1. INTRODUCTION TO THE GENERAL PRINCIPLES

OF ISLAMIC LAW OF TORT.

BY

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A Thesis submitted to the Postgraduate School,
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Department of Islamic Law
Faculty of Law.

DECLARATION.

I hereby declare that this work is original. It has not been presented or published anywhere at any time by anybody, Institution or Organization. All published and unpublished works cited have been acknowledged.

ABUBAKAR TSOHO GETSO **DATE**.....20/11/2021.....

CERTIFICATION.

The thesis entitled "INTRODUCTION TO THE GENERAL PRINCIPLES OF ISLAMIC LAW OF TORT" By ABUBAKAR TSOHO GETSO meets regulations governing the award of the Degree of MASTER OF LAWS of AHMADU BELLO UNIVERSITY, and is approved for its contribution to knowledge ad literary presentation.

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DEDICATION

To my late Father, and my Mother who source my education to the present level.

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Glory to God Most High, Full of Grace and Mercy; He created All, including man. To man He gave Special place in His Creation. He honoured man to be His vicegerent on earth. And to that end, induced him with understanding, purified his affections, and gave him spiritual insight; so that man should understand nature, signs, And glorify Him in Truth, reverence and unity.

Peace and blessing of Allah be upon His Messenger Muhammad (S.A.W.) and his households. Amin.

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ABSTRACT

The Teaching of Islamic Law of Tort in most of our Law Faculties is often hindered by certain difficulties of a technical nature, chiefly to do with the availability of materials in English Language. This is for the simple reason that the main sources of the subject are in Arabic language. Islamic Law of Tort therefore does not receive proper attention in terms of research compared with other aspects of Shariah.

Thus, the choice of this topic i.e. "Introduction to the General Principles of Islamic Law of Tort" is to provide law students, law Teachers, Practicing Lawyers, Area Court Judges and all those persons who have no adequate access to the original sources of Shariah, with a brief treatise giving a lucid, comprehensive and all-embracing view of Islam vis-a-vis its view point to tortuous liability.

The work is divided into six chapters. In the first Chapter we discussed the historical development of Islamic Law of Tort, and this was done by dividing it into three parts i.e. part one dealt with what was happening during the pre-Islamic Arabian Society; the second part talked about the Islamic Era and part three touched on the legal basis or rather authorities of Islamic Tort from the Qur'an, hadith and the views of Muslim Jurists.

Chapter two is an over view of Tort in Islamic Law. Here it discussed limit or rather various issues that fall within the ambit of Tort. This was done by classifying offence into two, i.e. those committed to the person of human being and those committed against his property. We also discussed the right of Allah and the right of individual in respect of some offences committed by a tortfeasor. And at the end of the chapter we

discussed conditions for Damanah or to put it differently, those conditions that must be satisfied before a tortfeasor could be punished.

In chapter three, we discussed vicarious liability and will be done by starting with a brief historical background of the law right from the Jahiliyyah period. We then discussed about authorities for and against the Law. We then end the discussion of this chapter by discussing those relationships and conditions that the law recognised before holding a person responsible for the act of another.

In chapter four, we discussed the liability for animals. Here we discussed about those torts committed by animals against human being and those committed by human beings against the animals. We also discussed the rights and responsibilities of the owners, riders or keepers of animals.

In chapter five, we discussed about the law regarding dangerous premises and chattels. Here we had a bird-eye view on what is attainable under the English Law. We then discussed about the torts of inanimate objects whether the owner of that objects is liable for any injury sustained by another from them. We then discussed the liability of the owners of defective premises and the conditions to be satisfied before holding him liable. We also discussed about the nature and liability for dangerous chattels or weapons and other moveable objects. We then concluded this chapter with a brief discussion on cases of liability without fault. And this emphasised on cases of inevitable accidents.

Finally, in the concluding chapter, i.e. chapter six, a summary of the whole research work was made, observations concerning the application of the law and the perception of the majority of Muslim Ummah to the law of tort generally, and

suggestions or recommendations was made on how to improve the application of the law.

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CHAPTER I

1. INTRODUCTIONS; The Historical Development of Islamic Law of Tort.

1.1 Pre-Islamic Era.

The Arabs of the Jahiliyyah period had no organised Form of Government. At that stage, it was the right of the person wronged, if capable, to avenge (from the male-factor) with a similar or more severe injury. Where the injured person was incapable of vengeance, the kin of the injured person might avenge the wrong not necessarily on the person of the offender but on his belongings too. It might be life or lives for life, because all lives were not of equal value to them. These attitudes used to result in blood-feuds among clans and tribes that span for many generations[1].

The Arabs were divided into tribes, sub-tribes and families. Each tribe elected its own chief. The chief won the confidence and respect of his fellow tribesmen by virtue of his nobility of birth, age and reputation for wisdom. The chief was the representative of his tribe in its relation with other tribes. If a wrong is committed against a member of a tribe, it is termed to be a wrong committed against the whole tribe, and the Kinsmen of the culprit are duty bound to surrender him to the chief of the tribe for punishment. It sometimes happened that the culprit belongs to a powerful family, and his Kinsmen would refuse to surrender him to the chief of the tribe for punishment. This would lead that family to break away and join another tribe and become their sworn allies. If the culprit

escaped alive and took refuge with a rival tribe he would be called "Dankhil" i.e. a person who has entered into alliance with another tribe.[2]

This period is termed or rather known as the Ayyam Al-Arab (the days of the Arabians). It was so described as such because intertribal hostilities were generally arising from disputes over cattle, posture-lands or springs. They afforded ample opportunity for plundering and raiding, for the manifestation of single-handled deeds of heroism by the champions of the contending tribes and for the exchange of vitriolic satires on the part of the poets, the spokesmen of the warring parties.[3]

The course of events on each of these "days", follow somewhat the same pattern. At first only a few men come to blows with one another in consequence of some border disputes or personal insult. The quarrel of the few then becomes the business of the whole. Peace is finally restored by the intervention of some neutral party. The tribe with the fewer casualties pays its adversary blood money for the surplus of dead. Popular, memory keeps the recollection of the heroes alive for centuries to come.[4]

Such was the case of the day of Bu'ath (War), fought between the two related tribes of a-madinah, the Aws and the khazaraj, some years before the migration of the holy Prophet (S.A.W.) and his followers to that town. The days of al-fijar (transgression), so called because they fell on the holy months during which fighting was prohibited, were fought between Qurraysh, and their allies the Kinanah on one side, and the Hawazin on the other.[5]

One of the earliest and most famous war was the one fought between banu-Bakar and their kinsmen the banu-Taghlib in north-eastern Arabia. The conflict arose over nothing more than a she camel, the property of an old woman of Bakar named Basus, which had been wounded by a Taghlib chief. The war was named after the name of the said she-camel. This war was said to have lasted for forty years with reciprocal raiding and plundering while its flames were funned by poetical exhortations.[6]

