī school, the usurper becomes responsible for the maximum value
(aqṣā qīmah) of the fungible property between the date of the ghāšb to the time when it
became impossible to procure an equivalent.

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. This view is similar
to the opinion of Muḥammad b. al-Ḥasan al-Shaybānī.

2- Infungible property.

81 Al-Hidayah, vol.4, p.12; al-Durr al-Mukhtar, vol.2, p.332; al-Ajwibah al-Khalfa, p.244; Tabyīn al-


83 Minhāj al-Tālibīn wa ʿUmdat al-Muṭīn, p.147; Hāshihāt al-Qāyūbī wa ʿUmavrah, vol.3, p.32; Minhāj al-

Rawḍ al-Murbiʿī, p.333.
According to the Ḥanafī85 and the Mālikī86 schools, the value of this property is the value which it bore on the day of ghāṣb. According to the Shāfi‘ī school, it is the maximum value of the property between the date of the ghāṣb 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

place, the value of that thing might change in consequence. In other words, the value of the thing may vary in different places. 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. 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. 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.

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, even though the usurper should expend a lot of money for that purpose.

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The alteration (taghayyur) of usurped property while in the usurper's possession

According to the fiqhah, 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 (rujab) 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 Hanafi school.96 This is also the opinion of the Malik school. Nevertheless, the Maliki 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 Shafi'I school, the owner has the option either of demanding (al-
muḫālabah) the value of ruṯāb, or of demanding the similar tamr (mithl al-tamr).  

In the Shāfiʿī school, there are a few examples which could be related in respect of this part.

[a] A person usurps a juice (ʾaṣūr) and it ferments and then changes into wine and lastly changes into vinegar. The vinegar must, according to the most correct opinion (al-aṣūrī), be returned to its owner with damages (arsh) when the value of the vinegar is less than the value of the juice.  

Otherwise, if that value is not less than the value of the juice, the usurper is not liable for damages.  

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.  

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 Shāfiʿī 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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of the juice.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{107}


\textsuperscript{105} See a different opinion in this school in Fatawā Qāḍīkhān in the margin of al-Fatawā al-Hindiyyah, vol.3, p.235.


[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). This is also the opinions of the Ḥanafī, the Mālikī and the Ḥanbalī schools. 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 (zarʿan), 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. 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


incubate the egg because his act is considered as *tabarru* (donation).\(^{111}\) According to the Ḥanafī and Mālikī schools, the usurper must replace it because it is *mithl* 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 qīmāt*), or an equal quantity of flour (because flour is grouped as *māl mithl*), 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 mithl*).\(^{113}\) This is also the opinion of the Mālikī school unless in the case of mixing usurped wheat with oil.


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. 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.\footnote{Al-Umm, vol.3, pp.289-290; Minhaj al-Talibin wa 'Umdat al-Muftin, p.149; Zakariyya al-Ansari, Minhaj al-Tullab printed with Minhaj al-Talibin wa 'Umdat al-Muftin, p.149; Minhaj al-Talibin, in the margin of Muqni'i al-Muhajj, vol.2, pp.291-292; al-Siraj al-Wahhab, p.273; Nihayat al-Muhajj, vol.5, p.184; Fath al-Wahhab, vol.1, p.279; al-Wariz, vol.1, p.212; al-Fiqh al-Manhaji, vol.7, pp.190-191. See also Tabyn al-Haqiq, vol.5, p.230; Majma' al-Anhur, vol.2, p.463. For detail see al-Muhadhdhab, vol.2, p.204; al-Shirazi, Kitab al-Tanbih, 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.}

114 Al-Mudawwanah, vol.4, p.185; Mukhtasar, p.227; al-Dardir, al-Sharh al-Kabir, vol.3, p.454; al-Fawakhir al-Dawani, vol.2, p.176; Bidayat al-Muhtadid, vol.2, p.239; al-Kina'i, al-‘Aqd al-Munazzam li al-Hukkam in the margin of Tabsirat al-Hukkam, vol.2, p.72; al-Abi, Jawahir al-Iklil, vol.2, p.151; al-Hattab, Mawahib al-Jalil, vol.5, p.287; al-Kaifi, p.432. In his book, Ibn Rushd mentioned that the taking of the original value of dyed cloth is borne on the day of ghia'. See Bidayat al-Muhtadid, vol.2, p.239. See also al-Kaifi, p.432; al-Abi, Jawahir al-Ikll, 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 (tayd) which means the price of the dyeing, irrespective of whether the value of the dyed cloth has increased or not thereby. See al-Fawakhir al-Dawani, 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 without claiming arsh, or of compensation equal to the value of his cloth which is based on the day of ghiaq. See al-Fawakhir al-Dawani, vol.2, p.176; al-Kaifi, p.432; al-Mawaj, al-Taj wa al-Ikll in the margin of al-Hattab, Mawahib al-Jalil, vol.5, p.287; al-Fawakhir al-Dawani, vol.2, p.176; al-Bajjah fi Sharh al-Tuhfa, vol.2, p.656; al-Risalah, p.121; al-Thamar al-Dani, p.510. If the value of the dyed cloth has decreased due to al-‘ayb al-samaw (the act of God), the owner has the option either of taking the dyed cloth back and claiming arsh from that person. See al-Mawaj, al-Taj wa al-Ikll in the margin of al-Hattab, Mawahib al-Jalil, vol.5, p.287; Bidayat al-Muhtadid, vol.2, p.239; al-Kina'i, al-‘Aqd al-Munazzam li al-Hukkam in the margin of Tabsirat al-Hukkam, vol.2, p.73; al-Bajjah fi Sharh al-Tuhfa, vol.2, p.656; al-Risalah, p.121; al-Thamar al-Dani, 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 ghiaq (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-Mawaj, al-Taj wa al-Ikll in the margin of al-Hattab, Mawahib al-Jalil, vol.5, p.287; Bidayat al-Muhtadid, vol.2, p.239; al-Kina'i, al-‘Aqd al-Munazzam li al-Hukkam in the margin of Tabsirat al-Hukkam, vol.2, p.73; al-Fawakhir al-Dawani, vol.2, p.176; al-Bajjah fi Sharh al-Tuhfa, vol.2, pp.656-657.}

115 The Shafi'i 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
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.\footnote{Al-Hidayah, vol.4, p.17; Mughnī al-Muḥtāj, vol.2, p.292; Fath al-Wahhab, vol.1, p.279; Al-Fiqh al-Manhajī, vol.7, p.191. However, there is in the Shafī'ī 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.}

The Ḥanafī school argues against the Shafī'ī 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.\footnote{Al-Hidayah, vol.4, p.17; Tabyīn al-Haqīq, vol.5, p.230. See also Mughnī wa al-Sharh al-Kabīr, vol.5, p.433.}

According to the Ḥanbalī school, this case (dyeing the usurped cloth) is similar
to the opinion of the Shafi' school in general, 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 Hanbal school is similar to the opinion of the Hanafi school.

3- If the usurper, according to the Hanafi jurists, alters the usurped property in such a
way that the name and its original purpose (manfa') are changed, he shall be liable to
make good the loss, which means he must replace it if it is fungible (mithl) property or
pay the value of it if it is infungible (iqm) 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.


This is also the opinion of the Mālikī school. 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.

In accordance with *istiḥsān*, the usurper is not entitled to derive any advantage from the usurped property until he pays the compensation. 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.

The Shafi`ī 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 (*muqāṣān*). The Ḥanbalī school and al-Shārazī add that the usurper is not entitled to claim any increment because his act in giving increase the

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value of the usurped property is considered as tabarruf (donation). 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 ribā.\textsuperscript{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-Ḥāṣkafī, al-Zaylaṭī, 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 (magḥṣūb)

According to the Ḥanafī school, any diminution or depreciation of value, materially (ḥissī madḍī) or immaterially (maḍnawī) of usurped property while in the


possession of the usurper, could be divided into four categories:

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. This is also the opinion of the Shāfi‘ī school, the Mālikī school and the Ḥanbalī school. 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.

126 Radd al-Muhtār, vol.6, p.188.


The depreciation of usurped property due to a defect in it itself (waif). The usurper is in this case responsible for such depreciation, on the condition that the usurped property is not *mal ribā'* (property which is grouped to *ribawī* property); but that with respect to *mal ribā',* either compensation for the depreciation or damage must not be taken along with the actual restitution, as that would necessarily induce usury (*ribā') or demanding the value of it and that property is left to the usurper, such as in the case of wheat which becomes foul. 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).

The usurper is responsible for the usurped property (when it is not *mal ribā'),* in all its parts for depreciation. 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.

The Shāfi‘ī school and the Ḥanbalī school opine (they did not mention

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135 Sharh Fath al-Qadīr, vol.9, p.328; Badā'i’ al-Ṣanā‘ī’, vol.7, p.159; Radd al-Muḥtar, vol.6, p.188; Majma‘ al-Ḍamānāt, p.133.


138 Majallah, article 900; Wahbah, al-Fīqh al-Islāmī wa Adillatuh, vol.5, p.728. See examples which could be related to this part in Badā'i’ al-Ṣanā‘ī’, vol.7, p.155.

whether it is *māl ribā‘* or not) that the usurper shall be liable for the depreciation of the usurped property, whether in its substance (*dhāl‘ayn*) 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 (*‘afin*), these two schools have their opinions respectively.\(^{141}\) The Ṣaffī Ṭ 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 (*naqs*) 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


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-ṣirfah*) while in the possession of the usurper, the latter is liable for that depreciation.\(^{145}\) It is also the opinion of the Shafi‘ī 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 (*ṣan‘ah*) while in the possession


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-Shāfī‘ī 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 (ṣan‘ah) 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-aghrād).\(^{150}\) 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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(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 Shāfī‘ī 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-Shāfī‘ī and Aḥmad b. Ḥanbal. On the other hand, Abū Ḥanīfah and Mālik


disagreed and opined that the owner has no right to claim the compensation.\textsuperscript{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 (\textit{arsh}) from him, and returns it with the slave to the owner, no compensation for the depreciation is incumbent upon the usurper.\textsuperscript{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.\textsuperscript{159}

This is also the opinions of the Mālikī,\textsuperscript{160} Shāfī\textsuperscript{161} and Ḥanbalī\textsuperscript{162} schools.


\textsuperscript{160} Al-Dardīr, al-Sharh al-Kabīr, vol.3, pp.453-454; al-Mudawwarah, 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.\textsuperscript{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.\textsuperscript{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 \textit{ghaşb} (and the usurper can claim the payment from the third party), or of taking it back with its defect and

\begin{thebibliography}{99}
\item Majallah, article 910; \textit{Alī Ḥaydar, Durar al-Hukkām}, vol.8, p.494; al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.6, p.169.
\end{thebibliography}


demanding the compensation (arsh) from the third party.\textsuperscript{165}

(3)- The depreciation of usurped property due to a defect of its quality by \textit{act of God (bi ḍafah 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-nuṣṣān) 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.\textsuperscript{166} So far as an \textit{act of God} is concerned, it has already been explained in the preceding pages, including the views of the Shāfi‘ī, 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- \textit{Yasīr} (small amount).

ii- \textit{Fāḥish} (great amount).

If the depreciation is of a small amount (\textit{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 (\textit{fāḥish}) so as to destroy many of its uses (if a rent of cloth were


\textsuperscript{166} ʿAlī Ḥaydar, Durar al-Hukkām, 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 ghaşb 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.\footnote{167}

The significations of fāhish and yasīr are as follows:\footnote{168}

i- Fāhish (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-Qadiir that fāhish is such as occasions a destruction of many of the advantages.\footnote{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:\footnote{170}

i- Fāhish means the depreciation which is equal to or in excess of one fourth of the value of the usurped property.

\footnote{167}{Al-Hidayah, vol.4, pp.16-17; Majma' al-Damanāt, pp.133-134; Sharh al-'Ināyah 'alā al-Hidayah printed with Takmilat Fath al-Qadīr, vol.9, p.342; al-Fatāwā al-Bazzāziyyah in the margin of al-Fatāwā al-Hindiyyah, vol.6, p.177; Majma' 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 fāhish in the Mālikī school in al-Mudawwanah, vol.4, p.169.}


\footnote{169}{Sharh al-'Ināyah 'alā al-Hidayah printed with Takmilat Fath al-Qadīr, vol.9, p.341.}

ii- Yasūr 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- Yasūr 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


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 (*fīdāʾ*) and occurrence of the injury itself (*iḍrāʾ*) were present in them.¹⁷⁵

Al-Kāsānī mentions that if restitution is granted in *gḥaqb*, it is more recommended in the case of *itlāf*. This is because, there have been the elements of transgression and injury concurrently.¹⁷⁶

Maḥmūsānī 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 (*ashyāʾ*), *itlāf* of animals (*bāḥāʾim*) and *itlāf* of inanimate beings (*jamādāʾ*) will be dealt with and grouped as *itlāf* of property.¹⁷⁸

¹⁷⁵ *Badaʿī’ al-Ṣanāʾi*, vol.7, p.165.

¹⁷⁶ *Badaʿī’ al-Ṣanāʾi*, vol.7, p.165.

¹⁷⁷ Maḥmūsānī, “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*:

1- Injurious act (*al-fi'l al-ḍārr*).

Injurious act is a deed that will bring about damaging (*ḍarar*) consequences, whether committed directly (*mubāsharah*) or indirectly (*tasabbub*), by commission (*iḥāb*) or omission (*salb*), by physical (*ḥiss*) or psychological (*nafs*) means.

2- Harm or damage (*ḍarar*).

*Ḍarar* here means any form of harm or damage (*adḥā*) 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 and so on.

According to the *fuqaha’, 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 *fuqaha’* opine that in the direct *itlāf*, a *mubāshir* will be held liable in all tort another’s food, drinking his milk and the like. \[c\] *Ifsād* is synonym for *itlāf* in the *fuqaha’*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; *Damān al-Mutlifat*, pp.199-200.

179 *Damān al-Mutlifat*, pp.208-220.

180 In the expression of *ḍarar*, carrying all forms of *ḍarar*, whether *ḍarar falsih* (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 ‘Izz al-Dīn b. ‘Abd al-Salām, direct *itlāf* can be classified into two categories: [1] *Itlāf* for the reason of restoration (*iṣlāf*) of the body and preservation (*birz*) of the breath of life (*arwāh*) 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.\textsuperscript{182} However, according to the Shafī‘ī school\textsuperscript{183} there are certain circumstances which exclude the \textit{mubāshir} from liability for destruction (\textit{dāmān al-mutlīfāt}).\textsuperscript{184} In short, the

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Killing, cutting and hurting on account of warding off an injurious assailant (\textit{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 \textit{Mūslīmīn}. (iv) Killing the rebels (\textit{bughāh}) in order to ward off their rebellion and to subject them to obedience to the \textit{imām} which has been refused by them. (v) \textit{īlāf} for warding off the \textit{māṣiyāh} (disobedience) like fighting tyrannies (\textit{ẓulmīn}) 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 \textit{jihād}. (vi) \textit{īlāf} of anything which could bring to disobedience of God like idol and the like which can denote a way to \textit{shirk}. (vii) \textit{īlāf} in favour of prevention (\textit{zair}), meaning the implementation of Islamic punishment like stoning punishment for a married male or female involved in \textit{zinā}, \textit{qaṣar} for homicide and injuries and so on so that such preventions can prevent adultery and criminality. See ‘Izz al-Dīn b. ‘Abd al-Salām, \textit{Qawālid ai-Ahkām} fī \textit{Maṣāliḥ al-Anām}, vol.2, pp.87-88.

\begin{itemize}


\item \textsuperscript{184} [1] Necessity (\textit{ṣara‘ra‘ah}). [2] Self-defence (\textit{dif‘ī ‘an al-nafs}), like in cases of reasonable defence of oneself or one's property or one's dignity from an assailant by wounding his animal or breaking his weapon. [3] Legal execution (\textit{tanzīd al-amr al-shar‘}), like in case of breaking a container of wine when it cannot be poured out. [4] \textit{īlāf} occurs in a period of war (\textit{jabh}) or rebellion of a group of Muslims (\textit{baghī fī fīshah min al-Mūslīmīn}). [5] \textit{Fāṣel māṣura} (\textit{qawvah qašīrah}) 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 \textit{Majāliḥ}, article 926. In the second case, however, the Ḥanafī school opinion is similar to the Shafī‘ī school opinion. See \textit{al-Mabsūt}, vol.26, p.189; \textit{al-Fāṭīwā al-Hindīyyāh}, vol.6, p.50; \textit{al-Hidāyah}, vol.4, p.198; \textit{Majāliḥ}, 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 \textit{al-Mabsūt}, vol.26, p.189.
\end{itemize}
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basic conditions for *itlāf mubāshharah* 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-Ta’addtī* (Trespass or Transgression).

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”. 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-ta’addtī* existed.

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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186 *Wahbah, Nazariyyat al-Damān*, p.77. *Tujjīwāz al-ḥaqq aw mā yusmāh bih al-shar‘*.

iv- On a narrow public way which can cause injury to the passer-by.\textsuperscript{188}

According to Muṣṭafā b. Aḥmad b. Muḥammad al-Zarqa',\textsuperscript{189} \textit{al-taʿaddī} in indirect \textit{iltāf} could appear in three ways:

i- Indirect \textit{iltāf} by action and simultaneously with \textit{al-taʿaddī} (\textit{al-tasabbub bi al-fiʿl maʿa wujūd al-taʿaddī}). In this case, when a \textit{mutasabbib} directs his act which is accompanied with the element of \textit{al-taʿaddī}, 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\textsuperscript{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.\textsuperscript{191}

\textsuperscript{188} Minhāj al-Tālibīn, in the margin of Mughnī al-Muhājir, 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.


ii- Indirect *iltifāt* by omission and simultaneously with *al-taʿaddīf* (*al-tasabbub bi ḍard ad-dīn al-fī l maʿa wujūd al-taʿaddīf*). 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 *fuqahāʾ* unanimously agreed\(^{192}\) that if a person has an extremely great necessity (*qarīrah*) 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-Nawai 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-mutaʿaddīf*. If he died, the owner would be liable for the *qiṣās* punishment.\(^{196}\)

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\(^{193}\) Al-Mughnī, vol.8, p.602. In the Shāfiʿī 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-Majmūʿ Sharh Al-Muhadhdhab, vol.9, p.43; Mughnī Al-Muḥtār, 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 Ḥashbū, p.86; Minhāj al-Taḥābīn in the margin of Mughnī Al-Muḥtār, vol.4, p.308.


\(^{196}\) Mughnī al-Muḥtār, vol.4, p.309; Al-Iqnaʾ, 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 Taṣāṣrat Al-Hukmām, vol.2, p.193 and Al-Muḥallā, vol.6, p.230. In brief, the *fuqahāʾ* give permission to fight the owner who has
iii- Indirect itlāf in the case of negligence (taqsīr) and simultaneous al-ta'addī. 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 āqilah has to pay a diyah of manslaughter (qatl shibh āmd) on his behalf.197

2- Al-Ta'ammud (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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198 Most of the fuqahā' prefer to apply merely the element of al-ta'addī rather than al-ta' ammad as the condition of itlāf indirectly. It is because in reality the element of al-ta' ammad is included in al-ta' addī conveying the meaning of al-ta'addī. 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-mutā'addī. See Wahbah, al-Fīqh al-İslāmī wa Adillatuh, vol.5, p.749.

199 Wahbah, al-Fīqh al-İslāmī wa Adillatuh, vol.5, p.748.

200 Wahbah, Nazariyyat al-Damān, 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 (ta'wīdz) of itlāf property, it will be observed in accordance with the opinion of the fuqaha'. The Ḥanafī school ruled that it should follow the value on the day of talaf.203 This is also the opinion of the Mālikī school204 and the Shāfi'ī school205 However, the Ḥanbalī school has


202 Majallah, article 90. It even mentions a formula which can be as groundwork and maxim, that is "al-mubāsharah muqaddamah 'alā al-sabab" meaning mubāshir takes precedence of responsibility over the secondary cause (mutasabbib). See see also Ashbāh S, p.162. However, there are certain exceptions in which mutasabbib still bears the liability. See Muṣṭafā Aḥmad al-Zarqa', al-Fī' al-Ḍārr, p.93; Wahbah, Nazariyvat al-Damān, pp.191-192.


grouped the compensation in the two following kinds of property. Their positions are similar to the assessment for compensation in *ghaḍb.*

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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2. *Majallat al-Ahkām al-Sharīʿiyah*, article 1429, p.444; *al-Mughnī*, vol.5, p.422. Its value is based on the state where *ilāf* occurred.
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’ith 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-diyār". 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’ith" 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 Hadīths. 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 Hadīth, 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 Hadīth 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 Hadīth, if a person is injured by falling

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into a well, this is overlooked. Likewise, if a person digs a well on land of his ownership or in uncultivated land (mawā'it) and somebody is injured (by falling into it), no liability is due on the person. They said (qūl): The meaning of "al-bī'r" is "al-bī'r al-qadīmah" (the ancient well) who digger (owner) is unknown. They said (qūl): 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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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 āqilah 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-aşıfī al-bīnā) and second, an unexpected defect in the premises (al-khalal al-țāri). 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 muta‘addīn 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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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 Shāfi‘ī 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 *muta‘addīn* 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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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 Shafi’i school (according to the most correct opinion), the Zahirî school, the Hanafi school in accordance with qiyas\textsuperscript{10} and it is a view of the Hanbali school according to the popular opinion. They substantiate their opinion by reason that the owner is not considered al-mutaddî. 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.\textsuperscript{11}

The third group

If the owner had previously been warned to knock down his wall as it is likely to...
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-Nakhaṣī, al-Shaḥbāṣ, al-Ḥasan, al-Thawrī, etc. of the ṭābi’ī *immat al-ṭābi’ī* (a'īmmat al-ṭābi’ī), the Ḥanafī school in accordance with *istihsān*, the *junghār fuqahā’* of the Mālikī school and the preferred opinion *(qawl al-mukhtar)* of the Ḥanbalī school. In the same manner where a man finds a garment of another, and its owner demands *(jālāb)* it of the man, if the man refuse to deliver it, he is guilty of a *al-taʿaddī* 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 lesor *(muʿajjir)*, a pledger *(rāhin)*, a partner *(shārik)*, a trustee/executor *(waṣiḥ)*, a guardian (like a father), should be requested to do so. That is to say that a pledgee *(murtahin)*, a lessee *(mustaʿjir)*, a trustee *(mūḍiʿ)*, a tenant *(sākin al-dār)*, a borrower *(mustaʿʿīr)* cannot be requested to demolish the building or wall because they have no

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such right.\textsuperscript{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 (\textit{min al-khārij} who is not one of the inhabitants) is of no effect. If the wall collapses on to a private road (\textit{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 (\textit{al-ṭarīq al-ẓāmm}), any person whatsoever has the right of giving the warning." \textsuperscript{14}

THE REQUEST (\textit{al-mutālabah}), THE STATEMENT OF TESTIMONY (\textit{al-ishhād}) AND THEIR CONDITIONS

In legal terminology, the fuqahā' use the word \textit{al-taqaddum} for the signification of \textit{al-mutālabah} or \textit{al-indhar} (warning/notice). It signifies the giving prior notice and recommendation in order to repel and remove an expected injury.\textsuperscript{15} The \textit{mutaqaddim}


\textsuperscript{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 (\textit{sukkan})- (whether they are hirers or tenants) have the same right. Further, if the owner (\textit{sāhib 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 (\textit{ja‘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 \textit{qāfī} (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 (\textit{iṣṣāḥ}); 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 \textit{qāfī} or the person is not at liberty to annul the right of the public. See al-Hidayah, vol.4, p.196; al-Durr al-Mukhtar, vol.2, pp.465-466. See also in al-Mughnī, vol.7, pp.828-829.

\textsuperscript{15} Majallah, article 889. \textit{Al-Tanbīḥ wa al-tawṣīyah bi dāf i al-ḍarar al-malhūs wa izalatuh gabl wuqūţīh}. 
says: "Your wall has become dangerous, you must therefore repair it or take it down lest it prove destructive",\textsuperscript{16} or: "Pull down your wall".\textsuperscript{17}

The application of muṣʿalabah should indicate a claim to the owner of the wall by the expression for restoration (iṣlāḥ) or for demolition (ḥadm), 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.\textsuperscript{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 isḥād 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 isḥād 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.\textsuperscript{19}

The type of isḥād is effected by a person who says to the bystanders, "Be you

\begin{footnotesize}

\textsuperscript{17} Majallah, article 928. Iḥda m ḥāʾīṭik.


\end{footnotesize}
witnesses that I have required (taqaddamtu) this person to take down his wall".  

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.  

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.  

It is proper, however, to remark that the ishhād before a wall has become ruinous or cracked is invalid as the element of al-taqaddum cannot be established.  

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-taqaddum, 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.
to repair or knock it down, by reason of the fact that the owner is not negligent (taqṣīr).

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 mutālabah for pulling down the wall as all mankind are partners (shurākā’) 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 mutālabah affects a matter of right in which all are equally concerned, all are therefore equally entitled to make it.

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 mutālabah, not others.

If there are partners in the house or many persons occupy it, the mutālabah by one


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 hāl 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


\(^{27}\) Majallah, article 928.

remission without it being agreed by every one of them because the rights of all are concerned.  

It is otherwise where the wall leans over the public road and the qaḍī or the person who made the ṣulūlah 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 qaḍī or the person who made the ṣulūlah is not at liberty to annul the right of the public.  

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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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 *mutālabah*, 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 *mutālabah* 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 *mutālabah* has been made to him. But if the *mutālabah* 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 *mutālabah*.\(^{32}\)

In order to validate the *taqaddum*, it should be expressed to the owner of the wall

\(^{31}\) *Al-Mabsūt*, 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-Qinā“ an Matn al-Iqān*, vol.4, p.125; *al-Mabsūt*, vol.27, p.10; *Majma‘ al-Ḍamānāt*, p.183; *al-Fatāwā al-Hindiyah*, vol.6, p.37; *Ḍamān al-Mutlīfāt*, 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 Ḥāshiyyah Sharḥ al-‘Ināyah ‘alā al-Hidāyah printed with Ṣan‘ī‘ 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-ʿamm) who will be a person empowered to make decision while the owner is absent. 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 yaqūmin maqāmahum wa yaʿmalūn lahum). So their acts are in effect the acts of the minor, lunatic and (administrator of) waqf.