The main form of punishment, during this period, was retaliation or payment of blood money. The disputes were resolved by proofs, and oaths, which are the main important methods of procedural settlement of claims. Often, the parties resorted to arbitration by a diviner whose decision was abided to.[7]

The doctrine of retaliation depends on the relative position of the family of the parties. If a member of an inferior tribe killed a member of a nobbler tribe, the latter would exact the blood of two men in lieu of one, of a male in lieu of a female and of a freeman in the place of a slave.[8]

Other forms of punishments that prevailed among the jahiliyyah Arabs is cutting off the right hand of the thief. And among the Jews of Medinah an adulterer used to be stoned to death if he was poor, but sometimes they punished the adulterer, rich or poor, by blackening his face and flogging him.[9] Some of these forms of punishments were reaffirmed by the Shariah but with many modifications. For instance the punishment of amputation of a thief's hand, rich or poor, without any distinction. And in the case of adultery, it is only a Muhsin

(who tested marriage life) that is stoned to death. For a person who tested no marriage life, one hundred lashes are inflected on him.

All the intertribal hostilities of plundering and raiding were brought to an end with the introduction of an entirely diffiferent new life order. This brings us to another period known as:

1:2 The Islamic Era.

Allah (S.W.T.)does not wish man to be lost in skeptism, to be corrupted by injustice, alienation and ethnocentrism. On the contrary, He wishes him to realise universal brotherhood through justice, truth, dignity and mercy; to restore to him his lost poise of equilibrium; to guide him towards peace well being and happiness.[10]

To put it differently, Islam did introduce to mankind the issue of equality, brotherhood and justice between nations, tribes and individuals. Differences of tribe, nation and what have you matters not for we all descended from the same root. I.e. from same single soul – Adam. Says Allah in this regard:

> "O mankind! We created you from a
> Single (pair) of a male and a female,
> And made you into nations and tribes,
> That ye may know each other (Not ye
> May despise (each other)....."[11]

Abdullah Yusuf Ali commenting on this verse says:

> "This is addressed to all mankind and
> not to the Muslim brotherhood, though
> it is understood that in a perfected

world the two would be synonymous. As it is, mankind is descended from one pair of parents. Their tribes, races and nations are convenient labels by which we may know certain differing characteristics. Before God they are all one, and he gets most honour who is most righteous."[12]

In another verse the Almighty Allah puts its thus:

"O Mankind! Reverence your Guardian Lord, who created you from a single person, created, of like nature, His mate, and from them twin scattered (like seeds) countless men and women.."[13]

With regard to the issue of brotherhood and loving one another, the Almighty Allah says:

"The Believers are but A single Brotherhood: So make peace and reconciliation between Two (contending) brothers; And fear God, that ye may receive mercy."[14]

The enforcement of the Muslim brotherhood is the greatest social ideal of Islam. On it was based the Prophet's sermon at his last pilgrimage, and Islam cannot be completely realised until this ideal is realised."[15]

Yet in another verse the Almighty God says:

God commands justice, the doing of the Good, and liberality to Kith and kin, and He Forbids All shameful deeds, and injustice And rebellion: He instructs

you, that ye may receive admonition."[16]

Justice is a comprehensive term, and may include all the virtues of cold philosophy. But religion asks for something warmer and more human, the doing of good deeds even where perhaps they are not strictly demanded by justice, such as returning good for ill, or obliging those who in worldly language" have no claim" on you; and the fulfilling of the claims of those whose claims are recognised in social life. Similarly the opposites are to be avoided: everything that is recognised as shameful, and everything that is really unjust, and any inward rebellion against God's law or our own conscience in its most sensitive form.[17]

The prophet (S.A.W.) in a numerous traditions did emphasise on the issue of equality and brotherhood. He says in one tradition that:

"All Muslims are equal like the
teeth of a Comb. There is no
superiority between Arab and
non-Arab, you are all from
Adam and Adam is from a clay."

This hadith, like the earlier on quoted verses, has done away with the question of apatheid on ground of differences of tribe, race and what have you. This is for the simple reason that we have the same root i.e. Adam. The prophet (S.A.W.) therefore, did in more strong terms, put it thus:

"He is not amongst us who fought (war) for tribalism, and He who is killed for tribalism. The Muslims should; therefore, be very cautious about the Jewish

tactics of divide and rule, otherwise we will be rendering a free service to the jaws and their allies.

One other tradition the mention of which is of utmost importance in this regard is that in which the prophet (S.A.W) compared the relationship of Muslims to one another with building. 1 le sys:

> "In relation to one another, the
> Muslims are like a building: every
>
> Unit reinforces and is reinforced by all others."

These values of the Shariah are indeed the only ones capable of bringing cohesion between the mankind and saving the humanity from its certain collapse.

The Jews of Medinah were so much disturbed and scared with the call of the prophet (S.A.W.) and more especially when the two most important tribes of Medinah, who were at war with each other for a long time, accepted Islam and as such got united. These two tribes were known as Aws and Khazaraj.

*

The Jews and Christians of Arabia did not fold their arms, in the contrary they tried to see that they, at all cost, break the unity of the Muslim so as to weaken their strength; because the more the muslims become strong the more weak other creeds become. They used to spend sleepless nights in their Dar-al-nadwa (house of assembly) discussing and planning how to over come and bring to an end the light of Islam from Arabia. But as they plan, God plans and He is the best planner.

The Jews in their day-in-day-out effort did one time succeed in causing a crack between the said two united tribes (Aws and KhazaraJ). But Allah (S.W.T) in His mercy saves the Muslims from going astray.

Narrated Abu Umar al-Askari who said that Muhammad bn-Hussaini al-Hadad narrated that Muhammad lbn Yahya Ibn Khalid narrated to him that Ishaq Ibn Ibraheem narrated to him that Mu'mil Ibn. Ismail narrated to him that Humad lbn Zaid reported that Ayuba reported from the authority of Akramah who said:

"There existed, during jahiliyyah, war between the tribes of Aws and Khazaraj. With the coming of Islam, they accepted Islam and reconciled their differences and Allah (S.W.T.) joined their hearts and became brethren. One day a jew saw the members of Aws and Khazaraj families sitting under one shade. The jew went and sat with them and sang a song that was sang by one poet at their longest and most bloody war of Buath. A member of the Aws tribe stood up and said that "but our poet said so and so.'" And another member from the Khazaraj also stood up and said "no our poet said so and so". Everyone was claiming that they defeated the other and as such were the victorious over the other. The two arguing members of Aws and Khazaraj then said let us go back to the battlefront and see who will defeat the other. Then and there, they gathered their tribesmen, took their weapons and went outside Madinah and started killing one another. When the news of the unfortunate incidence reached the prophet (S.A.W.), He hastens to the scene of the incidence. It was on his way that Allah the Almighty revealed to him some verses of the holy Qur'an.