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.

Regarding the case of taqaddum for the inclining wall or building, when the


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.\textsuperscript{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.\textsuperscript{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-ajiz) and therefore is not al-mutaddī in omitting to perform his task. This is the opinion of Abū Ḥanīfah, in accordance with qiyās, and also one opinion in


\textsuperscript{37} Al-Hidayah, vol.4, p.196; Al-Mughnī, vol.7, p.829; Majmūʿ al-Ḍamānāt, p.182.
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 ishād 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 madfūr). This matter also can be referred to the qātif 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


39 Al-Mabsût, vol.27, p.10; Radd al-Muhtār, vol.6, p.599; al-Durr al-Mukhtar, vol.2, p.465; al-Mughnī, vol.7, p.829; Tabyīn al-Haqīq, vol.6, p.148; Majma’ al-Damānāt, pp.182-185; Sharḥ al-ṭnayyah ‘alā al-Hidayah printed with Nata’īj al-Afkār, 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 qātif 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-Hidayah, 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 fuqaha’ about the case of attachment of janāḥ 41 or rawshan 42 or mīzāb 43 or sābā 44, etc., to a structure which causes


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-‘Ubayyī, Fath al-Mannān, p.276; al-Bayjūrī, Hāshiyat al-Bayjūrī, vol.1, p.715; Sharḥ Muntahā al-‘Irādāt, vol.2, p.269; al-Rawd al-Murbi’.
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 Shāfi‘ī 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 (ṣaṭḥ) 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

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-mutā‘addī. 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 Shāfi‘ī jurists remark that the construction of a janāh placed in or projected over the highway is to be allowed (ja‘īz) under the condition only of safety. If the janāh (or mīzāb) partly rests upon a wall, and the protruding portion (al-khārij) falls, the owner is responsible for the whole (jamān) qa‘mān for the accident while he is responsible for only half (ni‘f) of qa‘mān 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 qa‘mān 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 janāh or mīzāb which projected over the highway, not the portion which projected over what


he owned.

Further, there are two opinions in the Shafi‘i 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 Ḥanafi school, if a person constructs a janāḥ or a mīzāb or a kanīf (toilet/water closet) or a jidh (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 c:aqilah) because as a mutasabbib he is guilty of al-taqaddīm in having erected a building in such a place. So he is al-mutaqaddī in the case of tasabbub. A person who

⁴⁷ Al-Muhadhhab, vol.3, p.207; Minhāj al-Tālibīn wa ‘Umdat al-Muṣṭīn, p.284; Minhāj al-Tullāb printed with Minhāj al-Tālibīn wa ‘Umdat al-Muṣṭīn, p.284; al-Mahālī printed with Ḥāshiyatān Qālūbī wa ‘Umayrah, vol.4, p.149; Ḥāshiyatān Qālūbī wa ‘Umayrah, vol.4, p.149; Fath al-Wahhāb, vol.2, p.175; al-Shīrāzī, Kitāb al-Tanbih, p.128; al-Wajīz, vol.2, pp.149-150; Minhāj al-Tālibīn in the margin of Mughnī al-Muhtāj, 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-Tālibīn wa ‘Umdat al-Muṣṭīn, p.284; al-Mahālī printed with Ḥāshiyatān Qālūbī wa ‘Umayrah, vol.4, p.149; Mughnī al-Muhtāj, 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-Mahālī printed with Ḥāshiyatān Qālūbī wa ‘Umayrah, vol.4, p.149; Ḥāshiyat Qālūbī, vol.4, p.149.
occasions (*tasabbab*) destruction is responsible where he has in any respect transgressed (*ta'adda*). 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 *Hanafi* 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 *muta'addī* 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-kharij*), the person who set it up is responsible, because with respect to that part he is *al-muta'addī*, as having caused the *mīzāb* to project over the road without any necessity (*qarīrah*) 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-muta'addī*. In the same manner as where a person is wounded by another


\(^49\) It is to be observed that in this instance, *kaффārah* is not inflicted onto the person who has fixed up the *mīzāb*, nor is he excluded from *mīrāh* (inheritance) because he is not the actual perpetrator (*bi qātil ḥaq īghah*), but stands merely guilty of homicide by an intermediate cause. See *Al-Hidayah*, vol.4, p.191; *Tabyīn al-Ḥāqīq*, vol.6, p.144, *al-Shalabī, Ḥašḥiyat al-Shalabī* in the margin of *Tabyīn al-Ḥāqīq*, vol.6, p.143. And also the liability is not dispelled even though the *muta’addīn* is a lessee or a borrower or a usurper. See *al-Durr al-Mukhtar*, vol.2, p.463.
and also by a predatory animal like a lion or a tiger, and dies, only half of the *diyāh* 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 *diyāh* 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 *diyāh* 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

50  *Al-Hidayah*, vol.4, p.191; *al-Ikhtiyār li Ta’līl al-Mukhtar*, vol.5, pp.45-46; *al-Mabsūt*, vol.27, p.7; *Natā‘īj al-Afkār*, vol.10, p.308; *Sharḥ al-‘Ināyah ‘alā al-Hidayah* printed with *Natā‘īj al-Afkār*, vol.10, p.308; *al-Durr al-Mukhtar*, 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 *shākk* attached, and consequently, the liability is not imposed by doubt (*al-damān la yajib bi al-shākk*). But, in accordance with *istiḥsān* the liability is a half of the *diyāh* by reason that one part of the complete *diyāh* is due and in the other no *diyāh* is due and consequently in consideration of both circumstances, a half of the *diyāh* is imposed. See *al-Mabsūt*, vol.27, p.7; *al-Durr al-Mukhtar*, vol.2, p.463; *Tabyīn al-Haqā‘iq*, vol.6, p.143.


52  *Al-Fuṭūḥī*, *Muntahā al-‘Irādāt*, vol.1, p.523; *Kashshāf al-Qinā‘ ‘an Matn al-Iqna‘*, 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-bīnā‘ layṣa bi jinnīyāh*). See also *Dāmān al-Mutlifāt*, p.455.
Some jurists said that the construction of *janāḥ* or *mīzāḥ*, 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 *mīzāḥ* 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 nāfidh* 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 (*ḥaqiqatan*) and virtually (*ḥukman*) with respect to each of them.  

---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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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 sābāt 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 sābāt accidentally falls on a passer-by or a property, whether a part of the janāḥ or the sābāt, 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 ‘udwān) just as when he builds a building on the highway.

Some of the Ḥanbalī jurists said that the projecting of the janāḥ or the sābāt, 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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considered *al-muta'addī*. 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-ʿAbbās. (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 *sābāt* 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**

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\item Al-Mughn\textsuperscript{I}, vol.7, pp.830-831; Ibn Rajab, \textit{al-Qaw\'id f\text{\`}i al-Fiqh al-Isl\text{\`}am}, vol.1, pp.217-218; al-Futu\text{\`}ah, Muntah\textsuperscript{a} al-Irad\textsuperscript{a}, vol.1, p.523; Kashshaf al-Qin\textsuperscript{a}"an Matn al-Iq\textsuperscript{a}n"\textsuperscript{a}, vol.4, pp.123-124; Sharh Muntah\textsuperscript{a} al-Irad\textsuperscript{a}, vol.2, pp.269 and p.428; al-Rawd al-Murbi\textsuperscript{a}, p.299; Dam\textsuperscript{a}n al-Muthif\textsuperscript{a}, p.453. For detail see al-Mugni\textsuperscript{a}, vol.2, pp.128-129. However, the researcher found this \textit{\text{Had\textsuperscript{I}}th} mentioned in chapter of \textit{al-Sulh} of al-Mughn\textsuperscript{I}, vol.4, p.501. This \textit{\text{Had\textsuperscript{I}}th} mentioned that \textquote[\textsuperscript{a}Umar Ibn al-Kha\textsuperscript{a}j\'ab while passing by the house of al-\'Abb\'as uprooted the \textit{m\'iz\'ab} which was erected projecting out towards the road. Then al-\'Abb\'as asked: "Are you removing that which the Prophet himself erected by his own hand". See also Sharh Muntah\textsuperscript{a} al-Irad\textsuperscript{a}, vol.2, p.269. See a brief indication of this \textit{\text{Had\textsuperscript{I}}th} in al-Bayj\textsubscript{a}r\textsuperscript{I}, Hashiyat al-Bayj\textsubscript{a}r\textsuperscript{I}, vol.1, p.716. See also Mughn\textsuperscript{a}i al-Muht\textsuperscript{a}j\textsuperscript{a}, vol.4, p.85.
\end{enumerate}
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books of *fiqh* by both Abū Ḥanīfah's disciples, Muḥammad b. al-Ḥasan al-Shaybānī and Abū Yūṣuf and the Shāфиʿī 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 (*ṣaḥīḥ*). But Abū Yūṣuf 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-taḍḍīl* and he is considered a *al-mutāḍḍīl*. 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 Yūṣuf 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 Yūṣuf 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.\textsuperscript{56}

The Shāfi‘ī 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.\textsuperscript{57}

THE CASE OF A CRACKED WALL (TAŠAQQUQ AL-ḤĀ’ĪṬ)

Regarding this topic, is the case of a cracked wall similar to the case of an

\textsuperscript{56} Bada’ī al-Ṣanā‘ī, vol.7, p.284; al-Ikhtivār li Ta‘īl al-Mukhtar, vol.5, p.47; al-Hidāyah, vol.4, p.197; al-Durr al-Mukhtar, vol.2, p.466; Majma‘ al-Ḍamānāt, p.185. See also al-Muhaddhab, vol.3, p.207; Mūjabāt, vol.1, p.251. Al-Kāsanī in his Bada’ī al-Ṣanā‘ī 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 Bada’ī al-Ṣanā‘ī, vol.7, p.276.

\textsuperscript{57} Minhāj al-Ṭālibīn wa ʿUmdat al-Muṭlaḥ, p.284; Mughnī al-Muhtāj, vol.4, p.86; al-Maḥallī printed with Ḥāshiyatān Qalyūbī wa ʿUmayrah, 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-tawāl) 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-arcūf), 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. 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.

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.

2- The actual damage has been suffered by the plaintiff whether on the highway or on


59 For details, see Mūjabāt, vol.1, pp.251-252; Damān al-Mutlīfat, pp.447-448.

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 ta‘addīn and tafrīfī, 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 Shāfi‘ī 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

61 Majma‘ al-Damānāt, p.182.
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.

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 sunnī schools or the Zāhirī 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-naḍhaḥ, 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".  

"Injury caused by animals is not actionable".

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. This is agreed by Abū Dāwūd⁴ and al-Tirmidhī⁵.

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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⁴ Sunan Abī Dāwūd, 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, Fath al-Bārī, vol.12, p.225.


"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 fiqhāʾ 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

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8 Al-Mabsūt, vol.26, p.192; al-Hidāyah, vol.4, p.201; al-Durr al-Mukhtar, vol.2, p.469; Ibn al-'Arabī, Ahkām al-Qur'ān, vol.3, p.1269; al-Ajwibah al-Khaṭīfah, p.389; Lisān al-Ḥukkām, p.279; al-Fātāwā al-Hindiyah, vol.6, p.53; Salīm Rustam, Sharḥ al-Majallaḥ, vol.1, p.525. See also al-Qurūbī, al-Jāmiʿ li Ahkām al-Qur'ān, vol.11, p.315; Wahbah Muṣṭafā al-Zuwaylī, "Al-Mas'ūliyyah al-Nāshiʿah 'an al-Asyāʾ" in Majallat al-Majmaʿ al-Fiqhī al-Islāmī, pp.100-101; Nayl al-Awārī, 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-Awārī, vol.6, p.74; Lisān al-Ḥukkām, p.279; cf., Badāʾiʿ al-Sanāʾī, vol.7, p.273. But, the author of al-Ajwibah al-Khaṭīfah 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-
Shāfiʿī 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-Barāʾ b. Āzib (in the second group). 9 The Mālikī10 and the Ḥanbalī11 schools in this case concur with al-Shāfīʿī's opinion. In brief, the jumhūr of the fuqahāʾ 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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Shafî, Malik and Aḥmad b. Ḥanbal, is upon the point of period of damage done by the animal. In Bidayat al-Mujtahid, it notes al-Shafî and Malik point out that the owner of the animal would be responsible for the injury or damage caused by his animal of its 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 Dāwūd and Sulaymān revealed in the Qur'ān. 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. Second, they base their opinions on the Ḥadīth of judgement made when the female camel of al-Barā' b. Āzib 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 liable.

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15 In this book, it did not put the opinion of the Ḥanbalī school together with al-Shafî and Malik. 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 Dāwūd 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. Bidayat al-Mujtahid, vol.2, p.242.

17 Prophet Dāwūd 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 Ālī, The Holy Qur'ān, p.839. See also al-Alūsī, Rūḥ al-Mašā'ī, vol.17, pp.74-75; al-Qurṭubī, al-Jāmi' li Āhkām al-Qur'ān, vol.11, p.308; Ibn al-'Arabī, Ahkām al-Qur'ān, vol.3, pp.1266-1267.
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 Maḥmūsānī, Wahbah al-Zuḥaylī, Fawzī Fayḍ Allāh, 'Alīmad Fathī Bahnasī, Sulaymān Muḥammad Alīmad and 'Alī 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-khaṭīr*).19 (2) animals of domesticated nature or animals *mansuetae naturae* (*al-ḥayawān al-ṣādiq*).20

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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-ṣārīyyah*, Manār al-Sābiṭī, vol.1, p.439, and *al-ḥayawān al-mufsīd*, Mughnī al-Muḥti, 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-Šīrāzī 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 canine-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-Shaybanī, 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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damage, the sender is liable during the day or at night. But, the opinions of the Mālikī, Shafi'i, 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.

In brief, the element of negligence is an important matter in the view of the Mālikī, Shafi'i, 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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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 Shāfi’ī,29 Ḥanbalī30 schools and the majority of fuqahā’ from the Mālikī school (Ibn al-Qāsim, Ashhab, Ibn Kinānah and Aṣbagh)31 opine that every person may own and possess those animals without having to take them out or transfer them to


28 Al-Durr al-Mukhtar, 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 istīḥsān (jurisprudential preference). Ṭādād al-Muḥtar, vol. 6, p. 537; Ḍāmnān al-Mutilfāt, pp. 505-506; Bahnāsī, al-Mas’ūliyyah al-Jināʾīyyah, pp. 66-67.


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 ‘Urfah) and Ibn al-ʿArabī 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-ʿaqr)

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 qišāṣ
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

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 ‘Urfah 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-ʿArabī also maintains this group’s opinion. Al-Dusūqī, Ḥāshiyah ʿalā al-Sharḥ
al-Ṣawī, Bulghat al-Sālik, vol.2, p.409; al-Mawāq, al-Ṭāw wa al-Iklīl in the margin of al-Ḥāṭib, Mawāhib al-
vol.11, p.318; Dāmān al-Mutlīfīt, 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-‘ajmā‘, and injury caused by an animal is not actionable.\(^{33}\)

The Ḥanāfī 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-Iklīlī, vol.2, p.257; al-Duṣūqī, Ḥāshiyah ‘alā al-Sharḥ al-Kabīr, vol.4, p.226; Zarrūq, Sharḥ Zarrūq ‘alā Matn al-Risālah, vol.2, p.244; Ibn Nāṣīr, Sharḥ Ibn Nāṣīr ‘alā Matn al-Risālah printed with Sharḥ Zarrūq ‘alā Matn al-Risālah, vol.2, p.244; al-Fatāwā al-Khayriyyah, vol.3, p.18. See also Mukhtasar, p.273; al-Mawāqīf, al-Tābi‘ wa al-Ikhlāṣ in the margin of al-Ḥāṣib, Mawāhib al-Jalīl, vol.6, pp.240-241; al-Ḥāṣib, Mawāhib al-Jalīl, vol.6, p.241; al-Dardīr, Aqrāb al-Ma‘ālik, p.180; al-Dardīr, al-Sharḥ al-Ṣaghīr in the margin of Bulghat al-Sāliḥ, vol.2, p.356. In his Fatāwā, al-Ramīūsī 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-qisās or diyah? He replied: "If the dog has a vicious character, the person is responsible for the qisās". See al-Fatāwā al-Khayriyyah, vol.3, p.18. See also, Bahnaṣī, al-Ma‘ālikīyyah al-Jinā‘iyah, 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‘i‘ al-Sanā‘ī, vol.7, p.273; Fatāwā Qādī Tāhān 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. In addition, al-Sarakhsi 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-muta'addī. 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 (mawqīf 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 (mawqīf lā yajūz lah), he is responsible even though he has not been warned.

The Shāfi‘ī 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-muta'addī and mufarrīq (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-Mukhtar, vol.2, p.470; al-Fatāwā al-Hindiyyah, vol.6, p.52; Fatāwā Qāḍī Khān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.411; Lisān al-Hukkām, p.279; Majallah, article 929; al-Mudawwanah, vol.4, p.666; al-Kāfī, p.606; Mījābāt, vol.1, p.243. The Zāhirī school also opines in the same way. Al-Ramlī (a Ḥanafi 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 (āṣilah) 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-Khayrijyyah, vol.4, p.43; Bahnašt, al-Mas‘ūliyyah al-Jinā’īyyah, p.68.

35 Al-Mabsūt, vol.27, p.5.
is not liable. 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 Shafi`ī 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.

(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


38 Nihayat al-Muḥtārī, vol.8, p.40; Mughnī al-Muḥtārī, vol.4, p.208; al-Iqna, vol.2, p.243; Rahmat al-Ummah, p.276; al-Bayjūrī, Hāshiyat al-Bayjūrī, vol.2, p.469; al-Rawd al-Murbi, pp.334-335; al-Mughnī, vol.8, p.338. In this case, Abū Ḥanīfah's opinion is similar to al-Shafi`ī's opinion. Mālik opines that the owner is liable on condition he has known the animal is an animal feræ naturae. The Ḥanbālī school, in fact, has two opinions, but the most manifest (aqhar) opinion is similar to al-Shafi`ī's and Abū Ḥanīfah's opinions. In addition, according to Mālik, a house is not a proper place to keep animals feræ 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-Mudawwana, vol.4, p.666. The Ḥanafi jurists further assert that the owner is definitely not liable whether the person enters his house with his permission or not. See al-Fāṭāwā al-Bazzāziyyah in the margin of al-Fāṭāwā al-Hindīyyah, vol.3, p.406; Fāṭāwā Qāḍīkhān in the margin of al-Fāṭāwā al-Hindīyyah, vol.3, p.282; Mūjābāt, vol.1, p.243; Baddī‘ al-Sanā‘ī, vol.7, p.273; Līsān al-Ḥukkām, p.279; Bahnāsī, al-Mas‘ūliyyah al-Jinā‘iyyah, p.65, cf., Damān al-Mutlīfāt, 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 Shāfi‘ī39 and the Ḥanbalī40 schools.

Otherwise, according to the Ḥanafi41 school and the Shāfi‘ī42 school (in the other opinion), 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 Ḥanafi 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-ta‘addī* 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-muta‘addī*.44 If a snake attacks a person and, in being pushed


43 Fatāwā al-Nawawī, p.150; Mughnī al-Muhtāj, vol.4, p.207.

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".  

Muḥammad b. al-Ḥasan al-Shaybānī is reported by al-Sarakhsī in al-Mabsūt: "If someone throws an insect at a man and that insect bites him, he is liable because he intentionally caused this injury". 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.  

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 qawād (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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hostility, the punishment of *qawad* remains imposed on him*.\(^{48}\) In the Shāfī school, Muḥammad al-Sharīṭ 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 Shāfī\(^{51}\) 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


\(^{49}\) Mughnī al-Muhtāj, 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.


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 Shāfi‘ī 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

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. 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.

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54 Al-Mudawwana, vol.4, pp.664, 665 and 666; al-Muwatta, p.626; al-Zurqānī, Sharḥ al-Zurqānī `alā Muwatta', vol.4, p.199; al-Risālah, p.126; Taṣḥīrat al-Hukkām, vol.2, p.246; al-Thamār al-Dānī, pp.525-526; al-Kāfī, pp.605-606; Zarrūq, Sharḥ Zarrūq `alā Matn al-Risālah, vol.2, p.243. In al-Munżī, 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-Munżī, 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 (\(a\jra\)\) 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 (\(i\ndafa\’at\)) by him; otherwise he will not be liable.\(^{58}\)

Based on the Mālikī jurists' dissuasion, 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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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 Shāfīī 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 Shāfīī 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 qiyyās, there is the opinion in the Ḥanbalī school


which opines that the owner should not be liable by reason that this case is out of his duty of care and control.\textsuperscript{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 Ḥanafi\footnote{Al-Mughnī, vol.7, p.831.} 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-muta‘addī 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 (ṣūq al-dawāb) and places where animals are sent out on hire (al-maḥāll al-mi‘idd li wuqīf dawāb al-kirā’).\textsuperscript{63}

\textsuperscript{62} Al-Mughnī, vol.7, p.831.

The Mālikī, Shāfiʿī 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 responsible for accidents. See al-Durr al-Mukhtar, vol.2, p.467; Jāmiʿ al-Fusūlayn, vol.2, p.86; al-Ikhtiyār li Taʾīl al-Mukhtār, vol.5, p.48; Lisān al-Ḥukkām, p.279; Fatāwa Qādīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.456; Badāʾiʿ al-Ṣanāʿī, vol.7, p.272; al-Fatāwā al-Hindiyyah, vol.6, p.50 and p.51; al-Durr al-Mukhtār printed with Radd al-Muhtar, vol.6, p.604; Radd al-Muhtār, vol.6, p.604.


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 *mutaṣaddīn*.\(^{66}\)

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-taṣaddī* 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 (*ṣāriyyah*) reason and the animal or dog injures a person, then the *diyāh* is due on the owner of the animal or of the dog.\(^{68}\)

**THE CASE OF AL-NAFḤAH**\(^{69}\)

The *fuqahāʾ* 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-ʿUddah Sharḥ al-ʿUmdah, p.449.

\(^{67}\) Al-Rawḍ al-Murbi', p.334.


\(^{69}\) Al-Naṭfah means swishing or blowing or kicking or striking by the hind-legs or by the tail. The action of *naṭfah* is kicking or swishing (*al-ṣarbah*) by the hind-legs (*al-rijl*). See Ibn Ḥajar, Fath al-Bārī, vol.12, p.226; al-Muʾjam al-Wasīṭī, vol.2, p.946; Tahdhib Lisān al-ʿArab, vol.2, p.635. But al-Zurqānī used the word *tarmah* conveying the meaning of kicking or striking (*taḍrib*) by the hind-legs. See al-Zurqānī, Sharḥ al-Zurqānī ʿalā Muwatta', vol.4, p.199; Tahdhib Lisān al-ʿArab, vol.2, p.635. Whereas in Muwatta', the word *tarmah* is defined by *rafṣah*, also conveying the meaning of kicking. See Muwatta', 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-Shāfi‘ī, Shurayh and a view of the Ḥanbalī school. 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. 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.

The second group

The rider or the leader or the driver is not responsible for anything which the

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animal may destroy by striking with its hind-feet or by swishing with its tail. This is the opinion of the Ḥanafī, the Mālikī, the Ḥanbalī and the Zāhiri schools. This is also the opinion of al-Awzāʾī and al-Layth.

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). 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 (aṣahḥ).

The Mālikī jurists emphasize that the liability is not upon the owner of the animal

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76 Al-Muhallā, vol.11, p.20, issue 2118.


79 Al-Hidayah, vol.4, p.198; al-Fatwā al-Hindīyyah, 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 Taʾlīl al-Mukhtār, vol.5, p.47; Al-Hidayah, vol.4, p.198; al-Jāmīʾ al-Saghīr, p.516; al-Kanawī, al-Nāfiʿ al-Kabīr printed with al-Jāmīʾ al-Saghīr, p.516; Badāʾiʿ al-Ṣanāʾiʿ, vol.7, p.272.
if the case of kicking or swishing which is not caused by his intermediate causation; otherwise he is liable.  

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. Otherwise, he is not liable.

Another interesting juristic opinion on the torts of animals is that of Abū Muḥammad Ibn Ḥazm al-Zāhirī 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.

In brief, the reason of this group could be documented as follows:

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82 Al-Muhallā, vol.11, p.8.
a- The Prophet said: "Animal's tort by its hind-leg is to be overlooked".\textsuperscript{83} This Ḥadīth ordained that the nafljah 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 nafljah, not any act like trampling down or stepping or treading underfoot (waqa'). Such acts can be prevented, unlike the case of nafljah.\textsuperscript{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.\textsuperscript{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.\textsuperscript{86}

THE LIABILITY OF A RIDER, DRIVER AND LEADER\textsuperscript{87}

This topic will be discussed in the following ways:

\textsuperscript{83} Sunan Abī Dawūd, vol.4, p.196; Nāvī al-Awtār, vol.6, p.72.

\textsuperscript{84} Manār al-Sabīl, vol.1, p.439; al-Khaṭṭābī, Maṣālim al-Sunan, vol.4, p.36.

\textsuperscript{85} Al-Mughnī, vol.8, p.339.

\textsuperscript{86} Al-Mabsūt, vol.26, p.189; Damān al-Mutlifāt, 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-aqābī)\(^{88}\) 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-Hidayah, vol.4, p.199; al-lāmi’ al-Ṣaghīr, p.516; al-Durr al-Mukhtar, vol.2, p.467; al-Ajwibah al-Khafifah, p.388; Majallah, article 933. In another opinion, the liability is just upon the rider because he is mubāshīr, not the driver and the leader because both of them are just considered as mutasabbīb. If the mubāshīr and mutasabbīb come together, responsibility will be attached to the former not to the latter. See Radd al-Muhtar, vol.6, pp.531-532; Damān al-Mutlifāt, p.536.

animal is so obliged.\textsuperscript{90} This is endorsed by al-Marghīnān\textsuperscript{91} and al-Ḥāṣkaf\textsuperscript{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.\textsuperscript{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

\textsuperscript{90} Majallah, article 933.

\textsuperscript{91} Al-Hidayah, vol.4, p.199.


\textsuperscript{93} In the same manner, the rider is excluded from succession to the deceased in inheritance (al-mārādh) 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-Hidayah, vol.4, p.199 and also al-Mabsūt, vol.26, p.190; al-Iṣḥāḍ li Tażil al-Mukhtār, vol.5, p.48. See also al-Jāmī al-Saghīr, p.516; al-Kanawī, al-Nāṣir al-Kabīr printed with al-Jāmī al-Saghīr, p.516; al-Awibah al-Khaṭīfah, p.388; Radd al-Muhtār, vol.6, p.604; Bada' al-Sanā` fī, 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 (arjah) view of the Shafi’i school, the liability is upon the rider alone.95 It also coincided with an opinion of the Hanafi school on account that the rider is mubashir96 and an opinion of the Hanbal 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 fuqaha’s opinions could be separated into two groups.

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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{100}


\textsuperscript{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


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. Each of them is liable to pay half of the restitution.

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103 Al-Hidayah, vol.4, p.199; al-Durr al-Mukhtār, vol.2, p.467; al-Ikhṭiyār li Ta'īl al-Mukhtār, vol.5, pp.48-49; *Badā‘ī al-Ṣanā‘ī*, vol.7, p.280. In al-Hidayah, 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‘ī al-Ṣanā‘ī*, vol.7, p.280.

104 *Radd al-Muḥtār*, vol.5, p.532; *Muḥtār*, vol.8, p.8, p.339; *Ma‘ān al-Mubtāl*, vol.1, p.439; *Badā‘ī al-Ṣanā‘ī*, vol.7, p.280; al-Bayjūrī, Ḥāshiyat al-Bayjūrī, vol.2, p.468; *Kifāyat al-Akhvār*, p.644; al-Muftī al-Ḥubayshī, *Fath al-Mannān*, p.423; *Fath al-Wahhāb*, vol.2, p.206; *Kashf al-Qinā‘ ‘an Ma‘ān al-Mu‘ādāh*, vol.4, p.127; Sharḥ Muntaḥā al-Ḥāḍāt, vol.2, p.429; *Ma‘ālimat al-Aḥkām al-Shari‘iyah*, article 1449, p.450; al-Futūḥī, Muntaḥā Irāḍāt, vol.1, p.524; *Nihāyat al-Muhājī*, vol.8, p.39; *Muḥtār al-Muḥājī*, vol.4, p.204; al-Bāji, al-Munṭaqā, vol.7, p.109; Zarrūq, *Sharḥ Zarrūq ‘alā Ma‘ān al-Risālah*, vol.2, p.244; *Tafsīr 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 *Mukhtasar* 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 (ṣaḥīh). See al-Hidayah, vol.4, p.198.

There are several riders simultaneously

With regard to this topic, the fuqahä have a different opinions on liability of the riders. Their opinions can be listed into two groups.

The first group


The Mâlik 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-Radîf bears liability because he is the mutasabbib of the injury, al-muqaddîm because the bridle is in his hand. But, if the muqaddîm cannot conduct and control the animal after hard struggling, the liability is just upon the radîf.\footnote{Al-Mudawwannah, vol.4, p.664; Tabsîrat al-Hukkâm, vol.2, p.247; Ibn Nâjî, Sharh Ibn Nâjî ‘alâ Matn al-Risâlah printed with Sharh Zarrûq ‘alâ Matn al-Risâlah, vol.2, p.243; Mûjabât, vol.1, p.246.} Likewise, if the muqaddîm is a person who is unable to conduct the animal because he is a minor or a sick person or a
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*.

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.

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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the like. In fact, the fuqaha' 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-*'Amal 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-*Ta'addṭ (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 loss112 because there is no *al-*ta'addṭ 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

110 Mūjabāt, vol.1, pp.237-244.

111 Al-'Aynī, *Umdat 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-ta'addī* 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 an 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-Shāfiʿī 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


\(^{115}\) 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; Badāʾiʿ al-Ṣanāʾīʿ, vol.7, p.281; Mujābāt, 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.\footnote{Al-Umm, vol.7, p.138; Mughnī al-Muhtāj, vol.4, p.204; al-Iṣnaā', vol.2, p.242.}

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.\footnote{Al-Hidayah, vol.4, p.199.} However, the Shāfī Ṭ 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".\footnote{Majallah, article 929.}

4- The existence of deliberate intent in an indirect case, or in other words, in an act which causes injury (Al-Ta'ammud fī al-tasabbub).

In the case of indirect cause for injury, there will be no liability unless the element of ta'ammud existed. Ta'ammud here means a mistake (al-khaṭā') resulting from intention (al-qāṣd) or negligence (al-taqṣīr) or want of due care (ṣadam al-taharruz). 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
it causes an injury upon the person or property of another, the rider is not responsible thereof,\textsuperscript{120} because the essentials of \textit{qaṣd} or \textit{taqṣīr} or \textit{‘adām al-tahārruz} do not emerge. For more illustrations, this discussion will be elaborated in accordance with the \textit{fuqahā}'s examples for each one of these three circumstances.

\textbf{a- \textit{Al-Qaṣd}\textsuperscript{121}}

The \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{120} Majallah, article 937.

\textsuperscript{121} Most of the \textit{fuqahā} prefer to make this essential in the element of \textit{al-ta‘addī}, because they said that this element \textit{al-ta‘ammud} is included in \textit{al-ta‘addī}. So the element of \textit{al-ta‘addī} is sufficient to convict mutasabbib of his injurious act. See the discussion of Strict Liability, pp.50-62. However, Māḥmaṣṣānī puts forward this essential as one of the conditions for convicting the tortfeasor of an animal's acts. See Mīhabi‘ī, vol.1, p.239.

\textsuperscript{122} This is the opinion of Abū Yūṣuf. Abū Ḥanīfah's opinion is contrary to Abū Yūṣuf's opinion. However, the opinion of Abū Yūṣuf is implemented in \textit{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.

\textsuperscript{123} Minhāj al-Tālibīn in the margin of Mughnī al-Muhtār, vol.4, p.207.

\textsuperscript{124} Al-Khirshī, \textit{Fatḥ al-Jalīl ‘alā Mukhtasar Khalīl}, vol.8, p.113.
property. The hunter is liable for any damage that the animal might have inflicted.\textsuperscript{125}

b- \textit{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 (\textit{muta‘addīn}) and in neglecting (\textit{taqṣīr}) to secure the load properly upon the animal. If it had been sufficiently secured, it could not have fallen off.\textsuperscript{126} Likewise, if a person rides or drives an animal which is hard to control (\textit{al-dābbah} \textit{al-ṣu‘ābāh}) 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.\textsuperscript{127}

c- '\textit{Adān al-taḥarruz}\textsuperscript{128}

\textsuperscript{125} \textit{Al-Muhallā}, vol.11, p.11. For the same example, see \textit{Majallah}, article 923.


\textsuperscript{127} \textit{Mughnī al-Muḥtāj}, vol.4, p.205.

\textsuperscript{128} This condition is also like \textit{al-qasd} which can be put under \textit{al-ta‘addī} because, in the examples which are put forward under it, the existence of \textit{al-ta‘addī} appears. However, \textit{Ma‘ṣama‘ī} prefers to discuss it separately from \textit{al-ta‘addī}.
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.


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.\footnote{Jāmī‘ al-Fuṣūlāyn, vol.2, p.118; Mūjahāt, vol.1, p.240.} 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.\footnote{Al-Mīzān al-Kubrā, vol.2, p.154; Mukhtasār, 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-Ḥaṣṣāfī, Muḥammad al-Sharbīnī al-Khaṭīb, al-Sarakhsī, al-Marghīnānī, Ibn Qāṭī Samāwānah, 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 ʾAlīm 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 Sahīh Muslim, Abū Mūsā al-Ash'arī 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),

¹ Sahīh al-Bukhārī, vol.9, p.154. See also vol.1, p.264.
³ Sahīh Muslim, vol.4, p.1379.
⁴ Sahīh 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 fiqaha' 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 hypothetical 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 Wāqi‘at al-Muṭṭīn, p.64; Majmāʿ al-Damanāt, p.170; Fawzī Fayḍ Allāh, Nazariyyat al-Damān, p.187; Wahbah, Nazariyyat al-Damān, p.263.
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 *Sharî'ah* 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 *qamān* and *ta'wīd* (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.299-320.

\(^8\) *Fawzī Fayḍ Allāh*, *Nāzariyyat al-Damān*, 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 (ittikhād al-iḥtiyāq 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 taʾaddī 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 (ʿadam al-tamakkun wa al-iḥṭirāz).

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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10 See Fawzī Fayḍ Allāh, Nazariyyat al-Damān, p.187.
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 muta'addīr in this tashbīb case. He is also deemed negligent in controlling his animal.¹³

3- In the case of tort by poisoning, the fuqaha' 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 qīṣāṣ or diyah. The reason they give is that the tort is not a direct tort, whereas the qīṣāṣ punishment is inflicted just on the direct tortfeasor, not the indirect tortfeasor. But the tortfeasor must be punished with imprisonment and ta'zīr. 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 ta'zīr punishment, not the infliction of qīṣāṣ or diyah. However, if the person compels the

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¹² Wāqi‘at al-Muftīn, p.64; Majmā‘ al-Damānāt, p.170; Fawzī Fayḍ Allāh, Nazariyyat al-Damān, p.187; Wahbah, Nazariyyat al-Damān, p.263.

victim by feeding the poison down his throat, the punishment of *diyāh* 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 *taʿzīr* 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 Shāfiʿī, Hānbalī and Mālikī schools, such a person is

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\(^{16}\) Radd al-Mukhtar, vol.6, p.542.

\(^{17}\) Minhāj al-Tālibīn in the margin of Mughnī al-Muhtāj, vol.4, p.7; al-Sirāj al-Wahhāj, pp.478-479; al-Muhadhdhab, vol.3, p.176; Nihāyat al-Muhtāj, vol.7, pp.254-255; Wahbah, al-Fiqh al-Islāmi wa Adillatuḥ, vol.6, p.244; Bahnaṣī, al-Maṣūmiyyah al-Jīmādīyyah, 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 (*bālīghan* *ṣāliḥ*) when the poison is unknown to him, the person who serves it will be liable for *diyāh*. 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 *diyāh* 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 ikhtiyārīh*). 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 poisoned 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-Tālibīn in the margin of Mughnī al-Muhtāj, vol.4, p.7.


\(^{19}\) Al-Dardīr, al-Sharb al-Kabīr, vol.4, p.244; Mukhtasār, p.313; al-Khirshī, Fath, al-Jalāl ʿalā Mukhtasār Khalīlī, vol.8, p.7. Khalīlī b. Iṣḥāq 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 (*mādhdhir*). 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 Mukhtasār, p.313; al-
subject to qisāṣ (i.e. death). Ibn Ḥazm believes, however, that neither qisāṣ nor diyah is required of him or of his āqilah unless he forced the victim to eat, in which case qisāṣ 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 (mīzāḥ) 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 muta'addīn whether he is allowed by the authority or not

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²⁰ Al-Muhalla, vol. II, 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 sāḥibah ate it and one of his sāḥibah 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 sāḥibah 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 fuqaha... stems from those different versions of the Ḥadīths. See Bahnaṣī, al-Masūliyyah al-Jinā'iyah, p.145; al-Mughnī, vol.7, p.643; Mughnī al-Muhājī, vol.4, p.7; Wahbah, al-Fiqh al-Islāmi wa Adillatuh, vol.6, p.244. See this Ḥadīth in Sahīh Muslim, vol.3, p.1194; al-Muhadhdhab, vol.3, p.178.


²² Mukhtasar, p.348.
because the authority cannot permit any injury to the public.\textsuperscript{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 should be maintained on the condition of safety for the public.\textsuperscript{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 mutā'addīn.\textsuperscript{25}

\textbf{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

\begin{footnotesize}
\begin{enumerate}
\item Al-Mughnī, vol.7, p.823.
\item Mughnī al-Muhājī, vol.4, p.87.
\item Al-Ajawibah al-Khaftfah, p.390; al-Mabsūt, vol.27, p.8.
\end{enumerate}
\end{footnotesize}
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 \(mubāh\) (permissible) subject to the safety of others


\(^{28}\) Majma' al-Ḍamānāt, p.149.

\(^{29}\) Majma' al-Ḍamānāt, p.146.
with respect to the matters where an attention to safety is practicable.  

5- A mutasabbib is liable if he is deemed mutaddin, otherwise the liability is not upon him, whereas a mubashir is absolutely liable.

A few illustrations from the views of the fuqaha' will be set down in respect of this section.

1- If a person puts a jar or a vessel (ina') 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 mutaddin 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 (muta'arrif) 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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and negligence in the same way as occurs when a building which is built leans at the initial construction.\textsuperscript{32} It is therefore a trespass \textit{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 (\textit{aṣahḥī}) view. This case is compared with a case of where a person in severe need (\textit{al-muḍīr}) 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 \textit{ḍarar} from his life.\textsuperscript{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 (\textit{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 (\textit{al-mutadāhlrijah}). Muhammad 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 \textit{tadāḥrajat} \textit{an mawḍīhiḥā}


\textsuperscript{33} Minhāj al-Tālibīn in the margin of Mughnī al-Muhtāj, vol.4, p.196.
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.  

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.  

5- If a person puts a stone or a heap of soil on the highway or at a meeting-place (mutaqaqan) without legal permission which causes damage to another person, the person is liable.

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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 (qindîl) 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 mutaẓaddīn 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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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 (aqāḥī) 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 (qumānāt), 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.


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 *damān bi al-tasabbub* (liability for indirect cause) whether:

1- Placing chattels in an unauthorized place (*waqf al-shay'ī fī ghayr mawdū'īh*), or
2- Creating an unwarranted action (*tawallud fīl 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 *muta'addīn* for parking in the wrong place and *mutasabbīb* for the *qarar*. 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 (*anżimat 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.\(^\text{42}\)

**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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collision the fuqaha’ 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 (ta'frīf) of both masters, both of them are liable to each other.\(^{44}\) A Shafi’ī 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.\(^{46}\)

\(^{43}\) In the Shafi’ī and the Zaydi 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 (izgūdama al-farisiin li ghalaba al-farasayn lahumū). And it can be theorized that "the destruction by a wind is like the destruction by an animal (ghalabat al-rūḥ ka ghalabat al-dābbah)."

\(^{44}\) Al-Mughnī, vol.8, p.343; al-Wajīz, vol.2, p.152; al-Bahr al-Zukhār, vol.5, p.248; Damān al-Mutlifīt, p.545. The aṣharī opinion nevertheless of the Shafi’ī 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.

\(^{45}\) 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.

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-ta'addī, the Mālik 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-ta'addī. 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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48 Al-Qawānīn al-Fiqhīyyah, p.218; al-Kinānī, al-‘Aqd al-Munazzama lī al-Hukkām in the margin of Taṣfirat al-Hukkām, vol.2, p.81. See also Muḥammad al-Sāwī, Bulghat al-Sālīk, 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-‘ajz al-ḥaqiqī (actual incapacity).
liable because of his al-ta‘addī 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-muṣṣī’idah), 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-muṣṣī’idah 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

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 diya will be due from the ‘ṣiqlah of each one of the masters because they cannot do damage to another by means of saving themselves. See Bulghat al-Ṣālik, vol.2, p.386. In the same sense, Khalīl b. Ishaq says that there is no civil or criminal responsibility incurred if it is a case of ‘ajiz ḍaqiq 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 ‘ṣiqlah of each of the masters. See Mukhtasar, p.274 and p.314; al-Ṭūl, Jawahir al-Iklīl, vol.2, p.258; al-Ḥajjāb, Mawāḥib al-Jalīl, vol.6, p.243; al-Mawāq, al-Tā’i wa al-Iklīl in the margin of al-Ḥajjāb, Mawāḥib al-Jalīl, vol.6, p.243.

50 Al-Musnad, vol.1, p.313; Sunan Ibn Mājah, vol.2, p.784; al-Muwatta’, p.529; Ibn Rajab, Jāmi’ al-‘Ulama wa al-Hukm, vol.2, p.207; Mūjābāt, vol.1, pp.166-168; al-Durr al-Mukhtar printed with Radd al-Muhār, vol.6, p.593; al-Durr al-Mukhtar, vol.2, p.462; Majallah, article 19. This maxim is the most widely accepted tenet of the Sharī‘ah. 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, Sharh al-Zurqānī ‘alā Muwatta’, vol.4, p.430) pillars upon which the entire Islamic legal system is based. See also Shams al-Dīn, "al-Ḥuqūq fī al-Sharī‘ah al-Islāmiyyah" (March 1984) p.304, al-‘Arabi 30 where he notes that this maxim is the foundation of the Islamic theory of the abuse of rights.

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 exercise 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. However, the case of collision of horsemen will be discussed in the section of "Negligence".

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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 established, 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 (darar fahish) 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.\footnote{Sharh Fath al-Qadîr, 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 Fathî al-Duraynî in his writing. He used the word "al-td'assuf" 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-td'assuf can be translated "the abuse of rights" in English and "de l'abus des droits" in France. See Fathî al-Duraynî, Nazariyyat al-Ta'assuf fî Istfî al-Haq fî al-Fiqh al-Islâmî, pp.45-47. Muḥammad ʿAlîmad Sirāj also said that the Western tort law books discussed the rules (ahkām) of al-td'assuf under the topic of nuisance. See Muḥammad ʿAlîmad Sirāj, ʿĀdān al-'Udwa'n fî al-Fiqh al-Islāmī, p.297.}

There are Ḥadîths 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".\footnote{Sahîh al-Bukhârî, vol.3, p.393; Sahîh Muslim, vol.4, p.1380.}

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".\footnote{Sahîh Muslim, vol.4, p.1380; Sunan al-Nasâ‘î, vol.2, p.1214. In Sunan al-Nasâ‘î, the word "al-nâs" was used instead of the word "Muslims" in Sahîh Muslim.}

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.
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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6 Majallah, article 27. Al-Ḍarār al-ashadd yuzāl bi al-ḍarār 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-Muwattī', 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.

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 Ahmad 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 (yata'addī ḍarar) to another or not. For example, he can construct in property under his ownership a lavatory (mirḥāq) or warm bath (ḥammām) or quern (raḥān) or oven (ṭanawwurān) 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 Ḥadīth:

"He will not enter Paradise whose neighbour is not secure from his wrongful conducts."7

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7 Sahih Muslim, vol. I, p.32. See also in Badā'i' al-Ṣanā'i', vol.6, p.264; al-Mughni, vol.4, p.518; Fatḥ al-Duraynī, Nazariyyat al-Ta‘assuf, 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 (qīfī), "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. 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 (masha‘ikh) and they give their fatwā according to it. Al-Zayla‘ī, 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 ḡarar (ḡararan zāhiran)".  

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. 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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8 Al-Shalabī, Ḥāshiyat al-Shalabī in the margin of Tabyīn al-Haqa‘iq, vol.4, p.196; Radd al-Muhtār, 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-Shāfi‘ī and another view of Ahmad b. Ḥanbal. See Al-Mughnī, vol.5, p.518.


quantity of smoke emanating from the property belonging to the other.\textsuperscript{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 \textit{qiyaş}, but he cannot in accordance with \textit{istiḥsān}.\textsuperscript{13}

In the contemporary application, the rule of \textit{istiḥsān} has been applied. It is as enacted in the \textit{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.\textsuperscript{14} Similarly, if a person tans the animal's skin in his house and thereby causes continuously (\textit{alā al-dawām}) a bad smell to his neighbour, it should be prevented. Otherwise, if it rarely (\textit{alā al-nadrah}) causes a bad smell, it should not be removed.\textsuperscript{15}

A Shāfiʿī jurist, Ibn al-Ukhuwwah said in his book \textit{Maṣāṣiṣ 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 \textit{muḥtasib} (the Islamic inspector of the market) must order that


\textsuperscript{14} Majallah, article 1200; Radd al-Muhtār, vol.5, p.237; Ṣafī Ḥaydar, Durar al-Hukkām, vol.10, pp.225-226. See also Ṣafī Bāshā, Muṣḥid al-Hayrān, article 57, who chiefly follows and applies the rule of \textit{istiḥsān} in his treatise.

ovens shall be kept swept, kneading-troughs washed and covered with straw mats. 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.

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. They must be eliminated in any way possible. 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 (qarar fāḥish).

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16 Ibn al-Ukhūwah, Maṭālim al-Ourbah, p. 91.
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 (tībn) 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


must be removed. 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 yumna min al-taṣārrufī milkih bimā yaḏurr bijāriḥ). Therefore, the noise of pounding and hammering emanating from the fuller's shop or smith's shop, should be stopped. 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. It is clear in the Mālikī school with regard to the noise where Ibn 'Uttāb 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 Saʻīd 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".

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-kammad) or cotton carder's work (al-naddūf) is not required to be stopped. It is clearly similar to the notification by

23 This case is based on the analogy from the case which is enacted in Majallah, article 1200.


Khalīl b. Ishaq 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. This is also the view of Maṭraf and Ibn al-Majishūn. 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. 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.

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 (la’tb). Other cases might also be a nuisance to the neighbourhood such as noises produced by a teacher of music (mu’allim 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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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 Ḥadīṯ narrated on the authority of Abī Hurayrah:

"He will not enter Paradise whose neighbour is not secure from his wrongful conducts".\(^{36}\)

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\(^{35}\) Majallah, article 30. Dar’ al-mafāsid muqaddam ‘alā 'alb al-mašā'īf. See also Fatḥī al-Duraynī, Nazarīyāt al-Ta’assuf, pp.67-68.

\(^{36}\) Sahīh Muslim, vol.1, p.32.
"Wrongful conduct" here can be construed as including all wrongful deeds including noises produced by the neighbours.

**2 (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 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. 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.

Al-Baghdadī 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. This case is also supported by the Hanbalī jurist Ibn Qudāmah, who says that if the owner of the tree was prevented (imtand'ā) 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. 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 Sharh Muntahā al-¯Irādāt, vol.2, p.268; al-Mughnī, vol.4, p.487; al-Muqni wa Ḥāshiyatuh, vol.2, pp.127-128; Mughnī al-Muhtāj, vol.4, p.86; Majallat al-Abkām al-Shar’īyyah, 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-mu’tamad). However, this opinion is contrary to the opinion of Ibn al-Majīshūn. See al-Bahjah fī Sharh al-Tuhfah, vol.2, p.648; al-Tawaddī, Sharh Arijūzah Tuḥfat al-Ḥukkām printed with al-Bahjah fī Sharh al-Tuhfah, vol.2, p.648; al-Bājī, Fuṣūl al-Abkām, pp.212-213.

39 Majallah, article 1196.

40 Majma’ al-Damānāt, 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-Muqni 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.\textsuperscript{42}

\begin{quote}
\textbf{Structural weakness}
\end{quote}

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 laundry, or the turning of the mill wheel, the injury caused in any way whatsoever must be removed.\textsuperscript{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.\textsuperscript{44} In the same sense, the author of \textit{Mukhtasar} remarks that no one may do any danger against his neighbour's wall, nor may he build a stable (\textit{istabl}) against that wall because it might weaken or knock the wall down.\textsuperscript{45} This view

\textsuperscript{42} Majallah, article 1212.


\textsuperscript{44} Majallah, article 1200; \textit{al-Mughnī}, vol.4, p.518. See also \textit{al-Bahjah fī Sharḥ al-Tuhfah}, vol.2, p.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


$\text{Tariq nafidhah}$ [1] and [2]:

a- People have a right of passage through it and have a right to construct a door or doors giving onto it.

b- This $\text{Tariq}$ is not granted to a specific person only.

c- Anybody can do anything thereon [on condition that it] does not cause injury to others.

$\text{Tariq ghayr nafidhah}$ [3]:

a- No person who is not the owner or inhabitant of this $\text{Tariq}$ 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 $\text{Tariq}$ cannot make any construction on it whether it causes damage or not.

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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 (šāḥib) 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


is liable because he is negligent (taqṣīr). 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. 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. 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.

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52 Mughnī al-Mulṭāj, vol.4, p.83.
53 Majallah, article 1201.
54 Majallah, article 1200.
55 Mukhtasar, p.197; Tābsirat al-Hukkām, 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. 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 Ishāq 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. 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 (talah) is borne upon him. This is also the opinion of the Ḥanafi jurists.

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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57 Mukhtasar, p.197. See also Tabsirat al-Ḥukkām, vol.2, p.266.
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:

\(^{59}\) See *Mukhtasar*, p.348; *al-Qawan?n al-Fiqhiyyah*, p.218; *Majma' al-?amn*, 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-Mughn?*, 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 sadaqah (a charitable act)." 

"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."

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

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, *diyâh* is due from the *āqilah* of the defendant because he is the
occasion of the destruction and is guilty of *al-taḍaddī* 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-Jāmi‘ 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 *mutaḍaddīn*, 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 *mutaḍaddīn* in presuming to

articles 1192-1233.
encroach upon the public rights without a sufficient authority.\textsuperscript{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.\textsuperscript{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.\textsuperscript{67} In the following Ḥadīth, the Prophet allocates a provision for nuisance on
the highway:

"Abū Sa'īd 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".\textsuperscript{68}

A highway (including in that term any public way) is a piece of land over which

\textsuperscript{65} Al-Jāmi‘ al-Ṣaghīr in the margin of Kitāb al-Kharāj, p.119. See also al-Hidayah, vol.4, p.193.

\textsuperscript{66} Al-Hidayah, vol.4, p.193; al-Durr al-Mukhtar, vol.2, pp.463-464. See also Minhāj al-Tālib in wa 'Umdah al-
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.


\textsuperscript{68} Sahīh al-Bukhārī, vol.3, p.385; Sunan Abī Dāwūd, 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-nāfisī 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 ja'naḥ opening upon the road, or to make a sābih between two houses because it is dangerous to passerby. In brief, it is forbidden:

1- To condone the projecting of a ja'naḥ to any public way (wa yaḥrum al-ṣulḥ 'alā ishrā' al-ja'naḥ).