One of these verses reads thus:

"O ye who believe! If you listen
To a faction among the people of
The Book, they would (indeed)
Render you apostates after ye have

Believed!" [19]

The Almighty God continues by saying:

"Any how would ye Deny faith
while unto you Are rehearsed the
signs of God, and among you lives
the Apostle? Whoever holds firmly to
God will be shown a way that is straight."[20]

Says Allah (S.W.T.) in another verse:

"O ye who believe! Fear God as He
should be feared, and die not except in
a state of I slam."[21]

The earlier on quoted hadith to the effect that, he who fights or was killed for the sake of tribalism is not amongst us, explains the above verse. The phrase that "and die not except in a state of Islam," shows that a Muslim has, at any rate, no course to fight except for the course of Islam. And differences of tribe, race and what have you, are not within the meaning of the words 'course of Islam".

The Almighty Allah still continues by saying:

"And hold fast, All together, by the
rope which God (stretches out for you),
and be not divided Among your selves;
And remember with gratitude God's
Favour on you for ye were enemies And
He joined your hearts in love, so that by
His Grace, Ye became brethren, And
Ye were on the brink of the pit of fire,
And He saved you from it. Thus doth God
make His signs clear to you: that ye may be
guided."[22]

Commenting on this verse, Abdullah Yusuf Ali, the author of,

Translation and commentary of the Holy Qur'an has this to say:

"Yathrib was torn with civil and tribal
feuds and dissensions before the Apostle
of God set his sacred feet on its soil.
After that, it became the city of the
Prophet, Medinah, an unmatched
Brotherhood, and the pivot of
Islam. This poor quarrelsome world
is a larger Yathrib:- can we establish the
sacred feet on its soil and make
it a new larger Medinah?"[23]

Still, in another verse, Allah (S.W.I.) says:

"Let them arise out of you a band of
people inviting to all that is good,
Enjoining what is right, and
Forbidding what is wrong:
They are the ones to attain Felicity."

The ideal Muslim community is happy, untroubled by conflicts or doubts, sure of itself, strong, united and prosperous; because it invites to all that is good; enjoins the right; and forbids the wrong But alas, the contrary of all the ideals mentioned above is the case in our present day throughout the Muslim world. For there is no happiness, there is trouble and conflicts among us, we are not sure of ourselves, no strength, no unity and above all we are backward. In other words we are in a state of neither here nor hereafter.

Then the Almighty concluded by saying:

> "Be not like those who are divided amongst themselves And fall into disputations after receiving clear signs for them is a dreadful penalty."[26]

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It was reported that when the prophet (S.A.W.) arrived at the scene of the incidence (war) and recited the above quoted verses to them (Aws and Khazaraj) they all dropped their weapons and listened to Him. After finishing the recitation, they all came back to their senses, started weaping regretting for what they did, and at last they embraced one another. And this brought to an end of the conflict.[27]

From the initial stage. Islamic legislation has differentiated between those misdeeds committed against individual members of the public and those committed against the public when issues of liability are considered. In the case where public interests are affected or there is a mixture of both public and private rights but that of public are more preponderant, these rights or interests are

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attributed to Allah, the most exalted and punished by the state. But where individual's rights or interests are hurt they are designated as private in the sense that punishment will depend on the final say of the individual wronged.[28 <a)]

Unlike those cases that pertain the right or interest of n individual in which the individual concerned has the right of either demanding Qisas (retaliation), diyyah (blood money) or remitting the wrong done to him, in all cases that pertain to public right or interests, the Imam or Qadhi has no right of fore giving the wrongdoer or substituting the prescribed punishment with a lesser one. In the contrary he (Imam or Qadhi) should decide the case and inflict the prescribed punishment when the case, is proved beyond reasonable doubt. He should not inflict the said punishment when there is any shadow of doubt in the case. This is in line with the prophetic tradition, which says:

"Set aside 1 Iudud (prescribed) punishments when there is doubt.'[12 (b)]

If, for instance, a thief is caught and brought before the Qadhi, neither the Qadhi nor the owner of the stolen property can, even after he has recovered his stolen property, forgive and free the thief from the hadd punishment of amputation. For recovering his property is his own right while the punishment of amputation of the thief s hand is a public right ordained by Allah - The law-Give,"'

The prophet (S.A.W.), when confronted by some people through Usamat bn Zaid (R.A), to forgive a woman from a noble family who committed theft, replied thus:

"What destroyed those before you is that if a poor person steals they inflict the hadd on him but if it is a rich or noble person they leave him. By Allah, in whose hand the life of Muhammad is, even if it is Fatimat the daughter of Muhammad that steals I shall cut off her hand."[30] This indicates to us, how justice is supposed to be applied to everybody regardless of his personality, position and what have you.

In cases that affect the individual's right or interest as pointed earlier, the person wronged can decide to demand Qisas or to reconcile with the wrongdoer and accept compensation in the form of diyyah, Arsh (an amount less than the complete diyyah - it can be *Vz,* 1/3 or *lA* e.t.c. depending on the degree of the injury inflicted) or hukumat al-Adl (also an amount of compensation normally fixed by the judge as he deems fit) or even to remit it. If the plaintiff so chooses to demand for Qisas, he can not take the law into his hand and inflict the same injury or harm on the tort-feasor, in the contrary it is the state that will do it on his behalf and on behalf of the whole Muslim community. The Almighty Allah in this regard puts it thus:

> "....And if anyone is slain wrongfully,
> we have given his heir Authority (to demand
> Qisas or to forgive): but let him not exceed
> bounds in the matter of taking life; for he is
> helped (by the law)."[31]

Having said the above, we will now proceed to discuss the authorities of the law of Tort under the Shariah, and this is termed as:

1:3 The Legal Basis of Damanah.