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.  

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 barrīyah (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."  

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.  

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-Talibīn in the margin of Mughnī al-Muhtār, 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.


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 mutâ'addîn. 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


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-ta'addī by which the highway is rendered dangerous. However, Abū Yūsuf takes an

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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 (*qarar 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.

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 Ḥanafi 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

82 Majallah, article 1201.
83 Majallah, article 1200; *Alī Ḥaydar, Durar al-Hukkām, vol.10, p.227.
84 Qadrī Bāshā, Murshid al-Ḥayrān, article 61.
probability that his neighbour may suffer injury". 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. 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, Saḥḥān 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-Hindiyah, vol.2, p.284; al-Mabsūt, vol.27, p.23; Shahr Fath al-Qāḍīr, vol.5, p.506; Badā'ī’ al-Ṣanā’ī’, 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-Hindiyah, vol.3, pp.116-117.

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 Maṭrāf, Ibn Mājishūn, Aḥbār and Ibn Nājī. On the other hand, Ibn Nāfī 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. However, according to Ibn ‘Uttāb, 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.

However, other ‘ulamā’ 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 mashhīr opinion. This is also the opinion of Ibn al-Qāsim and Ibn Nāfī. 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


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 (manfa'ah tabtul).\textsuperscript{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.\textsuperscript{91}

According to Ibn ʿUtţāb'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.\textsuperscript{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 ʿAbdūs who reported from some of
his companions that if the andar which has been seen in existence from time immemorial


\textsuperscript{91} Al-Bahjah fi Sharh al-Tuhfah, vol.2, p.640.

\textsuperscript{92} Tabsirat al-Hukkām, vol.2, p.257.
(qadīman), any nuisance or interuption which is coming after that should be removed because the andar should be left as it was.\textsuperscript{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-qāṣd can be proved, second, when the obstruction of that benefits is entirely cut off.

\textsuperscript{93} Tabsirat al-Ḥukkām, vol.2, pp.256-257.
INTRODUCTION

Fire is a dangerous thing and obviously a thing which, if not kept within bounds, may do great mischief, and the Sharī‘ah 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 muta'addīn 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 established 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.

¹ Salmond and Heuston, p.330.
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. ʿAbd 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-ʿAsqalānī narrated from ʿAbd al-Razzāq from

Ja'far b. Musâfir al-Tunísí from Zayd b. al-Mubârak from ʿAbd al-Malik al-Ṣânī from Ma'mar from Hammâm b. Munabbih from Abû Hurayrah that he reported: The Prophet said:

"Injury caused by fire is not actionable".  

In another report, Al-Jmad b. al-Azhar narrated from ʿAbd al-Razzâq from Ma'mar from Hammâm from Abû Hurayrah that he reported: The Prophet said:

"Injury caused by fire is not actionable, and injury caused by a well is not actionable".  

The ʿulamā' have expressed their views on what is narrated by Abû Hurayrah above.

Al-Khattab says: "I have always heard the men of Ḥadîth (aṣḥâb al-Ḥadîth) saying: ʿAbd al-Razzâq has erred in quoting Ḥadîth. In fact, it is al-bi'r jubûr (not al-nâr jubûr) until I found it in the collection of Abû Dawûd reported from ʿAbd al-Malik al-Ṣânī from Ma'mar, which indicated that the Ḥadîth is not narrated by ʿAbd al-Razzâq alone. Al-Mundhirî stated that the narration of ʿAbd al-Malik al-Ṣânī is weak (qâ'îf). ʿAbd al-Razzâq is alleged to have mispronounced al-bi'r (taslîf al-bi'r). To adduce that allegation saying that the people of Yaman speak the word al-nâr as al-nîr, and then the narrators transferred such a word by misspelling. Al-Sunadî said: "The word al-bi'r, indeed, was mispronounced from the word al-nâr. The original word is al-nâr, not al-bi'r".  

And Ibn al-ʿArabi says: "The famous riwayât agreed on the word al-bi'r, whereas

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in a rare riwāyah (riwāyah šādhdhah) the Ḥadīth has come in the words al-nār jubār". Further, Ibn al-ʿArabī says that some of them say: "Some of them misspelled al-biʿr because the people of Yaman write the word al-nār with al-yāʾ not with al-alif (it becomes al-nīr). So some of them suppose that the word al-biʿr with a diacritical point underneath, should be al-nār with a diacritical point above, and they narrated it like that". This taʾwīl is narrated from Ibn ʿAbd al-Barr and others from Yahyā b. Muʿīn who asserted that Maʿmar misrepresented it (al-nār jubār) as he narrated from Hammām from Abū Hurayrah, and Yahyā b. Muʿīn supported his view saying: "Al-Ḥuffāẓ among the companions of Abū Hurayrah agreed on stating al-biʿr, not al-nār". However, Ibn al-Barr said: "Yahyā b. Muʿīn did not bring any proof to support his view". According to the opinion expressed by Al-Jīmāṭ b. Hanbal in respect of the Ḥadīth of ʿAbd 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 šahīḥ (lam yakun fi al-kitāb bāḥil laysa huwa bi šahīḥ). He, further, said: "The people of Yaman write al-nār as al-nīr and (al-biʿr) as al-bīr. So ʿAbd al-Razzāq misread the text".

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 ṣarīqah muʿtādah) 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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person who set it.\textsuperscript{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 \textit{itlāf} (\textit{mubāshir al-ītlāf}). So, in his opinion, if a person sets a fire to keep warm or to cook something, or for lighting a lamp (\textit{sirājān}), then he sleeps and the fire spreads to burn the rest of the house (\textit{amtārah wa nāsan}), he is not responsible for such damage.\textsuperscript{11}

According to Ibn Ḥazm, in authenticating (\textit{taṣḥīḥ}) this Ḥadīth, this Ḥadīth came in two ways:


And this is the valid report (\textit{khabar saḥīḥ}) and the proof (\textit{al-ḥujjah}) is with it and it is unlawful to act contrary to it.\textsuperscript{12}

Further, he builds his opinion and position by saying: "It is to be obligatory (\textit{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 \textit{mubāshir mutafaddīn}. The person is liable to retribution in the case of intentional murder and \textit{diyah} is due by his \textit{ṣāqilah} in the case of unintentional murder. Therefore, the fire

\textsuperscript{10} Al-Khaṭṭābī, \textit{Maʿālim al-Sunan}, vol.4, p.37; Ibn Ḥajar, \textit{Fath al-Bārī}, vol.12, p.266.

\textsuperscript{11} Al-Muhallā, issue 2117, vol.11, p.19.

\textsuperscript{12} Al-Muhallā, issue 2117, vol.11, p.20.
which is set without ta'addān, it is jubār as the Prophet said: "Al-Nār jubār". It can be said that no liability for compensation will be due when there is no ta'addān.

DANGER AND LIABILITY

The concept of liability for fire undoubtedly concerns Muslim jurists, and hence, the subject will be dealt with by examining the doctrines of all the Islamic schools of law.

The Ḥanafī treatise al-Mabsūt provides the rules for this discussion. Where a person ignites a fire to burn grass (hashīsh), harvest fields (jaṣā'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 exercises his right of ownership which is absolutely permissible to him. According to some of the later fuqahā' (ba'd al-muta'akhkhir), 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 istihlās.

Abū Yūsuf also gives his opinion which concurs with the rules provided in al-Mabsūt, apparently noting that if a man burns fodder (kala) 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.
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 Yūṣuf adds that a Muslim is not permitted to intend (*yata'ammad*) any harm towards his neighbour, or to burn his crop intentionally to the injury of the neighbour's land. In *Fatawā 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-ḥaqab*) on it so that the fire broke out to burn his premises, and went across (*ta'addā*) to his neighbour's premises, the man is liable. Similarly if a person burns something in his land in a normal way (*mūtād*), then the fire trespasses to another's land and does damage, he is not liable. Otherwise, if he exceeds the *mūtād* (*tajāwaz al-mūtād*) in igniting the fire, he is liable.

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.

The jurists of this school also discuss the distance of the position of the neighbour's land whether it is far or not. If, consequently, a person lighting a fire to burn thorny grass

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17 *Al-Ikhtiyār li Ta'īl al-Mukhtar*, vol.3, p.79. See also *Ḍamān al-Mutlīfāt*, 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.\footnote{Radd al-Muhār, vol.6, p.88.}

In another case, if a person burns herbage (kala') 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.\footnote{Mūṣīn al-Hukkām, p.207; Lisān al-Hukkām, p.281.}

Some ‘ulamā' 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.\footnote{Mūṣīn al-Hukkām, p.207; Lisān al-Hukkām, pp.281-282; Qaṭṭābīyāhī, Kitāb Mūṣībāt al-Aḥkām wa Wāqi’āt al-Ayyām, pp.387-388.}

As noted in al-Mudawwanah al-Kubrā, Mālik b. Anas recognizes that if a person
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. 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. In the same manner pecuniary responsibility rests on
the person who lights the fire during a high wind thereby causing damage to another.
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.

In relation to the case of fire, the Shafi'i jurists agreed that if this case comes up
in some unusual manner (khilaf al-"adah/khaliif al-"adah) 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 mutada'din 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

al-Risâlah, vol.2, p.245; al-Mawâq, al-"Iâji wa al-Ikflî in the margin of al-"Haajab, Mawâhib al-Jâlî, vol.6,

al-"Aqd al-Munâzamm li al-Hukkam in the margin of Tabsirat al-Hukkam, vol.2, p.80; al-Furûq, vol.4, p.27; al-
Mawâq, al-"Iâji wa al-Ikflî in the margin of al-"Haajab, Mawâhib al-Jâlî, vol.6, p.321; Zarrûq, Sharh Zarrûq "alâ
Matn al-Risâlah, vol.2, p.245. In the same sense, the Hanafi jurists also touched this case in Fatâwâ Qâdîkhân

24 Mukhtasar, p.291. See also al-Qawânîn al-Fiqhiyyâh, p.218; al-Khirshî, Fath al-Jâlî "alâ Mukhtasar Khalîl
vol.8, p.111; al-"Aûbî, Jawâhir al-Ikflî, vol.2, pp.296-297; al-Mawâq, al-"Iâji wa al-Ikflî in the margin of al-
"Haajab, Mawâhib al-Jâlî, vol.6, p.321; al-Dâdîr, Aqrab al-Masâlik, p.190; al-Dâdîr, al-Sharh al-"Saghîr in
the margin of Bulghat al-Sâlik, vol.2, p.408.

25 Mukhtasar, p.292; al-Mawâq, al-"Iâji wa al-Ikflî in the margin of al-"Haajab, Mawâhib al-Jâlî, vol.6, p.322;
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-Adhra'ī. 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-šādah/mu'tādah) and without negligence (tafrīrī). The defendant in this case is not a muṭa'addīn because his action is according to legal practice (mubāḥī). 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 (tasarrufī al-šādah li khatrātihā'bi ta'fīj nār khatrīrah taṣā'addīrādah), 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


if he, after igniting a fire, negligently lets it continue 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 'ādah 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.\textsuperscript{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 Shāfi‘ī school.\textsuperscript{29} This case is quite different in its decision held in Fatāwā al-Nasāfī of the Ḥanafī school which is reported in Muṭṭin al-Huḳkām and Lisān al-Huḳkām 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.


This is also the opinion of the Shafi'i school.\textsuperscript{30}

It is obvious that from the discussion by the fuqahā’ of the madhāhib above, the treatises from both madhāhib, viz the Shafi'i 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 \textit{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.\textsuperscript{31}

[2] Negligence. If a person \textit{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.\textsuperscript{32}

[3] Accident. If a fire \textit{accidentally} arises on a person's land and spreads \textit{without negligence} or \textit{any act that is not normal on his part}, he is not answerable.\textsuperscript{33}

\textbf{FIRE ON THE HIGHWAY}

The Ḥanafi jurists recognize this case mentioning that if a person lays burning coal (\textit{jamr}) in the highway and it burns anything there, the person is liable for the damage because he is \textit{muta‘addīn} in laying the \textit{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


\textsuperscript{31} This element has mostly been discussed by the fuqahā’ of the Ḥanafi and Mālikī schools.

\textsuperscript{32} This element has been touched on by the Shafi'i and Ḥanbalī jurists in their writings.

\textsuperscript{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-ruḥ fi'lāh/ḥukm fi'lāh qad untasikh). 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-‘ilm) 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 ‘aqilah, whereas in the case of destroying the clothes of another, the compensation is due

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 (*mitraqah*) 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 *Shafi‘ī* jurist al-Ramlī says that if sparks jump out of an ordinary practice (*“alā al-ṣādah*) 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 “alā al-ṣādah*), he is certainly liable. The *Shafi‘ī* jurist al-Ramlī does not ascribe any liability to the blacksmith unless the element of *lā “alā al-ṣādah* existed.\(^{37}\) The *Hanafi* 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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\(^{36}\) *Majallah*, article 926.

al-Hindiyyah where the blacksmith will bear liability if the element of knowledge (*al-*‘ilm) could be proved.\(^{38}\)

The opinion of the Ḥanafī and Shāfi‘ī 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 Shāfi‘ī 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-tā’addī* 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

\(^{38}\) See *al-Fatāwā al-Hindiyyah*, vol.6, p.42.

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 (tafrīf). 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 Shāfiʿī 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


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 (ta'addat) to a heap of it and did damage. The ṣabī was held liable, however, that liability is returned (yurja') 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

43 Majma' al-Damanāt, p.162. See examples in the topic "Vicarious Liability" on the sub-topic: "Liability of guardian for the act of his ward" and "ajīr kḥāṣṭ".
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 *tafrīq* or *taqṣīr* or *mujāwazat al-muṭād* (exceeding of normal practice) or *qillat taḥarruz* (want duty of care) in using fire to cause the destruction of another's property, and it apparently falls under "*iṣ tidā"* (transgression); whereas God strictly prohibits it. God says:

"Do not transgress the limits; for God loveth not transgressors."  

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44 See *Mūjabāt*, vol.1, p.203.  
45 *Al-Qurān*, 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-ma'rūr), a right to the flow of water (ḥaqq al-majrā), and a right to discharge rain water over another's land (ḥaqq al-masīḥ). These rights have also been laid down in the Majallah. 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.

As far as this topic is concerned, the researcher will attempt to study the liability

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1 ʿAlī al-Khaṭīf has elaborately discussed these three types of ḥaqq in his book Ahkām al-Muṣmālāt al-Sharīʿiyah, pp.53-56. Besides that, he also puts in his discussions the rights of shurb, shufah, tadrīt, jiwār, etc. See also the discussion of these rights in Ahmad Māḥmūd al-Shafīʿī, al-Mikkyiyah wa al-ʿAqd fī al-Fiqh al-Islāmi, pp.61-80; Murshid al-Hayrān, 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 Mukhtasār, 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-taḍaddī) 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 (mukhālīfan li al-muṭād), 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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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.
A person who accumulates water by way of non-natural use of land 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-ta‘addī* (a wrongful act) e.g., in doing something contrary of usual practice (*‘ādah*). It is obvious that the element of *al-ta‘addī* is an important matter in this case to prove someone committed tort. The concept of *al-ta‘addī* 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 *tafrīt* (negligence). He is not *muta‘addīn* because his deed is permitted (*mubāḥ*). Nevertheless the defendant is liable if he transgresses (*yata‘addā*) 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. The view of this school seems to us that the element of negligence (*farraṭa*---

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>tafrīf or excessive manner (asrafa---isrāf) or al-taḍaddī 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 ahḍath ḍararan umir biqāf‘ih) 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 Farihūn 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 Tābṣirat al-Hukkām 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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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 (tafrīf) but from an act of God (amr min Allāh), he is not liable.\(^1\)

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 (āfāh samāwiyah), sudden accident (ḥādith fuja‘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.\(^2\)

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 (juhr) and causes damage, the man is not held liable. The liability will be borne if he irrigates contrary to usual practice

\(^1\) Tabṣirat al-Ḥukkām, vol.2, p.244.  
(fawq al-ṣādiq al-ṣādiq) 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), or he is, according to al-Shīrazi, regarded as mutaʻaddin if he uses water for irrigation contrary to the usual practice.

The Ḥanafi 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-taqāṣīr fi milkih mubāh lah muṭlaqa) 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. In other words, the liability is due from the person who irrigates his land contrary to the usual practice (ghayr muʻtād) and the water transgresses (al-taqāṣīr) to another’s land. Likewise, if another’s goods are placed under a mū‘āṣah and the owner of the mū‘āṣah flows water through it and causes damage to the goods, he is liable. Abū Yūsuf maintains the view of the Ḥanafi school by mentioning that if a man who has a canal specifically for him and

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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

20 Abū Yūsuf, Kitāb al-Kharāj, p.56.
22 Al-Mabsūt, 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 Qadīkhān in the margin of al-Fatāwā al-Hindiyah, vol.3, p.251; Majma‘ al-Dāmānī, p.165; al-
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. 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. 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 (alsakr wa al-aqam) 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 istihsan. Otherwise, if the taqaddum has not been made, he is not liable.

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 (habah) cannot complain of water naturally flowing into his land from a higher level (qadah). Nevertheless, the proprietor of the higher land is liable if he knows that if he drains his land, the water will trespass (yatacad) onto his lower neighbour's land. The proprietor of the higher level should be requested to set up a dam (almusannah) to block water which flows to the lower level and he is prevented

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from draining his land until the dam is erected.\textsuperscript{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 qiṣṣā 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.\textsuperscript{29}

ESCAPE OF WATER (\textit{AL-TA'ADDĪ})

Cases from the Ḥanbalī, Mālikī, Shāfi‘ī, Ḥanafī and Zāhirī 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 \textit{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 \textit{fuqahā} which is considered as "al-

\textsuperscript{28} Majmā’ al-Dāmānāt, p.163; Radd al-Muhtār, vol.6, p.89; Fatāwā Qādīkhān in the margin of al-Fatāwā al-Hindīyyah, vol.3, p.461.

\textsuperscript{29} Al-Muḥallā, issue 2116, vol.11, p.19.
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 "ta'addal-ta'addāl" which can also be translated as "escape". 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.

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 muta'addīn and negligent. 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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injury, the man who pours the water will be held liable.\textsuperscript{33}

In the view of the Ḥanafi 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 diya\textsuperscript{h} for the man is due from the former’s aqilah, or a compensation for the animal from the person himself. The person is deemed a mutā’addīn because he has been guilty of causing an injury to passers-by on the road. However, if the man knowingly and wilfully (ta’ammadā) 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 yujūwīz al-mu’tūd) 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 istilḥāsān), not the worker because the order given is valid and the benefit of sprinkled

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


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 Shāfī school maintain that the liability will be ascribed to a person who sprinkles water on the road for his own benefit (\(\textit{li maṣlaḥah nafsih}\)) that causes a passer-by to fall. However, he is not liable when:

1. he sprinkles water for the benefit of the public (\(\textit{li maṣlaḥah al-Muslimīn}\)), e.g., to prevent the pollution of dust, or
2. the person who has fallen or slipped, intentionally (\(\textit{qaṣḍan}\)) passes over the part where the water has been spilled, or
3. his action does not exceed normal practice (\(\textit{lam yujūwiz al-adah}\)) or he did it in the course of natural use of his right, or
4. his action is permitted by the \(\textit{imām}\) (authority).\(^{38}\)


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-
ta'addī can be proved. It is clear that the Ḥanafī and Shāfi‘ī 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.
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-tacaddi) 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-kifayah)-
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 (\(anna\ al-wījib\ lā\ yataqa\īyad\ bi\ shart\ al-salāmah\)). 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 ʿAmr b. Shuʿayb on his father's authority from his grandfather who reported that the Prophet said:


"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 ⁴Abd al-ʾAzīz b. ʿUmar b. Abd al-ʾAzīz 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". ⁴Abd al-ʾAzīz, 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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⁴ Sunan Abī Dāwud, vol.4, p.195.

⁵ Ibn Ḥajar, Bulūgh al-Maṣām, 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 (tī'addā) 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 āqilah".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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8 Majallah, article 964.
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 (baff), 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 Ḥanafi 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.

Similarly, if a cupper (ḥajjam) practises cupping his patient in the usual manner without exceeding normal practice, he is not liable for any liability.\textsuperscript{11} In \textit{al-Jāmī 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.\textsuperscript{12} Ibn Rushd, one of the Mālikī jurists states:

"... and there is no difference of opinions (among the fuqaha') 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 \textit{muta'addin}".\textsuperscript{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 (ḏarsan), he is not liable for injury resulting from his hands if no element of mistake existed.\textsuperscript{14} Al-Qarafī says that the responsibility will not be borne by the expert doctor or veterinary unless it is known that he committed a transgression (\textit{ta'addā}) in his course of treatment.\textsuperscript{15} With regard to the expert doctor being free from liability, al-Dusūqī has stated:

\begin{itemize}
  \item \textsuperscript{12} Al-Jāmī al-Saghīr, p.449. See also al-Hidāyah, vol.3, p.245.
  \item \textsuperscript{13} Bidāyat al-Mujtahid, vol.2, p.313.
  \item \textsuperscript{14} Al-Mawāq, al-Tāj wa al-Ilāj in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.321.
  \item \textsuperscript{15} Al-Qarafī, al-Furūq, vol.4, p.29.
\end{itemize}
"In the case of a doctor and a cupper who is expert in the circumcision. When the cupper performs 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 āqilah liable for the diyah".16

Al-Shāfi‘ī 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 Ḥāshiyyah remarks that the expert physician (‘ārifan) is not liable19 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 (jā‘iz).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

17 Al-Umm, vol.6, p.239 and p.244.
18 Tuhfat al-Muhtāj in the margin of Ḥāwāshī al-Sharwānī wa Ibn Qāsim, vol.9, p.197.
medical treatment and is not known as a practitioner, is liable". Ibn al-Mundhir theorizes: "A practitioner who does not transgress in his practices, is not liable for any liability".

(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. Ibn Qayyim assesses this case and says:

"This determination does not contradict the meaning of the Ḥadīth mentioned earlier".

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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24 Ibn Qayyim, Zād al-Maṣād, vol.3, p.109; Ibn Qayyim, al-Tibb 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.\textsuperscript{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 skilful in the matter, but the patient suffers injury because of such medicine, the quack is liable.\textsuperscript{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.\textsuperscript{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).\textsuperscript{28}

(3) The third category of the doctor is the doctor who is highly trained, learned and


\textsuperscript{27} Iḅn Ḥajar, Fatāwā Ibn Ḥajar cited in Bahnasī, al-Mawsūʿah al-Jināʿīyah, p.190; Bahnasī, al-Mawsūʿah al-Jināʿīyah fī al-Fiqh al-ʿIslāmī, vol.4, p.42. According to Iḅn Ḥajar, the wrong medicine which is given by one who lack knowledgeable about it should be confirmed by two doctors of good reputation (ʿadalayn).

\textsuperscript{28} Tuhfat al-Muhtāj in the margin of Ḥawāshī al-Shaṛwānī wa ʿlā ʿlā Tuhfat al-Muhtāj, 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 (tagaddad) to a healthy part of the patient's body and he damages it by mistake (akhta'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 (jinayah khat̄a').

Regarding the liability of this category of doctor, the Ḥanafi jurists make him liable if he performs medical treatment which exceeds normal practice (mujawaz almuc̄tād) 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). This case could be connected to the Ḥadīth:

"And for the penis (which was cut) should be paid a diyah".

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 āqīlah. Ibn ʿAbīdīn elaborates this case mentioning that if a part of the

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32 Al-Durr al-Mukhtar printed with Radd al-Mukhtar, vol.6, p.69; Majma' al-Damānāt, 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 qiyy. See al-Durr al-Mukhtar printed with Radd al-Mukhtar, vol.6, p.69; Majma' al-Damānāt, p.48. In the above case, the phlebotomist is considered as guilty of direct murder. See Radd al-Mukhtar, vol.6, p.69.
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 (baytār) or doctor and others like them, ...... each of these is liable if they have committed a transgression (ta‘addū).....". 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-mārīfah). However, the diyah is due from his cīqilah. If he is not knowledgeable, he will be punished. 36 The kinds of punishment according to al-Mawāq and al-Qarāfī in


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 (khaṣṭ) or is impotent (‘innīn), 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 Shāfī`īs, the full diyah should be imposed. See al-Mīdanī, al-Lubāb fī Sharh al-Kitāb, vol.3, p.154; al-Dardīr, al-Sharh al-Kabīr ‘alā Mukhtasar Khalīlī in the margin of al-Dusūqī, Hāshiyyah, vol.4, p.273; Mughnī al-Muhtār, vol.4, p.67; al-Mughnī, vol.8, p.33; Kashfshāf al-Qinā‘ ‘an Matn al-Iqna‘, vol.6, p.47; Wahbah, al-Fiqh al-Islāmi wa Adillatuh, vol.6, p.343; Muḥammad al-Khalīrī, al-Masūliyyah al-Jina’īyyah, p.282.


their books are flogging and imprisonment. 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 āqilah.

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 āqilah. 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 āqilah because the tort committed by such unknowledgeable doctor is considered as an intentional tort. As a result, the āqilah does not bear any diyah resulting from such kind of tort.

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 (āliman), he is liable for injury. 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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38 Bidayat al-Mujtahid, vol.2, p.313; al-Mawāq, al-Tāj wa al-Ikll in the margin of al-Ḥaṭṭāb, Mawāhib al-Jal[ī], vol.6, p.321. Al-Qarāfī reports that the diyah will be borne by the āqilah 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.


41 Al-Umm, vol.6, p.239.
which is ascribed to his āqilah.  

(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 diyyah. However, according to Ahmad b. Hanbal, the diyyah will be paid either:
i- By the Muslim treasury (bayt al-māl), or
ii- By the āqilah of the doctor.  

(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 (ṣirāḥ) 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.  

However, if a major (bāligh) or the guardian of the minor or of the lunatic gives


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 muta‘addin (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-ta‘addī. He also theorizes: "The doctor will be regarded as muta‘addin when he does not have the permission (of the patient or of his guardian) and will not be a muta‘addin when the permission is given". 46 According to the fuqaha’, the intentional muta‘addin will be punished by qisāṣ. 47

BREACH OF DUTY (AL-TA‘ADDĪ) IN TREATMENT

In general, the basis of the liability for the doctor is al-ta‘addī or a mistake or negligence, not on the basis of ḍrarar (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


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-taharruz anh lā damān 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 (khaṭṭāf 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-ta‘addī). A jurist was also asked whether the surgeon would be liable in the event of the girl's death due to his assurance. The jurists 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 Shāfī jurists forbade anybody or any doctor to perform an operation on a tumour (ṣiḥah/ghuddah) if he presumed that such an operation would

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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 sultan 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 qarar that the father or the grandfather, as well as the sultan or his deputies, or the legal trustee (wasli) of the minor or the lunatic, may give his authorization for the operation to be performed.⁵² If the sultan (including his deputies, father, grandfather, etc.) does what is

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⁴⁹ Minhāj al-Ṭālibīn wa ʿUmdat al-Muftīn, p.305.


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 mughallazah* (*diyah* on the heavier scale) from his own property because the element of *al-tacaddTh* has existed in his act. On the other hand, a person outside the *ca§abah* or the authorities (*al-ajnabT*) cannot give the order to perform the operation in any circumstances. If the injury happens due to him, the punishment of *qi§~lqawad* is applied in this case. This is also the opinion of the ḤanbalT school.

Furthermore, in the case of phlebotomy and cupping, if the doctor commits no transgression (*al-tacaddT*) while carrying out his treatment on the patient, he is not

53 There are two kinds of *diyah*: *mughallazah* and *mukhassafah*. In *mughallazah*, the *diyah* is one hundred camels: thirty *hiqqah* (three-year-old female camels), thirty *jadhr*ah (four-year-old female camels), and forty *khalfah* (pregnant female camels). The *diyah mukhassafah* is one hundred camels, i.e. twenty *hiqqah*, twenty *jadhr*ah, twenty *labūn* (two-year-old female camels), twenty *ibn labūn* (two-year-old male camels), and twenty *bint makhāj* (one-year-old female camels). This is according to the ShafiT school. See Abū Shujā', *Matn Abī Shujā', pp.46-47; al-Iqna', vol.2, p.205; Minhāj al-Tālib in wa 'Umdat al-Muftīn, p.279; Minhāj al-Tālib printed with Minhāj al-Tālib in wa 'Umdat al-Muftīn, p.279; Abūmad b. Ruslān, *Matn al-Zubad*, p.62; al-Muftī al-ḤubayshT, Fath al-Mannān, p.398; *Umdat al-Sālik wa Uddat al-Nāsik*, p.353. However, according to the Ḥanafi, Mālikī and Ḥanbalī schools, the *diyah mughallazah* consists:

1. Twenty five *hiqqah*.
2. Twenty five *jadhr*ah.
3. Twenty five *labūn*.
4. Twenty five *makhāj*.


For the *diyah mukhassafah*, the Ḥanafī and Ḥanbalī schools give the same kinds of camels as the ShafiT school, but however, they require *ibn makhāj* (one-year-old male camel) instead of *labūn*. See *al-Hidāyah*, vol.4, p.178; *al-Rawḍ al-Murbi`, p.495; Bidāyat al-Muṭahid, vol.2, p.307.

It seems that the Mālikī school is similar to the ShafiT school in the discussion of this kind of *diyah*. See *Bidāyat al-Muṭahid*, vol.2, p.307; *al-Thamar al-Dānī*, p.518; *al-Kāfi`, p.596; *Mukhtaṣar*, p.277; Zarrūq, *Sharḥ Zarḥ al-Risālah*, vol.2, p.231.


55 *Mughnī al-Muḥtār*, vol.4, p.201; *Nihāyat al-Muḥtār*, vol.8, p.33. See also *al-Fiqh al-Manḥajī*, vol.8, p.87.

responsible for any injury which occurs, even though the patient dies.\textsuperscript{57}

As far as the matter of cutting the tumour is concerned, the Shafi’\textsuperscript{i} jurists opinion can be highlighted as follows:

1- If cutting the tumour would not be dangerous, the operation can be carried out.\textsuperscript{58}

2- Cutting the tumour will not be allowed when two expert doctors (or one expert doctor according to al-Adhra\textsuperscript{\textdegree}) 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).\textsuperscript{59}

3- If the danger in cutting the tumour cannot be assessed (either dangerous or not), cutting is permitted (\textit{yaj\^{i}uz}) by reason that by leaving the tumour without it being operated on, will cause the patient to suffer harm.\textsuperscript{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.\textsuperscript{61}

\textsuperscript{57} Minhāj al-Talibīn wa ʿUmdat al-Muftīn, p.306; Muḥnī al-Muḥtāj, vol.4, p.201; Nihāyat al-Muḥtāj, vol.8, p.34; Zakariyyā al-Anṣārī, 

\textit{Sharḥ al-Minhāj} in the margin of Ḥāshiyat al-Jamāl al-ʿalā 


\textsuperscript{60} Tuhfat al-Muḥtāj in the margin of Ḥāwāshī al-Sharwānī wa Ibn Qāsim, vol.9, p.194; Nihāyat al-Muḥtāj, vol.8, p.33; Muḥnī al-Muḥtāj, vol.4, p.200; al-Sirāj al-Wāḥḥāj, p.537.

5- Cutting the tumour is permitted if it more dangerous to leave it without being cut.\textsuperscript{62}

In brief, the Ḥanafī and the Shāfi‘ī 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".\textsuperscript{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 Shāfi‘ī 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 treatment 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 mutḍ‘addin. In short, the basis of the doctor's liability is al-taḍ‘addī, no ṣurar. Ibn al-Mundhir says: "The fuqahā‘ unanimously agreed that the practitioner who does not transgress (ḻam yataḍ‘add-in his practices), is not


\textsuperscript{63}Al-Qur’ān, 2:195.
EXEMPTION OF THE DOCTOR FROM LIABILITY ACCORDING TO THE OPINIONS OF THE FUQAHĀ'

The fuqaha' 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-ta'addī. 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 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-‘amal) so that he should be exempt from accountability providing there is no al-ta'addī, thus enabling him to make the best use of his professional skill and knowledge with impunity. The second ground for the exemption of the doctor from liability is the permission of the patient or of the patient's guardian. In short, the combination of the permission and the social necessity constitute the cause of exculpation or absolving the doctor from liability.
The tenor of al-Shafi'i’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.\textsuperscript{69} Aḥmad b. Ḥanbal agreed with al-Shafi'i on this point.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{69} Al-Umm, vol.6, p.239; Nihāyat al-Muḥtaḥ, vol.8, p.33 and p.35; Mughnī al-Muḥtaḥ, vol.4, pp.201-202; al-Sirāj al-Wāḥhāj, p.538.


\textsuperscript{71} Al-Mawāq, al-Tāj wa al-Ikhlās in the margin of al-Ḥaṭṭāb, Mawāhib al-Jalīl, vol.6, p.321.

\textsuperscript{72} 'Abd al-Qādir 'Awdah, al-Tashrīḥ al-Jinā'il, 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.\textsuperscript{73}

\textbf{NECESSITY OF CONSENT IN MEDICAL TREATMENT}

All the \textit{fuqahā'} of the \textit{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 \textit{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.\textsuperscript{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
\textsuperscript{Ṭ}Ābidīn 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.\textsuperscript{75} In the light of the case mentioned above, Ibn \textsuperscript{Ṭ}Ābidīn

\textsuperscript{73} \textit{Abd al-Qādir awdah, al-Tashrī' al-Jinā'ī}, vol.1, pp.521-522.

\textsuperscript{74} \textit{Al-Jāmi' al-Ṣaghīr}, p.449; \textit{al-Hidāyah}, vol.3, p.245. See also \textit{al-Fatāwā al-Hindiyah}, vol.6, p.34; \textit{Majma' al-Damānāt}, p.48.

\textsuperscript{75} \textit{Radd al-Muhtār}, vol.6, p.68. See also \textit{Badā'ī' al-Ṣanā'ī'}, vol.7, p.305.
theorizes: "By not action in excess and by being given permission, no liability will be imposed".  

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.  

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 ‘āqilah of the phlebotomist.

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. 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".

The jurists of this school continue their clarification of the necessity for consent

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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 Shafi'i school, al-Shafi'i himself lays down a principle:

"A person is not liable for whatever he has been given permission to do". ⁸²

On this principle al-Nawawi asserts that a cupper or a phlebotomist who performs his works with permission, is in no way responsible (for the consequences). ⁸³ Similarly, Zakariyya al-Ansari 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 Qudamah indicates this matter in a similar way to the Hanafi, Malik and

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⁸² Al-Umm, vol.6, p.240. Falam yaqman man qabila annahu ma‘dhūn lah fī nā fi‘ila.


⁸⁵ Ibn Ukhwawwah, Ma‘ālim al-Ourbah, p.159.

Shafī‘ī jurists. If a surgeon operates on a part of a patient's limbs to treat a canker (aklah) or a tumour (sitāh) 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-ṣamd- 87 qisṣā) or for negligence if he has the intent to harm the patient or is negligent. 88

GOOD INTENT (HUSN 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-Shafī‘ī 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 ta‘addī on the

87 Al-Mughnī, vol.8, p.327; al-Mughnī wa al-Sharī‘ 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 qisṣā because he has no power to do that and no responsibility to take care of such a patient. If that operation is performed by his father or caretaker (al-waṣī) or government (ḥākim) or authorized representative (amīnah al-mutawallī ʿalayh), the liability is not due from him because he performed the operation with the intention of healing and curing the person under him (gaṣī bih maḥlālah). See also Bahnašī, al-Mas‘ūliyyah al-Jinā‘īyyah, p.190.

88 See Bahnašī, al-Mas‘ūliyyah al-Jinā‘īyyah, 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 ("aqîl) and is not
punished (ma'khâdhiyah) 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 ("âhâh"). 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 (ḥâqîn). In modern 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.

89 Al-Umm, vol.6, p.244.

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 Ḥanāfī 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 (mu'tadan) 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 (qasāṣa) 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 Shāfīī jurists. According to them, a

\(^91\) Majma' al-Ḍamānāt, p.47.
\(^92\) Majma' al-Ḍamānāt, p.48; Radd al-Muhār, vol.6, p.215.
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. Ibn Ukhuwwah mentions in his *Ma'ālim 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".

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.

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** 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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97 Ibn Ukhuwwah, *Ma'ālim 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-ta'addī* 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 *ajār* of the fuller or his *tilmīdhn* in the work of a fuller carries out a pounding and the instrument used for pounding slips away from the *ajār* or *tilmīdhn* 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 *ajār* or *tilmīdhn* because his act is considered as *al-ta'addī* and negligence. Similarly if the *ajār* or the *tilmīdhn* causes damage to another with his instrument for pounding, the liability will be ascribed to him by reason that he is *al-muta'addī* and negligent in his activity.⁹⁸

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⁹⁸ Majma' al-Ḍamānāt, p.43; Wāqi'at 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 (*darsan*) 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

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.\textsuperscript{100}

\textbf{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.

\textsuperscript{100} Ibn Ukhuwwah, \textit{Ma‘ālim al-Qurbah}, p.167.
[4] He treats the patient with the permission of the patient or his heir, guardian, etc.


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 circumcision 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-ṭabāṭīb* (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-kāḥfāl* (eye doctor, oculist); [3] one who operates on people by using a dissecting knife or scalpel (*mibqar*)

¹⁰¹ For detail see †Abd al-Qādir †Awdah, *al-Tashrīf al-Jinā†*, vol.1, p.523.

and applies ointment or salve (*marāḥim*), known in Arabic as *al-jarāḥīḥ* (surgeon); [4] one who uses his razor (*mūsā*) in his treatment, known in Arabic as *al-khāṭīn* (doctor of circumcision); [5] one who performs his treatment with a lancet (*rīshah*), known in Arabic as *al-fāṣīd* (phlebotomist); [6] one who carries out his job with cupping-glasses (*mahṣā’im*) and a lancet (*mishraj*), known in Arabic as *al-haqqām* (cupper); [7] one who treats the patient by extraction (*khul*) (from a limb or a vein, etc.), connection (*waṣl*) (of a limb or a vein, etc.) and dressing (*ribā’*) (of a wound, etc.), known in Arabic as *al-mujabbir* (orthopaedist); [8] one who exercises his treatment by hot iron or flatiron (*mikwāḥ*) and fire for cauterizing, known in Arabic as *al-kawwār* (ironer or cauterizer); [9] one who brings his waterskin (*qirbah*) for the treatment, known in Arabic as *al-hārqīn* (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-daḥbah* which is used for all animals in general. 103

In short, all kinds of physicians mentioned above are subject to the same injunctions, 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 *Tābṣīrat al-Ḥukkām*:

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"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

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-taqřr" or "al-taqṣr". They both literally mean "negligence" or "recklessness" or "carelessness" where a person failed to do what he ought to do. The word "al-taqřr" is laid down in the Qur'an:

"Lest the soul should (then) say: Ah! woe is me!, in that I neglected (farrațtu) (my duty) towards God, and was but among those who mocked".

It has also been highlighted in a Ḥadīth:

"There is no negligence (tafriț) (of one's duty) in sleeping, the negligence of one's duty is not awaking until the time of the other (prayer) commences however".

In legal terminology, the term al-taqřr 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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2 Al-Qurʾān, 39:56.
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-tafrīḥ. 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-diyyāt or al-ṣiyāl. When these texts are looked at, it will be seen that the word tafrīḥ is not based on any theory as in the discussions in Western law. However, there is a contemporary Islamic treatise- al-Fiqh al-Manhājī ‘alā Madhhab al-Imām al-Shāfī’ī by Muṣṭafā al-Khin, ‘Alī al-Sharbājī 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, Șubhī Maḥmaṣṣānī and Muḥammad Aḥmad Sirāj have also briefly analysed cases which can be related to negligence in their books- al-Nażarīyyah al-‘Āmmah li al-Mūjahāt wa al-‘Uqūd and .Dirān al-‘Udwañ fi al-Fiqh al-Islāmi. 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 "farratā→al-tafrīḥ" in their writing like al-Sarakhsī, al-Ghazālī, Ibn Qudāmah, al-Nawawī, Ibn Farḥūn, Zakariyyā al-Ansārī, Muḥammad al-Sharbīnī al-Khaṭīb, al-Bahūtī, Ibn Dūyān and others. At the same time, some of these have also used the word "qaṣṣara→al-taqṣīr" in giving the same meaning as al-tafrīḥ. They are al-Ghazālī, al-Nawawī, Zakariyyā al-Ansārī and Muḥammad al-Sharbīnī al-Khaṭīb. Others prefer to use the word "al-taqṣīr", like al-Marghīnānī, Khalīl b. Ishāq, al-Ābī, al-Mawāq and al-Ḥaṭīb.
The word "al-ihmāl" is also occasionally used by the fuqahā’ in their texts to convey the same meaning as al-tafrīq 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 (īf mā yumkin al-taḥarruz); if, on the other hand, the duty of care is impracticable (īf mā
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-naftah* 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 *muta’addin* 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-Hidayah*, vol.4, pp.197-198. See also *Majma’ 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-naftah*, pp.210-214.

\(^6\) *Al-Hidayah*, vol.4, p.200; *al-Fatāwā al-Hindiyyah*, vol.6, p.43; *al-Mabāṣir*, vol.26, p.189; *Radd al-Muḥārīb*, vol.6, p.606; *Majma’ al-Anhur*, vol.2, p.661; *al-Shaybānī, Kitāb al-ʿAgīl*, vol.4, p.499; *al-Jawharāt al-Nayyirah*, vol.2, p.136; *Dārān al-Muṭtattār*, p.415. See also *al-Shaybānī, al-Amālī*, p.52; *al-Jāmi’ al-Ṣaghīr*, pp.515-516; *al-Kanāwī, al-Nāfi’ al-Kabīr* printed with *al-Jāmi’ 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.

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-tə'addī. 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 'qgilah. He is held guilty as an indirect nhuta addin 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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(ta'amada) passes over such a bridge or plank, falls off and perishes, the first person is not responsible even though he is muta'addin in creating the cause (tasbir), yet the second person is a wilful agent known to be a muta'addin and mubāsharah in his own act and therefore his injury is referred to himself.\textsuperscript{10} This is based on a legal maxim: if there are both al-mubāshir and al-mutasabbib, the judgement falls on the mubāshir.\textsuperscript{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

\textsuperscript{10} Al-Hidayah, vol.4, p.194; al-Jāmi al-Saghīr, p.515; al-Jāmī al-Saghīr in the margin of Kitāb al-Kharāj, pp.119-120.

\textsuperscript{11} Majallāt, article 90; The Jordan Civil Code, section 258.
the highway, a claim can be made against him for the damage suffered. 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-taqṣī ṭr) and the duty to take reasonable care (al-iḥṭīrāẓ) also applies to the person injured or the owner of the property. 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 (mustadbīr) 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.

liability is not due on the person.\textsuperscript{14} Al-Nawawi, 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.\textsuperscript{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.

\textsuperscript{14} Minh\={a}j al-Talib\={a}n wa 'Umdat al-Mu\={u}t\={a}n, p.306; Minh\={a}j al-Ta\={u}l\={a}b printed with Minh\={a}j al-Talib\={a}n wa 'Umdat al-Mu\={u}t\={a}n, p.306; Mughni al-Mu\={u}t\={a}n, vol.4, p.206; Zakariyya al-An\={a}ri, Shar\={a}f al-Minhaj in the margin of Ishiyat al-Jamal 'ala Shar\={a}f al-Minhaj, vol.5, p.177. See also Sulay\={a}n al-Jamal, Ishiyat al-Jamal 'ala Shar\={a}f al-Minhaj, vol.5, p.177; al-Mufti al-\={u}bayshi, Fat\={a}h al-Mann\={a}n, p.423; Fat\={a}h al-Wahhab, vol.2, p.207; Kashshaf al-\={u}mar' an Matn al-Ig\={a}t\={a}, vol.4, p.129; Shar\={a}f Muntaha al-\={i}r\={a}d, vol.2, p.431; al-Fat\={a}wa al-Hindiyyah, vol.6, p.54; Fat\={a}w\={a} Oq\={e}r\={a}n in the margin of al-Fat\={a}w\={a} al-Hindiyyah, vol.3, p.457. Al-Qaffal gives his fatwa 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 Mughni al-Mu\={u}t\={a}n, vol.4, p.206.

\textsuperscript{15} Minh\={a}j al-Talib\={a}n wa 'Umdat al-Mu\={u}t\={a}n, p.306. See also Mughni al-Mu\={u}t\={a}n, vol.4, p.206; al-Bayj\={a}ri, Ishiyat al-Bayj\={a}ri, vol.2, p.469; al-Mufti al-\={u}bayshi, Fat\={a}h al-Mann\={a}n, p.423; Fat\={a}h al-Wahhab, vol.2, p.207; al-Ig\={a}t\={a}, 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".  

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 *fuqahā* 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 Ḥanafi, Mālikī and Ḥanbali 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. 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-khata'), for where they have done so wilfully (al-camd), a half diyah only is due on account of each by


reason that each of them is considered as a murderer of himself. 21

As to the elaboration of this case, the jurists of the Hanafi 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 ʿaqilah of the other. 22 If the collision happens through a horseman coming from behind (al-muʿakhkhir) and colliding with another who is moving in front of him (al-muqaddim), the liability is due on al-muʿakhkhir, not on al-muqaddim (or al-sāʾir); 23 even though, in other situation, the collision is caused by al-muqaddim (or al-sāʾir). 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 (sāʾir) and the other is stationary (waqif), the liability is ascribed to the sāʾir (that means the diyah falls upon the ʿaqilah of the sāʾir and the compensation for the animal is due from the horseman himself). 25 This decision could


also be applied to the collision or accident among pedestrians (māshiyūn). 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 diyyah. 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-khata'ā), the diyyah for the persons killed or wounded will be due from the āqilah 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. 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.

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


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 Hanbali school, in elaborating this matter, is not greatly different to the discussion made by the Hanafi and Maliki schools. One of the Hanbali jurists, Ibn Duyan indicates this case in his manual text that if two free (harrān) and competent (mukallaṣfān) persons collide with each other and they both fall down and die, a diyāh will be due for each from the WRAPPER of the other as each of them is the mediate causation of killing the other. It is related on the authority of ʿAlī that the death of each individual resulting from a collision with another amounts to killing by misadventure (khatā').30 That means the liability in this case is a diyāh 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 qamān (diyāh) 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 diyāh for both of them is from his property as their death is caused by his mediate causation, since he is a mutaʿaddin in that manner. On the other hand, if those boys ride by themselves or their walt gives them a ride and they collide, then they are considered as mature persons (bāllīghīn) who have had a

misadventure. The 'ażilah 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.\(^\text{32}\)

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.\(^\text{33}\) Nevertheless, this school makes the condition that the pedestrian or the horseman who is stationary should 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 mutadaddin or negligent like sitting in a narrow road, the liability should be imposed on him alone, not on the sā'īr by reason that the damage is linked to his ta'addin.\(^\text{34}\) 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 qiṣṣā 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.\(^\text{35}\) 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


place, the punishment of retaliation (al-qawād) should be imposed. Otherwise if the death was unlikely to take place in such a collision, the case is considered as wilful misadventure (‘amd al-khaṭṭā’); or in other words, manslaughter (shibh ‘amd). 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 Shāfi‘ī school and Zunar have opined that in this case the ‘aqilah 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. In elaborating this case, the Shāfi‘ī 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 ‘aqilah 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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as homicide by misadventure. This judgement is also applied to the case of two people colliding sideways (munkibayn) or crashing head on (mustalqiyan), or between munkiban and mustalqiyan. If the collision is intentional on both sides, the ʿāqilah are responsible for half diyah mughallažah (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 qisās (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.  

According to some jurists (qāl), if the wali ʿ (of the minor or the lunatic) permits him to ride, the wali ʿ 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 wali ʿ, 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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is because he is regarded as having committed *al-ta'addi* in his actions.\(^{41}\)

Additionally, a collision between two pregnant women which causes the death of both, and also results in abortion, the *aqila* on both sides are responsible for half *diyeh* as mentioned earlier and four *kaffarāt* 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 *aqila* 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 *diyeh* where the *aqila* 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


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-taharruz 'anh*), 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 (*nūt*) whose

43 *Majma' al-Damānī*, p.48; *al-Fatāwā al-Bazzāzīyyah* in the margin of *al-Fatāwā al-Hindīyyah*, 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.

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 (hayajūn al-bahr) or violent winds (hayajūn 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-safinah) 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-taḍaddī.47 Mālik says:

"Every employee (ajār) 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 (taḍaddū) 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

a shipmaster, being treated as an *amin* and therefore being not liable except for *ta'addin* or negligence.\(^{49}\)

Salīnūn 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-ta'addī* 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 Shāfi‘ī schools.\(^ {53}\) However, Ibn `Aqīl 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 thehirer (*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-Murbi‘*, p.324; *al-Mughnī*, vol.5, p.495.


\(^{52}\) *Al-Mughnī*, vol.5, p.480.

hand. 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-ta'addī* or negligence during carrying them, irrespective of whether the owner accompanies them or not.

Al-Bahiīī concurs with Ibn 'Aqīl when he mentions that:

"... a sailor (*māllāh*) 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 'Umar, 'Ali, 'Abd Allāh b. 'Atabah, Shurayh, Abū Ḥanīfah, Mālik and a view of al-Shāfiī. In another view of al-Shāfiī, he is not liable as long as he does not commit *al-ta'addī* (*mā lam yata'add*-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-ta'addī* 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 (*mutabarak*), 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 (*yufarrat*), because the property

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54 *Al-Mughnī*, vol.5, pp.480-481.
56 *Al-Mughnī*, vol.5, p.479.
in his hand is *amānah* and he is like the trustee (*mūda*).\(^{57}\)

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-ta‘addī* or been negligent and otherwise he incurs liability where he commits *al-ta‘addī* 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 *muta‘addin* (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-ta‘addī* or been negligent, otherwise, he will not be liable. Malik b. Anas says:

"A man who is hired to load goods on an animal and then goods are

\(^{57}\) *Kashshāf al-Qinā‘* ‘an *Matn al-Iqna‘*, 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-Rawd al-Murbi‘*, p.324; *al-Mughnī*, vol.5, p.490.

\(^ {58}\) *Al-Rawd al-Murbi‘*, 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, Yahyā b. Sa`īd lays down a general statement: "The carrier (al-ḥamāl) is liable for any damage or loss". 60 And then, it is supported by Khalīl b. Ishaq 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`addī can be proved. Thus, a carrier hired for the purpose of carrying oil (duhn), food-stuff (ta`ām) or a fragile object (āniyāh) is not responsible for any damage or loss which is not caused by any al-ta`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 tie 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`addī or neglect (farrāqā), and that they are not liable where it is established that they have not transgressed (ya`addī) or been negligent. 63 The common or the private carrier has a duty

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 fuqaha have a different opinion regarding it. Their opinions can be divided into two groups:

First group is those who say that the carriage (ajjarr) is (trustee). The acknowledgement should be accepted and the liability is due from him unless the person who hired him (al-musta:jir) can establish that he has transgressed (ma'adda) or been negligent (farroj).

Second group is those who say that the carriage is guilty by disloyalty (al-khiyanah). The acknowledgement made by the person who hired him should be accepted and the liability is due from the carriage until he can prove that he did not transgress and act negligently in his employment.

The view of the first group are Abi Hanifah, Zafar, al-Hasan b. Ziyad, Al-Far'ab, and Malik. This view is ascribed to Imam Shafiyah, al-Azami, al-Maliki, al-Mawardi, al-Maliki, and al-Mahalli.