The Shariah, did explain, in details the way and manner of punishing the culprits or to put it differently assisting the injured person to get justice. There are so many authorities both in the Qur'an and the Sunnah of the prophet (S.A.W.) in this respect. Some of these authorities are as follows:-

Allah the Almighty in the holy Qur'an says:

> "We ordained therein for them: Life
> for life, eye for eye, Nose for noise,
> ear for ear, Tooth for tooth and wounds
> Equal for equal....."[32]

The retaliation is prescribed in three places in the pentateu, viz, Exod, xxi 23-25; Leviticus xxiv 18-21, and Deut, xix, 21. The wording in the three quotations is different, but in none of them is found the additional rider for mercy, as here. Note that in Matt. V.38, Jesus quotes the old law "eye for eye" e.t.c, and modifies it in the direction of forgiveness, but the Qur'anic injunction is more practical. This appeal for mercy as between man and man in the spiritual world. Even where the injured one forgives, the state or Ruler is competent to take such action as is necessary for the preservation of law and order in Society. For the crime has a bearing that goes beyond the interest of the person injured: the community is affected.[33]

The community is said to be so affected because the Almighty Allah in another verse puts it thus:

> "On that account: We ordained for the
> Children of Israel that if anyone slew
> A person – unless it be for murder or
> for spreading mischief in the Land –
> It would be as if He slew the whole
> people....."[34]

To kill or seek to kill an individual because he represents an ideal is to kill all who uphold the Ideal. On the other hand, to save an individual life in the same circumstances is to save a whole community.[35]

Allah the most high, in another verse says:

> "O ye who believe,! The law of
> equality is prescribed to you in cases
> of murder: The free for the free, The
> slave for the slave, the woman for the woman.
> But if any remission is made by the brother
> Of the slain, then grant any reasonable
> demand, And a mercy from your Lord.
> After this whoever exceeds the limits
> shall be in grave penalty. In the law
> of equality there is (saving of) life to you.
> O ye men of understanding, that ye may
> Restrain yourselves."[36]

Sha'abi said that this verse was revealed, when there existed a conflict between two tribes in Arabia; one superior to the other. The superior tribe said that they would kill, from the imperior tribe, a free for killing their slave, a man for killing their woman. So this verse was revealed.[37]

Note first that this verse and the next make it clear that Islam has so much mitigated the horrors of the pre-Islamic custom of retaliation. In order to meet the strict claims of justice, equality is prescribed, with a strong recommendation for mercy and forgiveness. To translate Qisas, therefore, by retaliation, is, I think, incorrect. The Latin legal term Lex Taliesin may come near it, but even that is modified here. In any case it is best to avoid technical terms for things that are very different. "Retaliation" in English has a wider meaning, equivalent almost to returning evil for evil; and would more Fitly apply to the blood feuds of the days of ignorance. Islam says: "If you must take a life for a life, at least there should be some measure of equality in it; the killing of the slave of a tribe should not involve a blood feud where many free men would be killed; but the law of mercy; where it can be obtained by consent with reasonable compensation, would be better."[38]

Our law of equality only takes account of three conditions in civil society; free for free, slave for slave, woman for woman. Among free men or women, all are equal. You cannot ask that because a wealthy, or high born, or influential man is killed, his life is equal to two or three lives among the poor or the lowly. Nor, in cases of murder, can you go into the value or abilities of a slave. A woman is mentioned separately because her position as a mother or an economic worker is different. She does not form a third class, but a division in the other two classes. The life having been lost, do not waste many lives in retaliation: Let the law take one life under strictly prescribed conditions, and shut the door to private

vengeance or tribal retaliation. But if the aggrieved party consents (and this condition of consent is laid down to prevent worse evils), forgiveness and brotherly love is better, and the door of mercy is kept open. In western law, no felony can be compounded.[39]

On the question of granting reasonable demand after remission, as the verse puts it, such demand should be such as can be met by the party concerned, i.e. within his means, and reasonable according to justice and good conscience. For example, a demand could not be made affecting the honour of a woman or a man. The whole penalty can be remitted if the aggrieved party agrees out of brotherly love. In meeting that demand the culprit or his friends should equally be generous and recognise the good will of the other side. There should be no subterfuges, no bribes, no unseemly bye-play: otherwise the whole intention of mercy and peace is lost.[40]

In yet another verse Allah (S.W.T.) says:

> "Never should a Believer kill a Believer,
> but (if it so happens) by mistake,
> (compensation is due): If one (so)
> kills a Believer, it is ordained that
> he should free a believing slave,
> And pay compensation to the
> deceased's family....."[41]

Narrated Abu Abdullahi Ibn Abi Ishaq who said narrated Abu Amin Ibn Najeed who said, Narrated Abu Muslim Ibrahim Ibn Abdullahi Ibn Hijaj who said, Narrated Humaid who said, narrated Muhammad Ibn Ishaq, from Abdurrahman Ibn Qasim, from his father that Harith Ibn Zaid was martyred

during the lifetime of the Prophet (S.A.W.). He came to Medinah to accept Islam from the Prophet (S.A.W.). Harith met, on his way, one companion of the prophet (S.A.W.), Iyash Ibn Abi Rabiat. Iyash knowing Harith to be a Kafir (unbeliever), but unknown to him of his intention to accept Islam, so he killed Harith. It is then and there that Allah (S.W.T.) revealed (4:92).[42]

Says Abdullah Yusuf Ali while commenting on the above verse:

> "Life is absolutely sacred in the Islamic Brotherhood. But mistakes will sometimes Happen as did happen in the melu at Uhud, when some Muslims were killed (being mistaken for the enemy) by Muslims. There was no guilty intention; therefore there was no murder. But all the same, the family of the deceased was entitled to compensation unless they freely remitted it, and in addition it was provided that the unfortunate man who made the mistake should free a believing slave – thus a deplorable mistake was made the occasion for winning the liberty of a slave who was a Believer, for Islam discountenances slavery. The compensation could only be paid if the deceased belonged to a Muslim society or to some people at peace with the Muslim society. Obviously it could not be paid if, though the deceased was a believer, his people were at war with the Muslim society: even if his people could be reached, it is not fair to increase the resources of the enemy. If the deceased was himself an enemy at war, obviously the laws of war justify his being killed in warfare unless he surrendered..."[43]

Allah (S.W.T.) in another verse says:

> "If then anyone transgresses the prohibition against you, transgress ye likewise against him….."[44]

In another verse the Almighty Allah puts it thus:

> "And in no wise covet those things in which God hath bestowed His gifts more freely on some of you than on others…"[45]

Abdullah Yusuf Ali comments thus:

> "Man and woman have gifts from God Some greater than others. They seem unequal, But we are assured hat providence has allotted Them by a scheme by which people relieve what they earn. If this does not appear clear in our sight, let us remember that we have no full knowledge but God has. We must not be jealous if other people have more than we have – in wealth or position, or honour or strength or talent or happiness. Probably things are equalized in the aggregate or in the long run, or equated to needs and merits on a scale which we can not appraise. If we want more, instead of being jealous or covetous, we should pray to God and place before Him our needs – though He knows all, and has no need of our pray, our prayer may reveal to ourselves our shortcomings and enable us to deserve more of God's bounty or make ourselves for it.[46]

He also says:

> "… these are the limits ordained by Allah, So do not transgress them If any do transgress the limits ordained by Allah, such persons wrong (themselves as well as others)."[47]

> "Zulm" in Arabic implies harm, wrong, injustice, or transgression, and may have reference to oneself; when the wrong is done to others it implies tyranny and oppression; the idea of wrong naturally connects itself with darkness, which is another shade of meaning carried with the root word."[48]