The view of the second group is that the carriage is (trustee). The acknowledgement should be accepted and the liability is due from him unless the person who hired him (al-musta:jir) can establish that he has transgressed (ma'adda) or been negligent (farroj).

correct opinion of the Shafi’i school\(^{65}\) and the Hanafi school\(^{66}\). It is also the opinion of Tawus and ‘Alî\(^{67}\). And, further, the view of the second group are ‘Umar, ‘Ali, ‘Abd Allâh b. ‘Atabah, Shurayh, al-Hasan, a view of Abû HANDâfah, the Malikî school and a view of al-Shafi’i\(^{68}\).

In addition, Abû Yusuf, Muḥammad b. al-Hasan al-Shaybâni\(^{69}\) the Shafi’i school\(^{70}\) and the Hanafi 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 ajîr should bear the liability until he can prove that the accident has occurred without his al-tabaddî and negligence. Hence, if the damage which happens due to the accident which is unavoidable as a result of fire or drowning, and the ajîr 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 fuqahâ have unanimously agreed that the ajîr khâṣṣ shall not be liable for any deficiency in damage to, or loss of, the


\(^{71}\) Al-Mugni’ wa al-Sharh al-Kabîr, vol.6, p.115; al-Mardîwi, al-Insâf, vol.6, p.73; al-Rawd al-Murbi’, p.324.
employer's property unless the former has committed *al-ta'addī* or been negligent. If *al-ta'addī* 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".  

Also, the Prophet said: "There is no liability on a person who is entrusted (*mu'taman*)."  

Also, it is reported by 'Ali and Ibn Maṣūd that: "There is no liability imposed on *mu'taman*".  

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 *fuqaha*.

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73 Al-Qur'ān, 2:286.

74 Cited in Sharaf, al-Ḥijārā, p.252. *Lā ḍamān *ʿalā mu'taman*.

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-tadădī 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 performs them, he will not be liable for an accident which cannot, in a business sense, be prevented by any known means.

**DUTY OF BAILEES (MŪDA') 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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of the *fuqahā‘*, this topic is discussed either in the chapter of hire (*ijārah*) or pledge (*rahn*) or trust (*wad‘ad*), 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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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.\textsuperscript{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 (\textit{taqūr}) by a trustee (or his servant), he is not liable for compensation.\textsuperscript{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 (\textit{al-gharaq}) or the stealing (\textit{al-sariqah}) is not considered, according to the *fuqahā’,* as being \textit{al-ta’addī} 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 (\textit{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


\textsuperscript{80} Majallah, articles 768, 777 and 780; Salīm Rustam, \textit{Sharh al-Majallah}, vol.1, p.426; \textit{al-Hidayah}, vol.3, p.215; \textit{al-Wajīz}, vol.1, p.237; al-Jazīrī, \textit{al-Fīqīh 'alā al-Madhāhib al-Arbā‘ah}, vol.2, p.289. The author of \textit{al-Hidayah} notes that a trustee is not responsible for a trust (deposit) unless there is \textit{al-ta’addī} (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 \textit{al-Hidayah}, 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-hammāniyy) 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 ʿAlī 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


82 Majallah, article 777; Salām Rustam, Sharḥal-Majallah, vol.1, p.431. See also al-Fatāwā al-Hindiyyah, vol.4, p.342; Fatāwā ʿAlī Qādīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.3, p.371. It is mentioned in Durar al-Hukkām that if a person enters a bathroom and leaves his clothes with the keeper (nājūr) 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 ʿAlī Ḥaydar, Durar al-Hukkām, vol.6, p.232; al-Fatāwā al-Bazzāzīyyah in the margin of al-Fatāwā al-Hindiyyah, vol.5, p.90.

like fire or sinking. Then the trustee would not be held liable.  

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.  

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.  

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-\textit{carşah}) and then they are damaged or lost, the trustee will be liable and considered as negligent in keeping them.  

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.

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\textsuperscript{84} Salim Rustam, \textit{Sharh al-Majallah}, vol.1, p.431.


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.\textsuperscript{89} If the house is not locked but there is somebody there, he is not liable.\textsuperscript{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 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.\textsuperscript{91} If the trust is destroyed or the value thereof diminished by \textit{al-ta'addī} 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.\textsuperscript{92} This case could be applied to cases like putting on a garment or employing a slave which has been entrusted to somebody without


\textsuperscript{90} \textit{Fatāwā Qāḍīkhān} in the margin of \textit{al-Fatāwā al-Hindiyyah}, vol.3, p.379.

\textsuperscript{91} \textit{Alī Ḥaydar, Durar al-Hukkām}, vol.6, p.244; \textit{al-Fatāwā al-Hindiyyah}, vol.4, p.344; \textit{Fatāwā Qāḍīkhān} in the margin of \textit{al-Fatāwā al-Hindiyyah}, vol.3, pp.377-378.

\textsuperscript{92} Majallah, article 787; \textit{al-Fatāwā al-Hindiyyah}, vol.4, pp.347-348; \textit{Fatāwā Qāḍīkhān} in the margin of \textit{al-Fatāwā al-Hindiyyah}, vol.3, p.373.
the trustor's permission. The trustee is considered as *muta'addin* in putting on the garment or employing the slave. Any act of the trustee which is not authorized by the trustor to the trust is considered as *muta'addin*.

(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.

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'addin* or negligence, no compensation is required.

**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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94 *Majallah*, article 779. See also Sa`īm Rustam, *Sharḥ al-Majallah*, vol.1, p.431.

95 *Majallah*, article 787. See also *Radd al-Muhājir*, 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. 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 ta'addîn or performed any act which is unauthorized. 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 (yata'addî) the condition imposed on him. 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. The lessee, in this case, could be deemed as al-muta'addî or negligent.

In another case, if a property hired to a hireling (al-ajîr) is destroyed by

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97 See Majallah, article 600.
98 Majallah, article 601.
transgression or neglect, the hireling is held liable. 101 Thus, if an animal is hired to a hireling or shepherd (al-rāf) 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 Ḥanāfī 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-mudād addī or negligent in carrying out his task.

It is negligence by the hireling (al-ajfr) 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 (ihṣāmāl) 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

101 Majallah, article 607.
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.\textsuperscript{105}

Ibn Qudāmah describes what is deemed \textit{ta'addin} (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 (\textit{yata'add}). We know of
no controversy on this point except for the view of al-Sha`bī that the
shepherd is liable. We hold that the shepherd is entrusted (\textit{mu'taman})
with the safekeeping of the livestock and is therefore, like the trustee
(\textit{mūḏaʿ}), not liable provided there is no \textit{ta'addin}. Because it is property
possessed under a contract of hire (\textit{ij̄ārah}), he is not liable without
\textit{ta'addin}. But as for that which is lost due to his \textit{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 \textit{ta'addin}.\textsuperscript{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 \textit{amīn} in looking after flocks. On the other
hand, if he has committed a transgression (\textit{ta'addū}) or been negligent (\textit{farraṭa}), he is
liable like a trustee (\textit{wādī}).\textsuperscript{107}

Mālik maintains that the keepers of camel or of goat or of cow or of any animal

\textsuperscript{105} \textit{Faṭwā Qāṣkān}, in the margin of \textit{al-Fatāwā al-Hindiyyah}, vol.3, p.336; \textit{al-Fatāwā al-Bazzāziyyah} in the
margin of \textit{al-Fatāwā al-Hindiyyah}, vol.5, p.81.

\textsuperscript{106} \textit{Al-Muḥnī}, vol.5, pp.495-496. See also \textit{al-Rawḍ al-Murbī}, p.324; \textit{al-Mudawwanaḥ}, vol.3, pp.408-409;
\textit{Minḥāj al-Tālibīn wa 'Umdat al-Muṭṭīn}, p.162; \textit{Minḥāj al-Tālibīn printed with Minḥāj al-Tālibīn wa 'Umdat
and 609; \textit{Faṭwā Qāṣkān} in the margin of \textit{al-Fatāwā al-Hindiyyah}, vol.3, p.336.

would not be liable unless they have committed wrongful acts (ta'addu') or been negligent (farra'ud).

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'dih) his children who have not reached the age of puberty. The teacher or vocational instructor (mu'allim al-hifah) 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-rajih), the mother does not have the right of discipline to her children or minors.

Conditions in Disciplining Minors

According to ʿAbd al-Qādir ʿAwdah in his book *al-Tashriʿ al-Jinaʿi 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 mubarrīh*) 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-Taʿaddī* or Negligence in Disciplining Minors

According to Mālik b. Anāṣ 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-Taʿaddī* 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 (*shādīdan*) 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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transgressed (ta'addā) in his action.\textsuperscript{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 ta'addin. 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-ta'addī 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 (ma'īn) 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.\textsuperscript{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 ta'addin in one's action.\textsuperscript{113}

It has been reported that Mālik b. Anas justifies this matter by saying that if the teacher or vocational instructor (mu'allim al-ṣurrah) beats a minor for the purpose of discipline and the minor dies thereby, the teacher or the vocational instructor is not liable

\textsuperscript{111} Al-Mughni\textsuperscript{\textsuperscript{\textsuperscript{1}}} wa al-Sharḥ al-Kabīr, vol.10, p.349. See also ʿAbd al-Qādir ʿAwdah, al-Tashrīf al-Jinaʾī, vol.1, p.518; Wahbah, al-Fiqh al-Islāmi wa Adillatuh, vol.6, p.301; Wahbah, Naẓariyyat al-Damān, p.327.


\textsuperscript{113} Al-Rawd al-Murbi, p.493.
for whatever happens as a result. But, if he commits al-ta'addt or exceeds the usual bounds of discipline (jā'warz fl adabīh) 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 ṣāqilah.\(^\text{114}\) 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 ('udwān) in his deed.\(^\text{115}\) 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 mughallażah (diyah on the heavier scale). This is because he is categorized under the tortfeasor for manslaughter (shibh al-'amād).\(^\text{116}\) However, there is a view that this case is one of misadventure (al-khaJa'). It is because Mālik recognizes that the cause


\(^{115}\) Al-Dardī, al-Sharh al-Saghir in the margin of Bulghat al-Sālik li Agrab al-Masālik, vol.2, p.383. See also Bulghat al-Sālik li Agrab 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 qisṣā. Equally, if the minor is slaughtered or his stomach is cut by his father. The punishment of qisṣā should be imposed on the father. See al-Bajjah fl Sharh al-Tujib, 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 qisṣā. See al-Bajjah fl Sharh al-Tutfah, vol.2, p.720.

for injury or death is based either on premeditation (‘amd) or misadventure.\(^{117}\)

On the other hand, in the case of a beating which is done on the authority of a sultān or governor (al-wāll) 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 sultān 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-Shāfi‘i.\(^{118}\)

In elaboration, if the father or the legal guardian beats a minor in disciplining him and he dies thereby, the fuqahā’ of the Ḥanafi 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


the father and legal guardian to do that.\textsuperscript{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.\textsuperscript{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 (tahdhib) the minor and, therefore, they are not accountable for the consequences of the permitted acts just as if the imām restrains (ţazara) a person and then the person dies.\textsuperscript{121} In another view, the father or legal guardian should not act beyond the permitted bounds of discipline.\textsuperscript{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).\textsuperscript{123}

With regard to teacher or ustadh, Abū Ḥanīfah and his followers opine that if a minor is beaten without the permission of his father or legal guardian, then the teacher


\textsuperscript{120} Fatāwā Qādīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.2, p.337.


\textsuperscript{122} Fatāwā Qādīkhān in the margin of al-Fatāwā al-Hindiyyah, vol.2, p.337.

\textsuperscript{123} Takmīrat al-Bahr al-Rā'īq, vol.8, p.383 cited in Bahnasī, al-Mas'ūliyyah al-Jinā'īyyah, p.181; al-Fatāwā al-Hindiyyah, vol.6, p.34.
is liable on the grounds that he is *muta‘addin* 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 *muta‘addin*. 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 Ḥanafi 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 *diyāh*, 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


ustādīh 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 (ustādīh) 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-Qurʿān 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 Ḥanafi school differentiate between disciplinary chastizement (qarb al-ta’dīb) and instructive chastizement (qarb al-ta’līm). According to them, chastizement for the purpose of ta’dīb is a right whereas chastizement for ta’līm is a duty. Therefore, ta’dīb is bound on the condition of safety but no such condition is attached to ta’līm. This difference, however, is confined to corporal punishment which

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128 Muʿin al-Ḥukkām, p.204.
is considered to be normal in respect of quantity (al-kam), quality (al-kayf) and place (al-maḥf). In the case of exceeding a normal beating, the liability is obligatory in all cases whether it is meant for ta’dīb or ta’līm.\(^{129}\)

As far as this matter is concerned, the Shāfī 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 qiṣṣa should be imposed on them. However, the diyaḥ will be ascribed to their ʿaqilah 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-mashrūʿ) of ta’dīb.\(^{131}\)

In brief, in the light of the discussion of ta’dīb and ta’līm above, it can be said


that generally the opinion of the *fuqaha'* may be divided into two groups according to the similarity of opinion among them. The first group is Abū Ḥanīfah and the Shāfī‘ī 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 *fuqaha'* have briefly discussed issues on this matter. In fact it has been discussed by the *fuqaha'* of the Shāfī‘ī 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 Shāfī‘ī 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

¹³² See Ḥāshiyat Ḥāsyīī 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. 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. 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. 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 then leaves him there.

The Ḥanbalī jurists appear to discuss this case saying that if a mature person (bālīgh ʿaqīl) places himself or his son under the charge of an expert swimmer for training, and he or his son is drowned, the trainer (al-muʿallim) is not responsible insofar as he is not negligent because he does what he has permission to do. In al-Mughnī, Ibn Qudāmah separates the liability according to whether the trainee is a mature person or

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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-Qādisi. 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. In brief, in both cases the liability of the trainer is upheld in the case of his negligence.


\[139\] Al-Mughni, 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 Qurān, the primary source of Islamic law; the Sunnah comprising the Ḥadīth- the words and acts of the Prophet; the consensus or ijma of legal scholars; and analogical reasoning or qiyās.

Suretyship (ṣamān) has been extensively studied by Muslim jurists. However, in the area of the law where ṣamān 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-tāʿaddī, 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 ʿāmin or "trustee". As an ʿāmin, 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-taadṭ* or *al-tafrīf*.

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-Ahkām al-Adliyyah*. 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 (*maṣlahah*). *ʿUrf* or customary law also played an important role in tort law. Therefore, if a case happened is contrary to *ʿurf*, liability will arise and the elements of *al-taadṭ* and *al-taqṣīf* will be examined. Because of that, the *fuqahā* produced a legal maxim: *al-taʿyīn bi ʿurf 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 *Sharī'ah* 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 *'aqilah* 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-tafrīq* or *al-ta'addī*, 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
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 fuqaha' 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-ta'add and al-tafrī existed, he is liable. The position or judgement of water is similar to the position of fire. The Sharī'ah 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-ta'add, al-tafrī, or mujāwazat al-mu'tād (exceeding a normal practice) in using them, where it falls under ḍtida and God strictly prohibits it indeed.

Upon examination, we found that the Sharī'ah lays down rules regulating medical practice. The Sharī'ah 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 fuqaha' 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 *fuqaha'* have also ruled *al-ta'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.
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BIOGRAPHICAL NOTES

‘ABD ALLĀH AL-ZUBAYRĪ- He is Abū ‘Abd Allāh al-Zubayr b. ʿĀ ḫmad b. Sulaymān ibn ʿAbd Allāh b. ʿĀṣim b. Mundhir b. al-Zubayr b. al-ʿAwwām al-Baqrī, known as al-Zubayrī. He is a ʿAshʿarī scholar. He was a blind man, but wrote several works Islamic sciences. Among them are Kitāb Mukhtaṣar al-Figh, known as al-Kāfī, Kitāb al-Jamiʿ fī al-Figh, Kitāb al-Fara'id, Kitāb al-Niyah, Kitāb Sitr al-Awrah, Kitāb al-Hidāyah, Kitāb al-Ishtishārah wa al-Iṣtikharah, Kitāb Rīyādat al-Muttaqīn and Kitāb al-Amān. He died after the year of 300/912M and before 320/932M. See al-Shīrāzī, Tābaqāt al-Fuqahā', p.117; Ibn Sirīn, al-Fihrisat, p.299; Kifāyat al-Akhbār, p.113.


‘ABD AL-QĀDIR ʿAWDAH- 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-Tashrīʿ al-Jināʿ al-Islāmī Mugaranan bi al-ʿAwnīn al-Wadāʾ. Others are Islām bayn Jahl Abnāʾīn wa ʿAjz al-ʿAwnāʾīn, al-Islām wa Awdāʿunā al-Siyāsiyyah, and al-Islām wa Awdāʿunā al-Oānīnīyyah.

‘ABD AL-RAZZĀQ- He is Abū al-Razzāq b. Hūmām b. Ṣāfiʿ al-Ḥimyarī al-Ṣanʿāʾī, born in 126H/743M. He was mawla 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, Māmar, etc., and ʿĀ ḫmad b. Ḥanbal, Iṣlāq b. Ibrāhīm b. Muhallid b. Rāhawayh, Ibn Māʾīn, and others had learned them from him. Ibn ʿAdī stated: "Many prominent Islamic scholars travelled to him (to learn Islamic sciences)". Abū Saʿd al-Samʿānī 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-Figh 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-Ḥijawi, al-Fikr al-Sādī, vol.2, p.509.

AL-ĀBI- He is ʿṢāliḥ Abū al-Samīʿ al-ʿAbī 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 il-Kīlī al-ʿAwm al-Mukhtasaṣ Khaṭīlī, and al-Thamar al-Dānī Sharḥ Matn Risālah Abī Zayd al-Qayrawānī.

ABŪ BAKR- He is Abū Bakr Abū ʿAbd Allāh b. Abī Qāḥṣaf b. ʿĀ ḫmad b. ʿĀ ḫmir b. ʿAmrū b. Kaʿāb b. Saʿd b. 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 Khaṭīfat 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. ٤٠٣ Umar b. al-Khāṭṭāb 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 outweigh it. He died in Medina in 13H/634M. See Khayr al-Dīn al-Ziriklī, al-Ājīm, vol.4, p.102; Keller, Reliance of the Traveller, p.1026; Muḥammad b. al-Ḥasan al-Ḥijāwī, al-Fīkr al-Sāmī, vol.1, pp.236-237; al-Shīrāzī, Tabaqāt al-Fuqahā, pp.18-19; Sīdī Muḥammad al-Muṭrī, al-Abhāth al-Sāmiyah, p.217.

ABŪ BARZAH AL-ASLAMI- He is Naqlāh b. Ṭubayd b. al-Ijārah, was a Companion of the Prophet. He died in 65H/685M. See al-Mawdūdī, Taḥfīz al-Ūrān, vol.5, p.315.


ABŪ ḤANĪFĀ- He is Abū Ḥanīfah al-Nuʿmān b. Ṭahīt, born in 80H/699M in Kūfah. He was a scholar of Irāq and the foremost representative and exemplar of the school of juridical opinion (raʾy). The Ḥanāfī school, which he founded, has decided court cases in the majority of Islamic lands for the greater part of Islam's history, including the Abbasid and Ottoman periods, and maintains its pre-eminence in Islamic courts today. He was well-known for his piety (wara) 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 (wuqūʿ) 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 Qurʾān 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-Ākbar and al-Musnad. See al-Shaʿrānī, al-Tabaqāt al-Kubrā, vol.1, pp.53-54; al-Shīrāzī, Tabaqāt al-Fuqahā, p.86; Muḥammad b. al-Ḥasan al-Ḥijāwī, al-Fīkr al-Sāmī, vol.2, pp.119-125; Sīdī Muḥammad al-Muṭrī, al-Abhāth al-Sāmiyah, p.219.

ABŪ HURAYRAH- He is Abū Hurayrah ʿAbd al-Raḥmān b. Ṣakhr b-Dawṣī, 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 ʿUmar he was appointed as governor of Bahrain. He

Abū Mūsā al-Asḥārī - He is Abū Mūsā ʿAbd Allāh b. Qays b. Sulaymān al-Asḥārī, 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 Qurān. 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 Ḫawāz 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 ʿaṣrāt 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 ʿaḥl al-Ḵūfah: ʿUmar, ʿAlī, ʿAbd Allāh, Abū Mūsā, Zayd b. Thābit...." See al-Shīrazī, Tabagat al-Fugaha', p.25; Khayr al-Dīn al-Ziriklī, al-Aṣlām, 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 Saʿīd 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-Aṣlām, vol.3, p.87; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.1, p.271.


Abū Yūsuf - He is Abū Yūsuf Yaʿqūb b. Ibrāhīm b. Ḥabīb b. Saʿīd 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 Baghdad during the caliphates of al-Mahdī and his son al-Ḥādī, and as head of the judiciary (qāḍī al-qudūs) under the caliph Hārūn al-Rashīd. He was the first person nicknamed ʿaṣrāt al-qudūs. He was the first to write works on the fundamentals of Ḥanafī jurisprudence, a faqīḥ, ʿalām, ḥāfiz, mujtahid with an extensive knowledge of Quranic exegesis. He, in the beginning, learned fiqh from Muḥammad b. ʿAbd al-Raḥmān, Abū Laylá and then moved to Abū Ḥanīfah and became the best student of his. He wrote many books in Ḥadīth and

Aḥmad B. Ḥanbal- He is Ābū ʿAbd Allāh Aḥmad b. Muḥammad b. Ḥanbal al-Shaybānī, imām of ahl al-sunnah and imām of madhhab of Ḥanbalī, born in 164H/780M in Baghdad, 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-Shafī‘ī, who when he left Baghdad for Egypt, said: "In departing from Baghdad, I have left no one in it more godfearing, learned in fiqh, abstinent, pious, or knowledgeable than Ibn ʿHanbal". Aḥmad b. Ḥanbal was imprisoned and tortured for twenty-eight months under the Abbasid caliph al-Muqtāṣim in an effort to force him to publicly espouse the Muʿtazilah position that the Qurʾān was created, but he bore up unflinchingly under the persecution and refused to renounce the belief of ahl al-sunnah that the Qurʾān is the uncreated word of Allāh. When he died in Baghdad 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 imams of Islam. His famous work is al-Musnad. See Khayr al-Dīn al-Ziriklī, al-A'īlām, vol.1, p.203; Ṣiddī Muḥammad al-Murī, al-Abbāth al-Sāmiyah, p.221; al-Shīrāzī, Ṣaḥīḥ al-Dīn, p.101; Muḥammad b. al-Ḥasan al-Ḥijawi, al-Fikr al-Sāmī, vol.3, pp.20-29.

ʿAlī- He is Amīr al-Muʾminīn Abū al-Ḥasan ʿAlī b. Abī Ṭalib b. ʿAbd al-Muṭṭalib al-Ḥāshimī al-Qurashī, the son of the Prophet's paternal uncle, the first child to accept Islam from the Prophet, and fourth of al-Khulafāʾ al-Rashīdīn, 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 Faṭīmah 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 ‘ulamā’ 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 ʿAbd al-Rahmān b. Mūlam in Kūfah in Ramadān in 40H/661M. See Muḥammad b. al-Ḥasan al-Ḥijawi, al-Fikr al-Sāmī, vol.1, pp.242-244; al-Shīrāzī, Ṣaḥīḥ al-Dīn, pp.22-23; Khayr al-Dīn al-Ziriklī, al-A'īlām, vol.4, p.295.

ʿAlī Ḥaydar- He is ʿAlī 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-
He was the author of an outstanding commentary of Majallat al-Ahkām al-6Adliyyah, entitled Durar al-Hukkām Sharh Majallat al-Ahkām al-6Adliyyah (16 volumes, in 4 book bindings).

AL AL-KHAFĪF- He was a lecturer at Department of Law (Kulliyat al-6Huqūq), 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-Damān fī al-Fiqh al-Islāmī, Ahkām al-Mu‘āmalāt al-Sharī‘iyah, 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 AL al-Khafīf.

AŚBAGH- He is Abū 9Abd Allāh Asbāgh b. al-Faraj b. Sā‘īd 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 Wāḥib 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 Ḥābīb. He wrote a few works: ten volumes al-Uṣūl, Tafsīr Ḥadīth al-Muwatta', twenty two kitāb Simakuh 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-Ḥijāwī, al-Fikr al-Sāmī, vol.3, pp.114-115; Ṣiddī Muḥammad al-Murīr, al-Abhāth al-Sāmiyah, p.293; Ibn Khallikān, Wafayāt al-‘Āyān, vol.1, p.240; al-Shīrāzī, Ṣabaqāt al-Fuqahā', p.158.

ASHHAB- He is Abū 9Amrū Ashhab b. 9Abd al-‘Azīz b. Dāwūd b. Ibrāhīm al-Qīsī al-‘Āmirī 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-Shāfi‘ī states: “I do not know that there is one who cleverer in fiqh than Ashhab”. Ibn 9Abd 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 mutlaq or mujtahid muqallid. This problem has also appeared to his friend Ibn al-Qāsim. Ibn 9Abd al-Barr reported from Muḥammad b. 9Abd al-Ḥakam who said that Ashhab is a hundred times more knowledgeable in fiqh than Ibn al-Qāsim, but Ibn Lubābāh has rejected it by saying that Muḥammad b. 9Abd al-Ḥakam said that because Ashhab was his Shaykh and teacher. Ibn 9Abd 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-Shāfi‘ī, at 64 years of age. See Muḥammad b. al-Ḥasan al-Ḥijāwī, al-Fikr al-Sāmī, vol.2, p.524; Ṣiddī Muḥammad al-Murīr, al-Abhāth al-Sāmiyah, p.293; al-Shīrāzī, Ṣabaqāt al-Fuqahā’, p.155; Ibn Khallikān, Wafayāt al-‘Āyān, vol.1, p.238; al-Bājī, Fuṣūl al-Aḥkām, p.149; Ibn Nadīm, al-Fihrist, p.281.