The prophet, peace be upon him, in a number of traditions did caution the Muslims against causing harm to one another. In one tradition he was reported to have said:

> "There should be neither harming nor reciprocating harm"[49]

He was also reported to have said in another tradition:

> "A Muslim is a brother to a Muslim, he should not perpetrate injustice against him nor forsake him. He should not attribute falsehood to him, piety is here. He pointed thrice to his chest. It is enough an evil for a Muslim to humiliate a Muslim. His blood, property and honour are forbidden for another."[50]

The above tradition should be perceived in a wider sense, in that it does not stop between a Muslim and another Muslim, it also applies between Muslims and non-Muslims, who do not fight the Muslims. This is for the simple reason that, the Almighty Allah did say "O ye my servants, I prohibit the doing of injustice on myself and therefore prohibited it amongst you Do not do injustice." You should therefore not perpetuate injustice on any human being been it on his person or property. You should not also attribute falsehood to him simply because

you do not share the same faith, tribe or colour with him. Because the tradition says "servants of Allah," which includes all mankind. A difference of tribe, race and what have you matters not.

The prophet (S.A.W) in his farewell pilgrimage was reported to have said:

> "O men! Listen to my words, for I do not know whether I shall not meet you again for such an occasion in future. O men your lives and your property shall be inviolate until you meet your Lord. The safety of your lives and your property Shall be as inviolate as this holy day and this holy Month. Remember that you will indeed met your Lord and that you will indeed return your deeds. I have certainly conveyed. Whoever is holding another person's trust, should render it to the person who entrusted him with it..."[51]

The sermon did caution us not to, in any way, cause any harm to any person nor on his property. We should not claim or squander others' property without just cause. The prophet, peace be upon him, in almost all his judgement passed between any Muslims in dispute, used to remark thus: "I am a human being like you, and you bring your cases before me and I decide according to the evidences available before me. It may be that some of you excel others in oration and I give judgement in their favour. Whoever I apportioned to him another's right, should not take it, for it is a portion of a hell-fire that I apportioned him."[52]

He, in another tradition, puts it thus:

> "injury should be avoided as much as possible."[53]

The tradition is in line with the provision in chapter 4:9 quoted above, or it can rather be said that it is an explanation of the verse. As the verse puts it that A Believer should never kill a Believer, but if it so happens by mistake, compensation is due so it follows also that A Believer should not cause any injury to any other person but if it is so happens by mistake he should compensate the plaintiff. But if it is so caused with legal justification, the person who inflicted the injury is said to be immune by the Shariah. The Muslim jurists in this regard put it thus:

"Legal permission negates tortuous liability."[54]

This juristic opinion gives protection to some group of individuals, such as; a person exercising his right of private defence; an executor of a death penalty e.t.c.

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CHAPTER 2

2:0 AL-DAMANAH – AN OVER VIEW.

Tortuous Liability in Islamic Law is basically founded on the doctrine of Damanah, which could be defined as civil liability of the defendant for committing a wrongful and injurious act, which is redressible by an award of adequate pecuniary compensation to the aggrieved plaintiff. This can be in the form of restitution of the chattel so damaged or any pecuniary compensation, which redresses such injury to person, chattel or property.

The principle of Damanah has been evolved by the Muslim jurists to cover all cases in which the defendant has committed an act causing material damage (Darar Fahish) to the plaintiff. Civil liability is not only restricted to tort as per as the Shariah is concerned, it extends to all forms of bodily injuries and all forms of civil transactions under which pecuniary compensation is payable. It also covers cases that go to affect the honour and dignity of an individual concerned. E.g. rape. Therefore, Damanah should not be regarded as a civil remedy, which is awarded whenever the ingredients of that offence are established. So Damanah is the remedy in case of breach of contract and other civil transactions (i.e. Mu'amalat). Again the doctrine of Damanah applies to Islamic law of crime where, under certain circumstances, the law provides for pecuniary compensation to be awarded to the aggrieved party. It is also the approved remedy for all

tortuous acts under the Shariah, like Itlaf (destruction of property), Gasb (usurpation), which includes conversion e.t.c.

The law of Itlaf has been comprehensibly developed by the Muslim jurists to encompass all forms of injuries to persons, chattels or property, where in a substantial number of cases, the remedy is the award of damages i.e. Damanah. It could be assumed that the law of Itlaf covers the scope of what is known in English law as negligence, nuisance and all forms of Trespass to persons, chattels or property. And other distinct rules are laid down to deal with Ghasb, liability for animals, liability of structures and dangerous premises and vicarious liability.

Notwithstanding the fact that the Muslim jurists endeavour to classify certain heads of tortuous liability, it must be observed that there tend to be fusion between criminal law and those torts which are included within Itlaf and these relate to cases of injuries to persons such as murder which is said to be a crime and as well as tort. It is said to be a crime when the plaintiff's representative or rather his heirs demand for Qisas, but if they demand for Diyyah then it becomes a tort. One other example of fusion is the case of Sariqa (theft). The criminal (thief) is liable for two punishments, that of hadd i.e. Amputation of his hand (when the conditions laid down by the Shariah are satisfied), and that of returning the property he stole (if it is still intact) or else the payment of it's exact market price.

The objective of tortuous liability is not directed towards punishing the tortfeasor but it is directed towards redressing the victim, normally with some

pecuniary compensation in the form of diyyah or Arsh or Hukumal al-Adl. Therefore, there is no legal excuse that could justify transgression or invasion of the inviolable and legally protected property. The legal excuse of insanity or incapacity in criminal cases is not an excuse in tortuous liability where the right of an individual has been tempered. Thus, while an insane person, a minor, e.t.c. Are not criminally liable, the contrary is the case in tortuous acts.

Before an individual is said to be tortuously liable he must have acted outside the limits of his rights laid down by the shariah, otherwise he will be immune from any liability, notwithstanding the fact that someone might have suffered some injuries from his actions. This will be discussed under the following heading:-

2:1 Concept of Damanah.

Islamic law is divine in its origin. It controls the society and it is not controlled by the society. In Islam, therefore, the public and private life of the Muslim society living in Islamic state are expected to conform strictly to the principles of Islam as contained in the Qur'an and explained by the prophet (S.A.W.). Similarly, the Muslim leaders piloting the affairs of the state are also expected, not only to lead their lives according to the tenants of Islam but should also govern it on the principles laid down by Islam.

The sanctity of other's property is a settled rule of law and at numerous places the Qur'an and Ahadith of the prophet (S.A.W.) prohibit wrongful conduct injurious to other's property right. Allah says in this regard:

> "... O ye who believe! Eat not up your property Among yourselves in vanities"[1]

The Almighty Allah in another verse put it thus:

> "And in no wise covet those things in which God Hath bestowed His gifts more freely on Some of you than on others..."[2]

Muhammad Aliyu Sabuni comments thus: "Do not desire O you who believe, to have what God has given to some of you of the worldly affairs or religion for that leads to envy and hatred." Zamakhshari said" It is prohibited to envy and desire what God has endowed some people over others such as carrisma and wealth. This difference is from Allah's bounty, wisdom and knowledge over the habit of men.[3]

The Prophet (S.A.W.) said:

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

The Shariah is, therefore, aimed at maintaining peace among the people. It is on this context that the law conceives each right as in its nature limited in its scope by the interest of others. Each man can deal as he likes with his property,

but also an owner can be prevented from so using his property as to cause excessive damage to others. The doctrine of abuse of right is worked out by the notion of limitation of activity within well-understood bounds, and liability arises if these bounds are overstepped.[4]

If an individual happens to exercise his legal right within the limit of rule of right and it accidentally happened that another person sustained an injury to his person, land or chattel, the Muslim jurists differ over the liability of the proprietor of right. The majority views among the jurists negate tortuous liability from a person who as a result of exercising his legal right another person is injured. They cited an example that if A dug a well on his land and Mr. B's goat got into it accidentally and died there, Mr. A would not be liable. The reason being that A acted within his legal right. They relied on the juristic view, which says:

"Legal permission negates tortuous liability."

It is asserted that it cannot be thought that the Lawgiver should permit or restrain an action without immunity to the liability. According to them, they could not imagine permission and liability to be ordained on an act of a Mukallaf (matured person) simultaneously. But it will be a different case if the Mukallaf went ahead and dug a well on a public high way, for he would be held liable for trespass upon a public right.[5]

In Islamic law, if a person destroys the property of another by conduct whether voluntary or involuntary, he would be held liable to compensation. Thus

if a person slips and falls upon and destroys any property belonging to another, he is bound to make good the loss. And if a man by dragging another's garment tears it, he must pay compensation.[6]

The Shariah does not exempt any group of persons from liability by reason of their incapacity. Thus if a minor destroys a property belonging to another he must compensate its owner at his expense.[7]

Compensation is always due where the damage or injury inflicted on the plaintiff or his property is so direct and no established right can be claimed as to justify the act. But in cases where both the parties have acted, the principle of contributory negligence by attributing damage to the act of both, the loss is divided. If a person does an act intentionally, he would be held responsible. If a person does an act, which destroys one thing, which also leads to the destruction of another thing, as long as his action was not intentional, he does not become responsible.[8]

The Muslim jurists have summed up the theory of tortuous liability under two rules:

1. that the act must be the cause of the liability, and
2. that where the act is lawful no liability will arise.[9]

The Shariah does not require a person whose right to safety of person or property is attacked to wait until the harm has been done but allows him under certain conditions the right to prevent and repel the attack by defending himself or his property. The principle under which the right of private defence is based,

under the Shariah, is that, when a man takes up arms against another, he looses the protection of the law. This right is available not merely to the person whose life or person is threatened, but also in certain cases to the bystanders. The extent of the right is measured by the necessity of the occasion; so that a person exercising it is not allowed to inflict, if he can avoid it, more harm than is necessary for warding off the threatened injury. Similarly if the person threatened can have recourse to the assistance of the law in time to prevent the harm, he cannot take the law into his own hands.[10]

One other important point that is worth mentioning here is the last opportunity rule. It sometimes happens that injury to a person may have due to a cause proceeding from another, but the person injured could have avoided it if he had used ordinary care. For instance, a shopkeeper sprinkles water on the portion of the public road in front of his shop, and a passer-by, who, could have avoided that part of the road if he wanted to, chooses to walk over it and falls down and injures himself, the injury is due to the man's own act.[11] It means in effect that the person having the last chance to avoid the occasion of the incidence should do what is humanly possible to avoid it, otherwise he will be said to have contributed, by his negligent act, to the occasioning of the incidence.

A similar provision is also obtained under English Law. Section 1(1) of the law reform (contributory negligence) Act of 1945 provides:

> "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage, recoverable in respect of that damage shall not be defeated by reason of the fault of the person suffering damage, but the damages recoverable in respect thereof shall be reduced to such an extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."[12]

The only difference between that provision found under the Shariah and the other one under English law is that; in the former case contributory negligence negates liability, while in the latter it only reduces the amount of damages to be received by the plaintiff.

To solve the problem as to what damage-producing acts are lawful, the Muslim jurists conceive the holder of a right to be bound to make its exercise as little onerous to others as is consistent with its purpose. When its exercise ceases to be profitable to the holder, it ceases to be lawful and responsibility for damage done arises from its exercise. The breach of the right and the illegal character of the damage-producing act are put forward as the ground of liability. The Mujellah contains classes of damage – producing acts of a kind common in the social life of the community. One of them, for example, is on the abuse of the right by the rules on nuisance. Thus, no one can be hindered from the use of his own property, yet if, from its use, excessive injury may result to others, then he may be hindered.[13]And 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 injury must be removed.[14]

2:2 Rules of Right Relating to Damanah

Rights means the authority recognised by the Shariah to control the action of man in particular mode against which it exists, and the latter being obliged in obligation to act as required.[15] Rights in Islam are classified into four categories:-

(1) Pure Rights of Allah or Huquq Allah khalisah

These are the Ahkam, which relate to benefits for mankind in general. The attribution of the name relates to the benefit, which is related by the general community, and they may be termed public rights. It is only the name of God which bestows blessing and He is the creator, everything accrues to man for man's welfare. There are no private features involved, for they contain what is true and just.[16] For example unlawfulness Zina or adultery is based upon the principle that its prohibition establishes parentage so that there may not be confusion among mankind in general. For this reason the enforcement of the rights is a state concern.[17]

(2) Pure Rights of people or Huquq al-Ibad Khalisah.