4TA‘Ā- He is Abū Muḥammad 9Atā b. Rabāḥ al-Jundī al-Yamānī, a prominent fuqahā’ al-tāBi‘īn of Mecca and was a famous jurist in his time. He was mawla of Quraysh. He was a trustworthy jurist, knowledgeable in fiqh and Ḥadīth. Abū Ḥanīfah said of him:

AL-AWZĀ’Ī- He is Abū ‘Amrū ‘Abd al-Rahmān b. ‘Umar b. Yaḥyā al-Awzā’ī, born in Lūbnān in 88H/706M. The word "Awzā’" is related to bāṭnī Awzā’ b. Murthīd in that time. He was the foremost jurist of Syria in the second century of Islam. He was a mujtahid imām, brilliant in fiqh, and knowledgeable in Qur‘ān, as well as pious, ascetic and trustworthy. Ibn ʿUyaynah states: "He is an imām in his epoch". Ibn Sa’d 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 ‘Aṭā’ b. Abī Rabāḥ and Ibn Shihāb al-Zuhrī. His school of thought applies two principles together: al-ra’y and al-Ijāra. 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-Maṣāʾil fī al-Fiqh. See Muḥammad b. al-Ḥasan al-Ḥijāwī, al-Fikr al-Sāmī, vol.2, pp.436-437; Ṣūdī Muḥammad al-Murīr, al-Abhāth al-Sāmiyyah, pp.221-222; Ibn Ṣu’dīn, al-Fihrisat, p.318; Kifāyat al-Akhvār, p.89.

AL-BAGHDĀDĪ- He is Abū Muḥammad b. Ghanīm 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 earlier Islamic jurists in the area of "liability" which entitled Majmāʾ al-Damānāt fī Madḥhab al-Imām Abī Ḥanīfah al-Neẓām. This work had been completely compiled in the year of 1309H/1891M.


AL-DUSŪQĪ- He is Abū ‘Abd Allāh Muḥammad b. Aḥmad b. ‘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 Hāshiyah al-

FAWZĪ FAYD ALLĀH- He is Muḥammad Fawzī Fayḍ Allāh, ustādh at Department of Ḥuqūq and Sharī`ah, the University of Kuwait. Before working at that university, he served as ustādh and head department at Department of Fiqh al-İslāmī wa Madhāhibuh, the University of Damascus. He received his Ph.D from Department of Sharī`ah, the University of al-Azhar in 1382H/1962M with a very good thesis entitled al-Mas'iilivvah al-Tal¢TS. He is also the author of a valuable work Naẓariyyat al-Ḍamān fi al-Fiqh al-İslāmī al-`Āmm.

AL-GHAMRAWĪ- He is Muḥammad al-Zuhrī al-Ghamrawī, one of the Shafī`ī jurists in the fourteenth century of the Hijrah. His famous works are two commentaries, one of Nawawī’s work Minhaj al-Talibīn, called al-Siraj al-Wahhāj Sharh `alā Matn al-Minhāj, and of Ibn al-Naqib’s work `Umdat al-Sālik wa `Uddat al-Nāsik, entitled Anwār al-Masālik.

AL-GHAZALĪ- He is Abū Ḥāmid Muḥammad b. Muḥammad b. Muḥammad b. Aḥmad al-Ghazālī al-Ṭūsī, nicknamed ḥujjat al-İslām (proof of Islam). He is a Shafī`ī scholar and  şifii adept, born in Ṭūs, Iran in 450H/1058M or 451H/1059M. The outstanding scholar of his time and he was nicknamed as Shafī`ī 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 Baghdad, Damascus, Jerusalem, Cairo, Alexandria, Mecca, Medina and came back to his home town Ṭūs. Among his famous teacher is Ḥāmīn al-Ḥaramayn al-Juwaynī, with whom he studied the Islamic sciences until al-Juwaynī’s death. He became a knowledgeable scholar in Shafī`ī law at al-Juwaynī’s hands. Al-Ghazālī debated with the scholars of Baghdad in the presence of the waṣīr (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 Baghdad, 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’ ʿUlūm al-Dīn, al-Wajīz fi Fiqh Madhhab al-İmām al-Shāfī`ī, al-Mustaṣfā mirāf ʿIlm al-Uṣūl, al-Baṣīṣ, al-Wasiṣ, Bidāyat al-Hidāyah, etc. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, p.394; Sīdī Muḥammad al-Murīr, al-Abhāth al-Sāmiyah, pp.280-281; al-Shīrāzī, Tabaqāt al-Fuqahā', pp.248-249; Khayr al-Dīn al-Ziriklī, al-Ajlām, vol.7, p.22.


AL-ḤASAN- He is Abū Sa`īd al-Ḥasan b. Abī al-Ḥasan Yasār al-Baṣīrí, born in Medina
in 21H/641M. He was known primarily for his piety, abstinence and assiduousness in *ibādah*, was a major theologian of Baṣrah during the last decades of the first century of Hijrah/seventh century of Masīḥ. 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-Fuqahāʾ*, pp.91-92; Muhammad b. al-Ḥasan al-Ḥijawi, *al-Fikr al-Sāmi*, vol.2, p.364; Sīdī Muḥammad al-Murīr, *al-Abhāth al-Sāmiyah*, p.299.

AL-ḤĀṢAN B. ZIYĀD- He is Abū al-Ḥasan ʿAlī b. Ziyād al-Tūnīsī. He was a Mālikī jurist and learned successively *al-Muwattaʿ* 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 Dīnīh. He lived after the death of Mālik for about five years. See al-Shīrāzī, *Ṭabaqāt al-Fuqahāʾ*, p.156.

AL-ḤĀṢČAFTĪ- He is Muḥammad b. ʿAlī b. Muḥammad ʿAbī. Alī al-Ḥuṣnī, was nicknamed ʿAlī al-Dīn al-Ḥāṣčaftī 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-Mukhtar fi Sharḥ Tanwīr al-Abṣār* and *Badr al-Muttaqā fi Sharḥ al-Multaqā*. See Khayr al-Dīn al-Zirikli, *al-Aclam*, vol.7, p.188; *al-Durr al-Mukhtar*, vol.2, p.539; *Majmac al-Anhur*, vol.2, p.783.

AL-ḤĀṬṬĀB- He is a ʿAbī ʿAbd Allāh Muḥammad b. ʿAbd al-Raḥmān al-Ḥāṭṭāb al-Raḍānī al-Mālikī, born in Mecca 902H/1496M, his origin was from Maghrib and he is widely known among Islamic scholars as al-Ḥāṭṭāb. He was a faqīh, al-ʿālim, ḥāfiẓ, and thiqaḥ. He was one of the most famous Mālikī jurists and the author of a commentary of Mukhtasar Khalīl which was entitled Mawāḥib al-Jallālī Sharḥ Mukhtasar Khalīl. He died in 953H/1546M. See Sīdī Muḥammad al-Murīr, *al-Abhāth al-Sāmiyah*, p.299; Muḥammad b. al-Ḥasan al-Ḥijawi, *al-Fikr al-Sāmi*, vol.4, p.319.


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 ʿIjazz 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-Iṣṭiḥkār bi Madhāhib ʿUlamāʾ al-ʿĀmps, Kitāb al-Tuqṣūl li Ḥadīth al-Muwattaʿ, Kitāb Ikhtiṣār al-Tamyiz li Muslim, al-Kāfī fi Fiqh Aḥl al-Madīnah al-Mālikī, and more than twenty others works including

IBN ʿABDŪS- He is Abū ʿAbd Allāh Muḥammad b. ʿAbd Allāh Muḥammad b. ʿAbdūs, one of very great companions of Saḥmūn and imām in his era. His origin was non-Arab (al-ṣaḥam) and he was from mawāli of Quraysh. He was a scholar of the Mālikī school, trustworthy and very knowledgeable in fiqh. Ibn al-Ḥarīth 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-Majmū'ah and four volumes Sharḥ Masa'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 ʿABIDĪN- He is Muḥammad Amīn b. ʿAbd al-Karim b. ʿAbd al-Azīz ʿAbīdīn, widely known as Ibn ʿAbīdīn al-Ḥanafī, born in Damascus in 1198H/1784M. Originally a Shāfiʿī 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 Hāshiyyah Radd al-Muhtar ṭala al-Durr al-Mukhtar. The other is Majmū'ah Rasā'il. He died in Damascus in 1252H/1836M. See Khayr al-Dīn al-Ziriklī, al-Āįlām, vol.6, p.42.

IBN ABĪ FĪRĀS- 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 Akriyvat al-Sufun.


IBN ABĪ ZAYD AL-QAYRAWĀNĪ- He is Abū Muḥammad ʿAbd 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 Islam and depth of knowledge and apt explanations of the opinions of the Mālikī school. He substantiated this with quotations from the Muwatta'. 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 Ṣalḥūn. It is undoubtedly the most classical work. His other works are Kitāb al-Nawādir wa al-Ziyādāt ala' al-Mudawwanah, Mukhtasar al-Mudawwanah, etc. He died in 389H/998M at seventy seven years of age. See al-Risālah, pp.iv–vi; STdṬ Muḥammad al-MurṬ, al-Abhāth al-Sāmiyyah, pp.224–225.

**IBN ‘AQĪL**- He is Abū Muḥammad Abū al-Wafāʾ ‘Alī b. ‘Aqīl b. Muḥammad al-Ṭifārī al-Ḥanbālī al-Faqīḥ al-‘Aqīl, a Shaykh of the Ḥanbālī jurists in Baghhdād in his era. He, in the beginning of his life, followed the Mu’tazilah 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-‘ARABI**- He is Abī Bakr Muḥammad b. ‘Abd Allāh b. Aḥmad, widely known as Ibn al-‘Arabī al-Māʾāfirī al-Iṣḥābī al-Mālikī. He was born in Iṣḥābī in 468H/1076M. He grew up in a religious family. His father who died in Alexandria in 493H/1099M was one of the fuqahāʾ of Iṣḥābīyyah. He learned Islamic sciences since he was young of age, then went to pursue knowledge to Cairo, Syria, Baghhdād, and Hijāz, and then returned to his native city. He was educated by a number of the famous fuqahāʾ in his time like al-Ghazālī, al-Ṭurtuṣhī, al-Ṣayrafaʾ, al-Akhwānī, 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 Islam to the public. He was knowledgeable in taṣfīr, Ḥadīth, fiqh, uṣūl, Arabic language and poetry. He wrote a number of works, among them are four volumes Ahkām al-Qurʾān, Āridat al-Aḥbash al-Tinnidh, al-Mahṣūl fī Usūl al-Fiqh, Kitāb Aʾyān al-Aʾyān, 20 book bindings al-Inṣāf fī Masāʾil al-Khilāf, Kitāb Mushkil al-Qurʾān wa al-Sunnah, etc. He died in 543H/1148M and was buried in city of Fāṣ at 75 years of age. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, pp.259–260; STdṬ Muḥammad al-MurṬ, al-Abhāth al-Sāmiyyah, pp.262–263; Ibn Farḥūn, al-Dībaʾ al-Madhhab, pp.281–282; Ibn Khallikān, Wafayat al-Aʿyan, vol.4, p.296; Ibn al-ʿArabī, ʿĀkhām al-Qurʾān, vol.1, pp.4–7.

**IBN ǲǲǲ.setColumns.**- He is Ibrāhīm b. Muḥammad b. Sālim b. Dūyān, 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 Dūyān wrote many books on varied subjects, among which were those dealing with history, fiqh, etc. Among his works are Manār al-Sabīl fī Shahī al-Dalīl, Kashf al-Niqāb fī Tārīkh al-Āshāb, Shahī al-Zad, etc. He was afflicted with blindness in his later years and died on the night of Ṯā al-ʾAfīr in 1353H/1934M at seventy eight years of age. His famous teachers are ʿAbd al-ʿAzīz b. Mānī, Muḥammad b. ʿUmar b. Sālim and Ṣāliḥ b. Fumās. See Manār al-Sabīl, vol.1, p.2.
IBN ḤABĪB- He is Abū Marwān ʿAbr al-Mulk b. Ḥabīb b. Sulaymān al-Andalusī al-Qurtubī al-Mardāsī al-Salāmī, born at Nawāḥī, Ghurnātah (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 faqīḥ, 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-Bīrāh and then continued it in Qurtubah (Cordova). Afterwards, he went to Mecca for the ḥajj and studied the Mālikī school in Medina under supervision of the fuqaha’ there before returning to his native country Andalusia, where he worked to spread out Malik’s opinions. He learned fiqh formally from Yaḥyā b. Yaḥyā, Ḥṣā b. Dīnār, al-Ḥasan b. ʿAṣim, Ṣafīr b. Yūsuf b. ʿAlī, al-Ijāzījī al-Ḥasan b. Ḥasan b. al-Mājishīn, and al-Ijāzījī al-Ḥasan b. ʿAlī, al-Fikr al-Sāmiyā, vol.3, pp.116-117; al-Shīrāzī, Tabaqat al-Fuqaha’, p.164.


IBN ḤAJIB- He is Abū ʿAmr ʿUṯmān b. Abī Bakr al-Ruwaynī al-Miṣrī al-Dimashqī, then al-Iṣkandarī al-Kurṭī, known as Ibn Ḥajib. He was a jurist of the Mālikī school. He was an eminent jurist, as a faqīḥ, a grammarian, a philologist, and a reader of the Qurʾān. He wrote several works, among them are Kāfiyyah in grammar, Shāfiyyah in ṣarf, and a few works in the area of canonical readings of Qurʾān, usūl and fiqh. He died in 646H/1248M. See Muḥammad b. al-Ḥasan al-Ḥiḥawī, al-Fikr al-Sāmiyā, vol.4, pp.270-271.

IBN ḤAZM- He is Abū Muḥammad ʿAlī b. Ṣaʿīd b. Ḥazm al-Qurtubī al-Andalusī al-Zāhirī, one of the famous imāms in Andalus, born in Cordova (in present day Spain) in 384H/994M. He is the greatest scholar of Andalus in his era, knowledgeable in Ḥadīth sciences and brilliant in Islamic jurisprudence. He, in the beginning, followed the Shafi’ī school, and a student of al-Shafi’ī who accepted only the Qurʾān, Ḥadīth and ijmāʿ 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 most famous book is entitled al-Muhallā- 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-Muhallā are: al-Isal ila fahm al-Khisal al-Jamicah li Jumal Shara'ic al-Islam fi al-Wajib wa al-Ḥalāl wa al-Ḥarām wa al-Jīmā, al-Qiyās wa al-Ra'y, al-Jīmā wa Masā'iluh al-Abwāb al-Fiqh. See Muḥammad b. al-Ḥasan al-Ḥijāwī, al-Fikr al-Sāmī, vol.3, pp.44-45; Sīdī Muḥammad al-Murīr, al-Abbāth al-Sāmiyah, pp.245-246; Khayr al-Dīn al-Ziriklī, al-Aṭīmān, vol.4, p.254.

IBN HĪBBĀN- He is Abī Ḥāmid Muḥammad b. Aḥmad b. Hībbān al-Tarnīmī, born in Bust (in present day Afghanistan). He was a Shāfī‘ī scholar and Ḥadīth master (ḥāfiz). He was known as "the senior Shāfī‘ī" (al-Shāfī‘ī al-kabīr). In his search for knowledge of Ḥadīth, he travelled to Khurasan, Syria, Egypt, Iraq, 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-Anwār wa al-Taqāsīm, also known as al-Musnad al-Sāḥih, etc., and died in Bust in 354H/965M. See Sīdī Muḥammad al-Murīr, al-Abbāth al-Sāmiyah, p.241; Khayr al-Dīn al-Ziriklī, al-Aṭīmān, vol.6, p.78; al-Subkī, Tabagat al-Shafī‘īyyah al-Kubra, vol.3, p.131.


IBN KINĀNAH- He is ʿUthmān b. ʿIsā 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, Tabaqāt al-Fuqahā’, p.152; al-Bājī, Fuṣūl al-
AHKĀM, p. 140.

IBN MĀJAH- He is Abū ʿAbd Allāh Muḥammad b. Mājah b. Yazīd al-Rubʿī 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 Sunān (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-Αlāμ, vol.7, p.144.

IBN AL-MĀJISHŪN- He is Abī Marwān ʿAbd al-Malik b. ʿAbd Allāh b. Abī Salamah al-Mājishūn al-Madānī al-Tamīmī al-Faqīh, of Qazvin, Persia, born in 209H/824M. He was a Hadīth master and very knowledgeable scholar of Quranic exegesis. He travelled in pursuit of knowledge of Hadīth to Baṣrah, Baghdād, Syria, Cairo, Ḥijāz, Rayy, etc. He wrote al-Sunan, one of the six Sunān (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-Αlāμ, vol.7, p.144.


IBN NĀFIʿ- He is Abū Muḥammad ʿAbd Allāh b. Nāfiʿ, known as al-Ṣāʾigh. He was
mawlā of Banī Makhzūm. He learned fiqh from Malik and his companions for 40 years and served as muftī in Medina after Malik. He was an illiterate scholar. Ashhab stated: "Every lecture of Malik which I attended, Ibn Nāfī' had attended it too". Ashhab helped him to write everything and he had an outstanding work, that was a commentary on the Muwatta' 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 Qāsim b. Ḥisā b. Naǧī, a Mālikī scholar in ninth century of the Hijrah. He was a faqīh, ḥafīz, zāhid and warāʾī. He wrote several works, the most famous of which was a commentary of al-Risalah, work of Ibn Abī Zayd al-Qayrawānī, entitled Sharḥ ʿalā Matn al-Risālah. This work was published by Dār al-Fikr together with Sharḥ ʿalā Matn al-Risālah written by Zarrūq. The other is al-Ziyādat al-Mālīm al-Īmān fī Rijāl al-Qayrawānī. 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. Qāṭībathā, al-Burhān al-Karkhī, al-Amīn b. ʿAbd al-ʿĀl al-Ḥanafī, Sharaf al-Dīn al-Balqīnī, ʿĀhmad b. Ṭūnus-known as Ibn al-Shalabī, Abū Fayḍ al-Salāmī and Nūr al-Dīn al-Ḍaylāmī al-Mālikī. Beside that, he was a faqīh and also was an active person in practising taṣawwuf. He learned and acquired al-ṭarīqah al-ṣāḥiyyah from al-Shaykh Sulaymān al-Khuḍayrī. There are different opinions about the date of death of Ibn Nujaym. His son ʿĀhmad said that he died in 970H/1562M. His student al-Shaykh Muḥammad al-ʿĀlamī and others said that he died on Wednesday morning 8 Rajab 969H/1561M and was buried nearby al-Sayyidah Sakīnah bint al-Ḥusayn b. ʿAlī. He produced a number of works in Ḥanafī jurisprudence. Among them are al-Asbāb wa al-Nāzāʾīr, al-Bahr al-Raʿīq Sharḥ Kanz al-Daqāʿīq, al-Fatāwā al-Zaynīyyah, Taʿīṣīq ʿalā al-Hidāyah, Ḥāshiyyah ʿalā Jamiʿ al-Fuṣūlīyān, al-Fawāʾid al-Zaynīyyah fī Fiqh al-Ḥanafīyyah, al-Raṣāʾil al-Zaynīyyah fī Fiqh al-Ḥanafīyyah, etc. See Khayr al-Dīn al-Ziriklī, al-Aḥām, vol.3, p.104; Ibn Nujaym, al-Asbāb wa al-Nāzāʾīr, pp.5-6 and 15-16.

IBN QAṢĪ SAMĀWANAH/AKHŪ ZĀDAH- He is ʿAbd 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, Taʿīṣīq ʿalā Sharḥ al-Miftāḥ, Jāmiʿ al-Fuṣūlīyān, al-Durar wa al-Gharar, al-Asbāb wa al-Nāzāʾīr, Risālah Tafsīrīyyah, 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 ʿAbd Allāh ʿAbd al-Raḥmān b. al-Qāsim b. al-Khālid b. Junādah al-ʿAtqī 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 Ḥāmī Mālik for twenty years, and
continued his teacher's task when he died. There are different opinions on whether Ibn al-Qāsim a mujtahid mufaq or mujtahid muqallid. According to Abū Zayd b. al-Imām, he is a mujtahid muqallid who followed Mālik b. Anas like Muhammad b. al-Hasan al-Shaybānī followed Abū Ḥanīfah in the Ḥanafi school and al-Muṣāfi followed al-Shāfī in the Shāfī school. But, according to Abū Mūṣā ʻImrān al-Mushhālī al-Ǧībāṭī, he is a mujtahid mufaq 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 Muhammad b. ʻAbd al-Salām al-Hawari in Tunis. He died in Cairo in 191H/806M at 63 years of age. See Muhammad b. al-Hasan al-Ǧījāwī, al-Fikr al-Samī, vol.1, pp.516-519; Șīdī Muḥammad al-Mūrī, al-Abhāth al-Samīyah, pp.269-270; al-Shīrāzī, Ṭabaqāt al-Fuqahā, p.155.

IBN QAYYIM- He is Shams al-Dīn Abū ʻAbd Allāh Muḥammad b. Abī Bakr b. Ayyūb b. Sa’d al-Ẓarī al-Qimāshqi 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 usūl. 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-Maʾād fi Ḥady Khayr al-ʿĪbād, al-Ṭuruq al-Hukmiyyah fi al-Siyāsah al-Sharīʿiyah, Ilām al-Muwatiqīn ʻan Rabb al-ʿĀlāmīn, al-Ṭībānī al-Qurān, Kitāb al-Rūḥ, etc. See Muhammad b. al-Hasan al-Ǧījāwī, al-Fikr al-Samī, vol.4, p.436; Șīdī Muḥammad al-Mūrī, al-Abhāth al-Samīyah, pp.271-272; Khayr al-Dīn al-Ziriklī, al-Aṣlām, vol.6, p.56.

IBN QUDĀMAH- He is Abū Muḥammad ʻAbd Allāh b. ʻĀḥmad b. Muḥammad b. Quṭbānah b. Miqādām b. Naṣr b. ʻAbd Allāh b. Ḥudhayfah b. Muḥammad b. Yāʾqūb b. al-Qāsim b. Ibρāhīm b. Ismāʿīl b. Yahlīyā b. Muḥammad b. Sālim b. ʻAbd Allāh ibn Amīr al-Muʿminīn ʿUmar al-Khaṭṭāb, nicknamed Muwaffaq al-Dīn Ibn Quṭbānah al-Jamāʿī al-Maqdisī, born in Shābān 541H/1146M in Jamāʿī, 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-Muqni, ʿUmdat al-Fiqh, al-Kāfī fi al-Fiqh, Rawdat al-Nāẓir fi Usūl al-Fiqh, etc. and more than twenty works of Islamic law, theology, Ḥadīth, Quranic exegesis, biography, legal opinion, tenets of faith and genealogy. He travelled to Baghdad in between 560-561H and lived there four years before returning to Damascus, where he died on Saturday, the day of Ṭūr al-afīr in 620H/1223M. See al-Muqni, pp.5-9; Khayr al-Dīn al-Ziriklī, al-Aṣlām, vol.4, p.67.


IBN RUSHD- He is Abī al-Walīd Muḥammad b. Aḥmad b. Muḥammad b. Aḥmad b. Rushd al-Andalusī al-Malikī al-Qurtubī, known as Ibn Rushd al-Ḥaṭīb al-Dīnī. 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 Averroes, 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-Ḥaṭīb al-Dīnī). He was a well-known Malikī 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 excellent education in fiqh, Ḥadīth, kalām, medicine, Arabic literature and usūl. Some of his well-known teachers are Muḥammad ibn Riziq, Ibn Bashkuwal, Abī Jaʿfar Hārūn al-Talājjī, and Abū Marwān ibn Jurrayl. 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 Niḥayat al-Muqtasid. See Muḥammad b. al-Ḥasan al-Ḥijawi, al-Fikr al-Saʿīdī, vol.4, p.267; Tafsīr Muḥammad al-Murīr, al-Abhāth al-Saʿīdī, pp.330-331; Ibn Farḥūn, al-Dībāj al-Madhhab, pp.284-285.


IBN SHĀS- He is Abū Muḥammad ʿAbd Allāh b. Najm b. Shās al-Jadhāmī al-Saʿīdī al-Faqīḥ al-Malikī, a knowledgeable scholar about the Malikī school and its principles,

**IBN SHUBRUMAH** - He is Abū Shubrumah Abū Allāh b. Shubrumah al-Ḍābī al-Kūfī. He was one of the fuqahā' of tābi‘īn, born in 92H/710M. It was reported by Anas, Abū al-Ṭufayl, al-Sha‘bī, etc. that Ibn Shubrumah was a faqīh as well as brilliant (ṣāqīlan), honest (aḥfīlan), 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-Sha‘bī. Ḥammād b. Zayd describes him as brilliant in fiqh as: "I have never known that there is a kūfīyīn (an inhabitant of Kūfah) cleverer in fiqh than Ibn Shubrumah". He died in 144H/761M. See al-Shīrāzī, \textit{Ṭabaqāt al-Fuqahā'\textit{,}}, p.85; Muḥammad b. al-Ḥasan al-Ḥijawi, \textit{al-Fikr al-Sāmi}, vol.2, pp.482-483.

**IBN SURAYJ** - He is Abū al-ʿAbbās Aḥmad b. ʿUmar b. Surayj, a scholar of the Shāfitī school. Al-Shīrāzī stated in his \textit{Ṭabaqāt}: "He was one of the great Shāfitī jurists (uwamī al-Shāfī iyyīn) and imām of Muslims (a'immat al-Muslimīn), and was nicknamed 'The Bright Fire' (al-bīz al-ashhab)". He served as qaḍī at Shīrāz and surpassed in talent all al-Shāfitī pupils even al-Muzānī. He was an active defender of the Shāfitī 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, Shāfitī doctrines were spread into many countries." His teachers other than al-Anmāṭī are al-Za‘farānī, Abū Dāwud al-Sijistānī, etc. He died in Baghdad on 25 of the Jamādī al-Awwal in 306H/918M or on Monday 25 of the Rabī‘ al-Awwal, and was buried in the court of his house at the Suwajjat Ghalib which is on the west bank of the Tigris, near the suburb of al-Karkh at 57 years of age. See Ibn Khallikān, \textit{Wafayāt al-Ayān}, vol.1, pp.100-102; al-Shīrāzī, \textit{Ṭabaqāt al-Fuqahā'\textit{,}}, p.118; Muḥammad b. al-Ḥasan al-Ḥijawi, \textit{al-Fikr al-Sāmi}, vol.3, pp.155-156.

**IBN TAYMIYYAH** - He is Taqīy al-Dīn Abū al-ʿAbbās Aḥmad b. ʿAbd al-Ḥalīm b. ʿAbd al-Salām ibn Abī Allāh b. al-Khiḍir b. Abī b. Abī 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 \textit{al-ʿAqīdah al-Ḥamāwiyyah} and \textit{al-Wasīṭiyah} 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 \textit{Fatāwā Ibn Taymiyyah}, \textit{al-Qiyās fī al-Sharī‘ī al-Islāmī}, al-Ḥisbah fī al-Islām, etc. See Muḥammad b. al-Ḥasan al-Ḥijawi, \textit{al-Fikr al-Sāmi}, vol.4, pp.433-435; Sīdī Muḥammad al-Murīr, al-Abhāth al-Sāmiyah, p.232.

**IBN AL-UKHUUWAH** - He is ʿDia‘ al-Dīn Muḥammad b. Muḥammad b. Aḥmad al-
Quarshi al-Shafi’i, widely known as Ibn al-Ukhuwwah. He was an Egyptian and a Shafi’i scholar. He wrote a work for the guidance of persons invested with the office of the hisbah or charged with the duty of maintaining public law and order, and the supervision of market dealers and tradesmen. This work was named Ma’ālim al-Qurbah fī Ahkām al-Hisbah, 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, Ma’ālim al-Qurbah (tr. by Reuben Levy), pp.xvi-xvii.

IBN ‘URFAH- He is Abū ‘Abd Allāh Muḥammad b. Muḥammad b. ʿUrfah al-Warghamī al-Tunisī al-Mālikī, born in 716H/1316M. He was a follower of the Mālikī school a muftī and a khaṭṭāb (preacher) at Zaytunīyyah mosque. He was pre-eminent scholar of Mālikī jurisprudence in the area of Africa in his epoch, who wrote several works, among them were Mukhtasar al-Fīqh and al-Hudud 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 ‘UTTAB- He is Abī ‘Abd Allāh Muḥammad b. ‘Uttab al-Qurṭubī, a shaykh of muftīs 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 ‘ulamā’, among them are Ibn al-Fakhkhar, Ibn al-Asbagh al-Qurashi, 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-Abhath al-Samiyah, p.261; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.4, pp.247-248.

‘IMRĀN B. ḤUṢAYN- He is Abī Nujayd ‘Imrān b. Ḥuṣayn b. ‘Ubayd b. Khalaf al-Islāmī al-Khuzā’ī, one of the Companions of the Prophet. He was one of the ‘ulamā’ and fuqahā’ among the Companions and was appointed as a qāḍī in Kufah. He related 130 Ḥadīths from the Prophet, and was sent by ‘Umar b. al-Khaṭṭāb to the people of Baṣra 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 Sa’d, al-Ṭabaqāt al-Kubrā, vol.4, p.287; al-Shīrāzī, Ṭabaqāt al-Fuqahā’ p.33.

‘IZZ AL-DĪN ‘ABD AL-SALĀM- He is Abū Muḥammad ‘Īzz al-Dīn ‘Abd al-Ṣāḥib b. ʿAbd al-Salām b. Abū al-Qāsim b. al-Ḥasan al-Dimashqī al-Sulamī, nicknamed the sultān of scholars (sultān al-ʿulamā’). He was born in Damascus in 577H/1181M. He is a learned person (ʿāliman), piety (warācan), and ascetic (zāhidan), a Shafi’ī scholar and mujtahid. He was educated in Damascus, went to Baghdad in 599H/1202M, and then returned to his native city, where he first taught and gave the Friday sermon at the Zawiyah of al-Ghazālī, and then at the Great Umayyah Mosque. He learned fiqh from Ibn ʿAsākir and usūl from al-Āmidī. He produced a number of brilliant works in Shafi’ī jurisprudence, Quranic exegesis, sufism, government, usūl, though his main and enduring contribution was his masterpiece on Islamic legal principles Qawā'id al-Aḥkām fī

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-Qurʿān, vol.1, p.322.


Khalīl B. Iṣḥāq- He is Abū al-Mawaddah Ǧīyāʾ al-Dīn Khalīl b. Iṣḥāq b. Mūsā b. Shuʿayb, was renowned as al-Jundī, was nicknamed Ǧīyāʾ 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 scholars 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 ʿulamāʾ of Egypt. Khalīl was the author of several works. He composed six volumes of commentators upon Ibn al-Ḥajib, named al-Tawdīḥ. 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-Mudawwānah. But, his work which the most widely circulated and the most revered is the Mukhtaṣār. 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-Hijawī, al-Fikr al-Sāmī, vol.4, pp.287-288; Sīdī Muḥammad al-Muḥirī, al-Abḥāth al-Sāmiyyah, pp.301-302; Mukhtaṣār, pp.3-7.

AL-LAYTH- He is Ābū al-Ḥārithaṯ al-Haṭṭ al-Layth b. Sa'd b. ʿAbd al-Raḥmān al-Fahmiṯ al-Aṣbāḥānī al-Misrī, born in Qalqashandah, a village in Cairo in 94H/712M. He was one of Malik's companions and followed his school of thought. He was a knowledgeable scholar in his era, a faqīḥ, imām and leader of scholars in Cairo. Al-Shaficī said of him: "Al-Layth has more knowledge in fiqh than Malik, but Malik'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 Masaʾil fi al-Figh. He died in Cairo in Shābaḏn 175H/791M on Thursday and was buried on Friday. See Muḥammad b. Abū Ḥasan al-Ḥiǧāwī, al-Fikr al-Sāmī, vol.2, pp.439-440; Ibn Nadīm, al-Fihrist, p.281; Kifāyat al-Akhvār, p.218; al-Shirāzī, Tabaqāt al-Fuqahā', pp.75-76; Ibn Khallikan, Wafayat al-Aʿyan, vol.3, pp.280-281.

MAḤMAṢṢĀNĪ- He is ʿUbār 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-Nazariyyah al-Aʾmam wa al-ʾUṣūd fī al-Sharʿīyah al-Islāmiyyah, Falsafat al-Tashrīʿ fī al-Islām, Muqaddimah fī Ihyaʿ ʿUlūm al-Shariʿah, al-Mujāhidūn fī Haqq, al-Mujtahidūn fī al-Qaḍāʾ, Turāth al-Khulāṣaʾ al-Rāṣidīn fī al-Figh wa al-Qaḍāʾ, al-Awzaʾī wa Tāʾalīmuh al-Qānūniyyah wa al-Insāniyyah, al-Qānūn wa al-ʾĀlaqāt al-Dawlīyyah fī al-Islām, etc. See Falsafat al-Tashrīʿ fī al-Islām, back cover.

MĀLIK B. ANAS- He is Ābū ʿAbd Allāh Mālik b. Anas b. Mālik al-Aṣbāḥī al-Ḥimyarī al-Madanī, born in Medina in 93H/712M. He was known as the Iṯām of Medina, and was renowned for his piety, sincerity, faith, and godfearingness. His piety was such 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 Muwatta', the greatest Ḥadīth collection of its time, nearly every Ḥadīth of which was accepted by al-Bukhārī in his Sahīḥ. Al-Shafiʿī 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 Muwatta' and Risiḥah fī al-Waʿz. He died in Medina in 179H/795M and was buried at Baqī'. See al-Shīrāzī, Tabaqāt al-Fuqahā', pp.53-54; Ṣafīyy al-Dīn al-Khuzrajī, Khulāṣat Tadhīb Tadhīb al-Kamāl, p.366; ʿĪdī


AL-MAWARDĪ- He is Abū al-Ḥasan ʿAlī b. Muḥammad b. Ḥabīb al-Baṣrī al-Baḥdādī 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-Qāʾim b. Amr Allāh and he was one of the foremost Shāfiʿī scholars in his era, and published a number

AL-MAWDUDĪ- He is Sayyid Abūl Acla 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 Jamā‘at Islām, 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, ilm 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.


AL-MUNDHIRĪ- He is Zakīy al-Dīn Abū Muḥammad ‘Abd al-‘Aẓīm b. ‘Abd al-Qawī b. ‘Abd Allāh b. Salāmī 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 Shābān
581H/November 1185M. He was a jurist who attained a profound knowledge of the Qur’an, Hadith, Arabic literature, jurisprudence, and composed a Mu’jam and other important works. He wrote also an abridgement of the imām Muslim’s Ḥadīth, a summary of Ḥadīths published by Abū Dāwūd which was named as Mukhtasar Sunan Abī Dāwūd, and a valuable treatise entitled al-Targhīb wa al-Tarhib. He died in Egypt in 656H/1258M. See Ibn Khallikān, Wafayāt al-Ā’yān, vol. 1, pp. 154-155; Muḥammad b. al-Ḥasan al-Ḥijāwī, al-Fikr al-Sāmī, vol. 4, p. 403.

MUṢṬAFĀ AL-ZARQĀʾ - He is Muṣṭafā b. Āḥmad b. Muḥammad b. ʿUthmān al-Zarqāʾ, born and grew up in a religious family. His father Āḥmad b. Muḥammad b. ʿUthmān al-Zarqāʾ 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-Qawāḍī 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 Shari‘ah, the Jordan University until now. He has written a number of famous books among Muslim scholars, they are: al-Fi‘l al-Ḍārr wa al-Ḍāmān fīth, three volume of al-Madkhal al-Fiqh al-cĀmm, etc.

AL-NAKHAṬI - He is Abī ʿImrān Ibrāhīm b. Yazīd b. Qays al-Aswad b. Umar b. Rabī‘ah b. Ḥāritah b. Sa‘d ibn Mālik b. al-Nakha‘ al-Kūfī, well-known as al-Nakha‘ī 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 usūl al-fiqh and Hadith, as well as pious, godfearing and ascetic. He died in 95H/713M or 96H/714M. See STdT Muhammad al-Murīr, al-Abhath al-Samīyah, p.282; Muḥammad b. al-Ḥasan al-Ḥijāwī, al-Fikr al-Sāmī, vol.2, pp.357-358; al-Shīrāzī, Ṣabaqāt al-Fuqahā‘, p.83.


a part of Damascus in 631H/1233M. He is one of the most famous scholars of the Shāfi‘ī school. A Ḥadīth master, biographer, lexicologist, and šīffī. He went to Damascus with his father in 649H/1251M to study Islamic sciences. He memorized the text of Abū Ḳīq 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 hajj, then visited Medina, and then returned to Damascus, where he assiduously devoted himself to mastering the Islamic sciences. He taught Shāfi‘ī law, Ḥadīth, fundamental jurisprudence, Arabic, and other subjects. He learned from more than twenty-two scholars of his time, including Abū al-Ma‘ānī Ishāq al-Maghribī, Kamāl al-Dīn al-Arbā‘īn, Ḥabīb al-Ra‘īfīn 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 Shāfi‘ī jurisprudence, Ḥadīth, history and legal opinions, among the best known of which are his Minhāj al-Tālibīn wa Ḥudūd al-Mufțīn, which has become a main reference for the Shāfi‘ī school. Others the famous are: Sharḥ al-Ṣahīh al-Muslim, Ṭibb al-Qādīhī, al-Adhkār, al-Arba‘īn, al-Ishā‘ī ʿUlūm al-Ḥadīth, al-Taqīb, al-ʿUmdah fī Taṣḥīh al-Tanbīh, al-ʿIṣāḥ fī al-Manāṣik, al-ʿIṣāḥ fī al-Majmū‘ al-ṣharḥ al-Muḥadhdhab, 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 Nawa, where he became ill at his father's home and died at forty-four years of age on 27 Rajab 676H/1277M at Wednesday night. He was young of age but great in benefit to Islam and Muslims. See Mughnī al-Muhtāj, vol.4, pp.545-547; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Samī‘ī, vol.4, p.406; Sīdī Muḥammad al-Murūrī, al-Abhāth al-Sāmiyyah, pp.324-325; al-Shīrāzī, Tabaqāt al-Fuẓahā‘ī, pp.268-269; Khayr al-Dīn al-Ziriklī, al-A‘lām, vol.8, p.149.

AL-QĀDĪ- He is Muḥammad b. al-Ḥusayn b. Muḥammad b. Khalaf b. Aḥmad b. al-Farrā‘ al-Qādī al-Ḥanbalī, widely known as Abū Ya‘lā. 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 qādī in his epoch and produced reputable formal legal opinions. He wrote a number of outstanding works, among them are: al-ʿUkāūl al-Sulṭānīyyah, Abkūm al-ʿUqūn, ʿIṣāḥ al-Baydā‘īn, Masā’il al-Imān, al-Mu‘tāmad, al-Radd al-ʿAshīrīyyah, Kitāb al-Ṭibb, etc., and died in Ramaḍān 458H/December 1065M at 78 years of age. See Abū Ya‘lā, al-ʿUkāūl al-Sulṭānīyyah, pp.15-16.

AL-QADŪRĪ- He is Abū al-Ḥasan Aḥmad al-Qadūrī, a great Ḥanafī scholar in the fifth century. He was the author of Mukhtasār, renowned as Mukhtasār al-Qadūrī among Muslim scholars. It is in fact a commentary of Mukhtasār al-Karkhī. He

AL-QARAFĪ- He is Shihāb al-Dīn Abū ʿAbdāb Aḥmad ibn ʿAbd al-Raḥmān al-Ṣuhnāṭī al-Bahnaṣī al-Miṣrī, widely known as al-Qarāfī. He was one of the famous Mālikī scholars and was knowledgeable in Islamic sciences: fiqh, usūl and also in logical sciences (al-ulūm al-usliyyah). A Shāfiʿī jurist ʿĪzz al-Dīn ʿAbd 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-Dhakhrah, al-Furiğ, Sharḥ al-Tahdhīb, al-Tanqih fī al-Uṣūl, Sharḥ al-Jallāb fī al-Fiqh, and Sharḥ Mahṣūl al-Rāzī. See Muḥammad b. al-Ḥasan al-Ḥijawi, al-Fikr al-Ṣāmi, vol.4, p.273; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Ṣāmiyyah, pp.319-320.

AL-RAMLĪ- He is Shams al-Dīn Muḥammad b. Abī al-ʿAbdāb Aḥmad b. Ḥamzah b. Shihāb al-Dīn al-Ramlī al-Miṣrī al-Anṣārī, renowned as "al-Shāfiʿī al-ṣaghīr" (the junior al-Shāfiʿī). He was recognized as reformer (muḥaddid) 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 Nihayat al-Muhtaj ila Sharḥ al-Minhaj, Sharḥ al-Bahjah, ʿUmdat 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-Ḥijawi, al-Fikr al-Ṣāmi, vol.4, pp.420-421.


SAḤNŪN- He is Abū Saʿīd ʿAbd al-Salām b. Sāʿd 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, ʿAlī 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-riʿāsah al-ilmiyyah) of the West and head of the judiciary in Qayrawān. He produced a very valuable work in the Maliki school, well-known as al-Mudawwanah al-Kubra, 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-Ḥijawi, al-Fikr al-Ṣāmi, vol.3, pp.117-118; Sīdī Muḥammad al-Murīr, al-Abḥāth al-Ṣāmiyyah, p.310; al-Shīrāzī, Ṭabaqāt al-Fuqahā', 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 Başrah. Ibn ʿAbd al-Barr stated: "He is one of the ḥuffāz (of Ḥadīths)". He died in Başrah, but according to another opinion, he died in Kūfah in 58H/677M or 59H/678M. See Saftī al-Dīn al-Khuzrajī, Khulāsat Tadhhīb Tadhīb al-Kamāl, p.156.

AL-SARAKHSĪ- He is Shams al-A‘immah Abī Bakr Muḥammad b. ʿAlī b. Sahl al-Sarakhsī al-Ḥanāfī. He was a great Ḥanafī scholar, mujtahid, judge, and the author of the encyclopaedia al-Mabsūt (the Extensive), whose thirty volumes he dictated to students from an underground cell where he was imprisoned in Uzjand near Fergana (in present day Uzbek) for advising a local chief in the matter of religion. This thirty volumes of al-Mabsūt 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 ʿUṣūl al-Sarakhsī. He died in Fergana in 483H/1090M. See Khayr al-Dīn al-Ziriklī, al-Aclam, vol.5, p.315; Muḥammad b. al-Ḥasan al-Ijāwī, al-Fikr al-Samī, vol.2, p.358; Kifāyat al-Akhyār, p. 78.

AL-SHĀFIĪ- He is Abū ʿAmrū ʿĀmir b. Sharāḥīl b. ʿAbd al-Shābīl al-Ḥimyarī al-Kūfī, widely known as al-Shāfīʿī, born in 19H/640M. He was one of the "ulamāʾ al-tābitīn and was one of the famous scholars of Ḥadīth in Kūfah in his time. Al-Zuhrī states: "There are four scholars: Saʿīd b. al-Muḥayyab in Madīnah, ʿĀmir al-Shābīl in Kūfah, al-Ḥasan b. Abī al-Ḥasan in Başrah, and Makhlūl in Shām". He was a knowledgeable scholar. Abū al-Ḥusayn describes him: "I have never seen someone who is cleverer than al-Shābīl". He died in 103H/721M or 104H/722M or 107H/725M or 110H/728M. See al-Shaybānī, Tabaqāt al-Fuqahāʿ, p.82; Muḥammad b. al-Ḥasan al-Ḥijāwī, al-Fikr al-Sāmī, vol.2, p.358; Kifāyat al-Akhyār, p.78.

AL-SHAFICĪ- He is Abū ʿAbd Allāh Muḥammad b. Idrīs b. al-Sabbāb b. ʿUbayd b. ʿAbd Yāzīd b. Ḥāshim b. al-Muṭṭalib b. ʿAbd al-Manāf al-Qurashi b. al-Makkī b. al-Shāfīʿī b. al-Shāfīʿī b. al-Sabbāī b. al-Abd b. al-Muṭṭalib b. ʿAbd al-Mannāf al-Qurashi b. al-Makkī b. al-Shāfīʿī b. Al-Shaficī. 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 circumstances of extreme poverty and want. He memorized the Qurʾān at the age of seven, the Musāwwaʿ 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-Shāfīʿī produced his first school of jurisprudence (al-madhhab al-qadīm). And then al-Shāfīʿī 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-Aʿlām, vol.6, p.26; al-Shāfīʿī, al-Cabaqat al-Kubrā, vol.1, pp.50-52; Stīfī Muḥammad al-Murīr, al-Abḥāth
AL-SHAYBANI - He is Abū ʿAbd Allāh Muḥammad b. al-Ḥasan al-Farqad al-Shaybānī, born in Wasīṭ, ʿIrāq in 132H/749M. The word "al-Shaybānī" was attributed to a famous tribal group "Shaybān". He was grown 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 Masʿarī, Sufyān al-Thawrī, Mālik b. Dīnār, Mālik b. Anas, al-Awzāʾī, Rabīʿah, 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 Qurān 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-Jāmiʿ al-Saghīr, al-Jāmiʿ al-Kabīr, al-Amāl, Kitāb al-Asl known as al-Mabsūṭ, al-Siyar al-Kabīr, al-Athar, al-Hujjah or al-Hujaj, al-Muwatta', etc. See al-Jāmiʿ al-Saghīr, p.34; al-Shīrāzī, Tabagat al-Fugaha', p.142; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmiyah, al-Fikr al-Samī, al-Fikr al-Samī, vol.2, pp.512-514; Sīdī Muḥammad al-Murīd, al-Abhāth al-Samiyā, p.314; Khayr al-Dīn al-Ziriklī, al-Aghādīr, vol.6, p.80.

AL-SHIBRAMALSI - He is Abī al-Qiyāra Niʿr al-Dīn abī t al-Shibramalṣī al-Qāhirī. His most famous work is Ḥāshiyyah, a commentary of the work of al-Nawawī's Minhāj al-Talibīn wa cumdat al-Muftīn. His Ḥāshiyyah has been printed with Nihayat al-Muhtaj written by al-Ramlī and Ḥāshiyyah written by al-Maghribī al-Rashīdī and published in eight volumes. He died in 1087H/1676M.

AL-SHIRAZI - He is Ibrāhīm b. ʿAlī b. Yūsuf al-Fayrūzabādī al-Shīrāzī, known by the surname of Abū ʿĪṣāq, nicknamed as Jamāl al-Dīn, widely known as Abū ʿĪṣāq al-Shīrāzī, born in Fayrūzabād, Persia in 393H/1003M. He is one of the most popular scholars in the Shāfiʿī school, a teacher and debater. He studied in Shīrāz and Baṣrah before coming to Baghdād. In Shīrāz, he learned fiqh from Abū ʿAbd Allāh al-Bayḍāwī (d. 424H/1032M), Abī Aḥmad ʿAbd al-Wahhāb b. Muḥammad b. Rāmīn al-Baghdaḍī (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, usūl, Ḥadīth, etc. from a number of scholars there, and he displayed his genius in Islamic jurisprudence, becoming the mujtahid of the Islamic community of his time. He was also appointed as the Shaykh of the al-Nizāmiyyah Academy which the waṭr Niẓām al-Mulk built in Baghdād to accommodate Abū ʿĪṣāq's students. He wrote many works, among the most famous of them is his al-Muḥaddithab fī Fiqh al-Imām al-Shāfiʿī which took him fourteen years (from 455H-469H) to produce, and which has been commented on by al-Nawawī and known as al-Majmūʿ Sharḥ al-Muḥaddithab. Others are al-Tanbūḥ fī al-Fiqh, al-Ṭabṣīrah, al-Nukāt fī al-Khilāf, al-Lumaʾ wa Sharhu, al-Maʿānīh, al-Mulakhhis al-Talḥīhīs, Tabaqat al-Fugahāʾ, Nash Ahl al-ʿIlm, etc. He died at Wednesday night on 12 Jamādī al-Ākhir 476H/1083M at 83 years of age, and Abū al-Wafāʾ b. ʿAqīl al-Ḥanbalī managed his body. See al-Muḥaddithab, vol.1, pp.3-11; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-
SHURAYH- 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 ʿUmar 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-Shaḥbī 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-ṬAHĀWĪ- He is Abī Jaʿfar Ālīmad b. Muḥammad b. Sāliḥ b. al-Ẓāhir b. al-Kindī, born in 238M/852M or 229H/843M. Al-Ṭahāwī means native of Ṭahā, which is a town in Upper Egypt and al-Ẓāhir 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 Shāfī‘ī school, and taken lessons from al-Muzanī- a student of al-Shāfī‘ī. 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 Ikhtilaf al-Ulama’, Ahkām al-Qur’ān, Misālī al-Āthar, al-Shurūṭ, etc. He died in Cairo on Thursday 1st of Dhū al-Qa‘dah 321H/933M and was buried in the Qarafah where his tomb can still be seen. See Ibn Khallikān, Wafayāt al-Ayyān, 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.


AL-THAWRĪ- He is Abī ʿAbd Allāh Sufyān b. Saʿīd 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 Ḥishāq al-Sabī‘ī, al-Aʿmash, etc., the most important of whom were those who transmitted Ḥadīths from Companions of the Prophet like Abū Hurayrah, Jarīr b. ʿAbd Allāh, Ibn ʿAbbās, and others. A number of principal Imāms took Ḥadīths from him, such as Jaʿfar al-Ṣadiq, Abū Ḥanīfah, al-Awzā‘ī, Shufbah, Ibn Jurayj, Mālik and others. He died in 161H/777M in Baqraḥ. See Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fikr al-Sāmī, vol.2, pp.438-439; Khayr al-Dīn al-Ziriklī, al-ʿĀlām, vol.3, pp.104-105;
`UMAR B. AL-KHATTÄB- He is Amīr al-Mu’mīnīn Abū Ḥafṣ `Umar b. al-Khaṭṭāb ibn Nufayl al-Qurashi al-`Adawī, 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 Fayruz Abū Luʿluah `Abd al-Mughīrah b. Shu′bah while performing the dawn prayer and died three nights later in 23H/644M. See Sīdī Muḥammad al-Murīn, al-`Abjāth al-Sāmiyāh, p.218; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fīr al-Sāmī, vol.1, pp.237-241; al-Shīrāzī, Ṭabaqāt al-Fuqahā', pp.19-21; Khayr al-Dīn al-Ziriklī, al-`Aṣlām, vol.5, pp.45-46.

WAHBĀH- He is Wahbah al-Zu`aylī, an outstanding contemporary `ulamā’ in this era and the author of a number of books on various subjects of the Islamic sciences including fiqh, usūl al-fiqh, Quranic exegesis, etc. He is currently a lecturer at the Faculty of Sharīʿah, 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-Fīqh al-Islāmī wa Adillatuh, Nazariyyat al-Dāmān, Nazariyyat al-Dārūrah al-Shārīyyah, al-Wāsīt fī Uṣūl al-Fiqh, al-Nuṣūṣ al-Fiqhiyyah al-Mukhtārah, Niẓām al-Islām, al-`Alaqāt al-Dawliyyah fī al-Islām, Tafsīr al-Munīr, etc.

YAḤYĀ B. MAʕĪN- He is Abū Zakariyyā Yaḥyā b. Maʕīn b. ʿAwn al-Murṭāfī al-Baghdādī al-Ḥāfīẓ, a native of Baghdad and a celebrated ḥāfīz. 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 Dāwūd, and others. Al-Jamīd b. Ḥanbal declared: "Every Ḥadīth which is not known to Yaḥyā b. Maʕīn is not a Ḥadīth". Ibn Maʕīn heard Ḥadīths delivered by Abū Allāḥ b. al-Mubārak, Sufyān b. ʿUaynān 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 Bāqī 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-ʿĀyān, vol.4, pp.24-27; Muḥammad b. al-Ḥasan al-Ḥijawī, al-Fīr al-Sāmī, vol.3, pp.82-83.

AL-ZAYLĀʾī- He is Fakhr al-Dīn ʿUthmān b. ʿAlī al-Zaylāʾī al-Ḥanafi, 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-Ḥaqāʾiq Sharḥ Kanz al-Daqāʾiq and Barakat al-Kalām ʿalā Aḥādīth al-Aḥkām. See Khayr al-Dīn al-Ziriklī, al-`Aṣlām, vol.4, p.273.
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