These are Ahkam, which relate to the benefit of specific individuals. Sanctity, for example, of others property which accrues benefit for the owners. An action taking other's property is justified only on the grant of permission.[18]

(3) Combination of both of the above Rights with a predominance of the Rights of Allah. For example, the punishment of defaming a person lies in the violation of the right of Allah for the reason that it affects God's creature's personality and his piety. It is a violation of people's

rights that it injures a private individual. The predominance is of the right of Allah because there is no inheritance and no excuse in the punishment of hudud. [19]

(4) Combination of Both of the Above Rights with a predominance of the Rights of the people. For example, the command of qisas or talion for the punishment is needed for the one who takes the life of another person, and spreads out mischief in the community violative of the right of Allah and of an individual. The latter has a feature of compensation, which is inheritable to make a private compromise complete.[20]

The above two rights of Allah and rights of the people are also further subdivided. The right of God is called (i) pure, when it confers solely with religious matters as Iman, Ibadat, e.t.c; (ii) Those which contain lesser elements of punishment but have a penal element as exclusion, from inheritance for the murderer, e.t.c; (iii) Those having further punishments as hudud or punishments for wine-drinking, theft, e.t.c; (iv) those which have a lesser penal element but do provide punishments as exclusion from inhentance of the murderer, e.t.c; (v) those which are between (iii) and (iv), as to feed the poor as 'Ibadat and to expiate, e.t.c. The rights of the people are divided into those, which relate to unlawful expropriation of others' property, sale of properties, marriage rights, e.t.c.[21]

After talking about different kind of rights and to whom they belong, it is cardinal, at this juncture, to talk about injuries and their classifications. Injuries

can be said to be classified into two main headings, which may also be classified into so many sub-headings. These are a follows:-

2:3 **Injuries Against Human body**

Injuries that are inflicted on the human body differ in their degree of seriousness. Some even go to the extent of resulting into the death of the person that sustained them (i.e. plaintiff). While others are very minor, in that they do not leave disfiguring scar on their healing. These can be categorised under the following headings:-

2:3.1 **Homicide or Qatl**

Although the offence of homicide is one of the heinous offences under both the Shariah and secular laws, Muslim Jurists have nevertheless considered it to be a tort within the right of individuals i.e. the heirs of the deceased. This is for the simple reason that the Shariah has prescribed a retaliatory penalty in the form of Qisas and an alternative civil compensation in a form of diyyah in lieu thereof. Arsh or Hukumal al-Adl can be executable at the demand of the aggrieved party.

When the offence of homicide is proved against the murderer, the heirs of the deceased have the options of demanding Qisas or diyyah or remitting it in Toto and this last option is the best. The Almighty Allah says in this regard:

> "... And remission is the nearest to righteousness.
> And do not forget liberality between yourselves..."[22]

It is opined by the Muslim Jurists that if the legal heirs of the deceased decided to forgive the murderer in Toto, the judge or ruler has no right to punish him; he should be discharged and acquitted. But according to Imam Malik and

Laith, he should be punished by way of Ta'azir with one-year imprisonment and one hundred lashes.[23] Even the jurists who opined that the murderer should be discharged and acquitted after remission by the legal heirs, still hold the view that the Judge in this case has discretion to punish him with whatever punishment he thinks fit, taking into account the interest of the public at large. It can be imprisonment; lashes or he can be deported from the area. This is applicable to habitual or rather incorrigible murderers.[24]

The legal basis for Qaud or Qisas and remission or forgiveness is the saying of the Almighty Allah. Says He:

> "O ye who believe! The law of equality is prescribed to you in cases of murder: The free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand, And compensate him with handsome gratitude. This is a concession And a mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty.[25]

It is reported by Bukhari and Muslim from Abu Huraira (R.A.) that the prophet (S.A.W.) has said:

> "For him whose brother is slain has two distinct options, he can either accept diyyah or demand for Qisas"[26]

In this tradition there is ground that the brother of the slain has option, if he so wishes he can opt for Qisas and if he so desires he can take diyyah whether or not the murderer assents to it. Another view says that the brother of the slain

has the right only to demand for Qisas and cannot demand for diyyah unless the murderer assents to that. The first view is said to be the popular view. It is therefore the right of the legal heirs of the deceased to either forgive the murderer or demand Qisas. If one of the legal heirs forgives the murderer then the other heirs cannot insist on Qisas, they can only demand for the payment of diyyah.[27]

Muhammad Hassan a companion of Abu Hanifa reported that a man who was alleged to have killed another intentionally was brought to Umar bn. Khattab (R.A.) and he ordered that he should be killed. Subsequently some of the legal heirs forgive the man. Umar still felt that he should be slain. Abdullah bn. Mas'ud (R.A.) said:

> "The life is for them all; if one of the legal heirs forgives, he has save his life and it is not befitting for the other who does not forgive to claim the right of the one who forgives."

Umar then asked, "What do you see?" Abdullah said: "You should take diyyah from the property of the murder and take away from it the share of the heir who forgives him." Umar then agreed with Abdullah. This is also the view of Muhammad and Abu Hanifa.[28]

But if, among the legal heirs, there is an infant then everything will be delayed pending his maturity in order to give him the right of choice. This is for the simple reason that Qisas is the right of all the heirs and there is no choice for a child before his maturity.[29]

It is worth noting here that the shariah in this regard aims at protecting the right of the minor, and I am therefore of the opinion that it is in order, in the case where the other co-legal heirs demanded for diyyah, to go on and take it from the murderer, and distribute it among them including the minor. Notwithstanding the fact that the minor, as at that time, is not capable of making any choice. What is important is to see that justice is done while sharing or rather distributing the diyyah. And as it has been pointed earlier, the life belong to the heirs all, and if some of the heirs forgive the murderer, or opt for diyyah the other heirs have no right to insist on Qisas, the only options left to them is either to accept diyyah or remit it in toto. So here it will not be of any help, simply because one of the legal heirs is a minor, to wait until he is matured and make his choice. The share of diyyah of the minor can be kept with his guardian, which he can, on his becoming of age, decide to accept or take it back to the murderer and therefore remitting it to him.

But on the other hand, since the shariah always encourages afwa (Forgiveness), if the other co-heirs demanded for Qisas, I think there is a good reason to wait until the minor heir is matured per-chance, he will save the life of the murderer by opting for diyyah or remitting it in Toto. For the moment he demand for diyyah or opt for remission, the earlier demand of the other co-heirs will not hold-water, they will now be left with two options – accepting diyyah or remission. So by so doing the life of the murderer will be saved.

If on his (minor) becoming of age, also demanded for Qisas as his other co-heirs, then the murderer will be killed. And if all the heirs are matured and demanded diyyah, the murderer will be subjected to pay the amount.[30]

The right of the legal heirs to demand for Qisas is not automatic in that some conditions have to be satisfied before their demand can be met. These conditions are:-

1. The blood of the person slain must, at the time of his being slain, be forbidden. If for example prior to his being killed he has committed robbery, Zinah or apostasy, there is no liability on the murderer, neither Qisas nor diyyah, for at that time the blood of the slain is not protected by the shariah and as such is not haram. In this regard Bukhari and Muslim reported a tradition from Abdullah bn. Mus'ud that the prophet (S.A.W.) has said:

> "The taking of the life of a Muslim is forbidden except in three cases: a fortified person who committed Zinah; A person who killed another; and a person who apostates and forsakes his religion."[31]

2&3 The murderer must be an adult and sane. This is because the punishment of retaliation is not inflicted on a minor or insane person for none of them possesses the power of thinking or rather reasoning. But if the insane person is suffering from the type of insanity that at times ceases and becomes sane and sometimes resumes to his state of insanity. Qisas can be inflicted on him if he

happens to commit murder at the time of the lunacy interval i.e. when he is normal. The prophet (SAW) is reported to have said:

> "The pen is lifted on three persons: a minor until he is matured; insane person until he regains his sanity; and sleeping person until he wakes up."[32]

4. The killer must be free in his judgement or action. He should not be coerced, for coercion removes freedom of choice and there will be no liability on the person whose intention is removed. If for instance a master coerced his servant to kill another without just cause, it is the master that will be killed in retaliation but not the servant; but the servant should nonetheless be punished under Ta'azir. This is the view of Abu Hanifa and Daud. And it is one of the views of Shafi'i. The other view of Shafi'I is that the servant should be killed but not the master. According to Malik and Hambali both the master and the servant will be killed if the legal heirs of the deceased person do not forgive them.[33]

   But if the person who commanded the killing and the person who obeyed the command are both minors, then the commander will be killed but not the executor who was forced.[34]

If a ruler commands one of his subject to kill another person unjustly, if the subject knew that the killing of that person is unjust but still went on and executed the command, Qisas is due on him unless if the legal heirs of the

deceased forgive him, in which case he will be asked to pay diyyah. This is so because the prophet (S.A.W.) has said:

> "No obedience to any person in contradicting the law of Allah."[35]

But if the person did not know that the killing was unjust, then Qisas is to be inflicted on the ruler but not the executor of the killing. This is so because obedience to a ruler in things that do not contravene the Shariah is obligatory.[36]

5. The killer should not be a father or son to the deceased. If, for instance, a father kills his son, he will not be killed. Tirmidhi reported from Abdullah Bn. Umar that the prophet (S.A.W.) said:

> "A father should not be slain for the killing of his son."[37]

Yahya bn. Said reported from Umar bn. Shuaib that a person from banu (family) Mudlijin, called Qatadata threw his son with a sword and injured the son on his legs as a result of which he died. When the story of the incidence reached Umar bn. Khatab (R.A.) Umar then imposed diyyah on the father. When he collected the diyyah, he asked of the brother of the slain and gave the whole diyyah to him denying the same to the father who is the murderer, though a legal heir to the deceased son. This is in line with a prophetic tradition, which says:

> "A killer is not entitled to anything (inheritance)" [38]

Imam Malik is of the opinion that a father who slaughter his son, should also be killed in retaliation, because his own act was deliberate and deliberateness is the basis for retaliation.[39]

6. The killer should be on the same status with the person killed at the time of the killing. E.g. the killer and the deceased had been free men and Muslims. A Muslim cannot be killed for killing a slave. But the reverse is allowed where a non-Muslim kills a Muslim.[40] The Muslim jurists are not unanimous about this view. These differences arose as a result of their different understanding of chapter 2:178 of the holy Qur'an.

Some group of the Muslim jurists are of the opinion that Muslim should never be killed for killing a non-Muslim or slave. They relied on the prophetic tradition reported on the authority of Ali bin Abi Talib (R.A.), that the prophet (S.A.W.) has said: "Listen! No Muslim should ever be killed for killing a non-Muslim."[41] It has been submitted that this tradition is in regard to a non-believers in a war with the Muslims, so if a Muslim kills any one of them, he will not be killed. But for those non-believers who are in treaty with the Muslims, the Muslim jurists differed. Some are of the views that if Muslim should kill a non-believer in treaty with the Muslim, he will not be killed. According to them, since there is no any authority that abrogates the above quoted hadith, it still applies.[42]

But according to Abu Hanifa and Abi Ya'la a Muslim should not be killed for killing a non-Muslim who is at war with the Muslims as opined by the

majority, but if he kills a non-believer, who is in treaty with the Muslims, he should also be killed. For Allah – the Almighty says: "Life for life". They further argued that since the hand of a Muslim is cut off for stealing the property of a non-Muslim (in treaty with the Muslims), he should also be killed for killing a non-Muslim because the sanctity of life is equal to that of property.[43]

7. The killer should not join hand in killing the deceased with a person to whom Qisas is not applicable. If, for instance he joined hand with a minor or insane person or a person acting on mistaken believes, Qisas will not be applied on them. But according to Maliki and Shafi'I, where adult joined hand with a minor and killed another, the punishment of Qisas will be inflicted on the adult and the minor will be asked to pay half of the diyyah. They differ on the question of payment of the said half diyyah. Malik put the responsibility of paying the diyyah on the relations of the minor, while Shafi'i opined that it should be paid out of the minor's property.[44]

If a person aids another person to kill somebody, e.g. by holding or tying the hands or legs of the deceased just to enable the killer to kill the deceased, both the killer and the person who aided the killing will be said to have jointly committed murder and they will all be killed. This is the view of Laith, Maliki and Nakha'i. But according to Abu-Hanifa and Shafi'i, the killer will be killed and the person who aided the killing will

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be imprisoned for life. They relied on the tradition reported by Dar al-Qutni on the authority of Umar that the prophet (S.A.W.) has said:

> "If a person aids another to kill someone, the killer should be killed and the person who aided the killer should be imprisoned."[45]

Shafi'i Narrated that a case was brought before Ali (R.A.) of a person who was deliberately killed as a result of being held by another person. Ali decreed thus:

> "the killer should be killed and the person who held the deceased to enable the killer to kill him should be imprisoned for life.[46]

The punishment of Qisas will not be inflicted on the killer on the following cases:-

1. If one or all of the legal heirs of the deceased forgive the killer. But it is a condition that the heir or heirs that forgive must be sane and prudent i.e. they should not be minors or prodigals. The Judge in this case has no right to refuse the remission or to insist on retaliation and also if they demand for Qisas he cannot insist on blood money. It is their own right and not that of the judge.[47] This is not obtainable under English Law, in that all criminal cases are said to be committed against the state, individual citizens have no right to choose the type of punishment to be inflicted on the accused person
2. Death of the killer or non-existence of the part of the body that was injured. A person who killed another and before the punishment of Qisas

is inflicted on him happens to die; or if he destroyed any part of the other person's body e.g. hand, and before his hand is cut off in retaliation, he was involved in an accident and lost all his hands. In all these cases there will be no Qisas for the absence of the life (i.e. the life of the killer) or that part of the body where he inflicted the injury. The only alternative is to accept diyyah or remit the tort-feasor in Toto. Hambali and Shafi'i put the burden of payment of the diyyah on the relations of the tort-feasor. But to Maliki and Hanafi, diyyah is not due.[48]

3. If the tortfeasor and the plaintiff or his legal heirs (in case of murder) have amicably settled the case between themselves.[49]

Apart from those injuries that cause the life of the plaintiff, there are other injuries that are inflicted on human body and which do not lead to the death of the person that sustained them, but only leave disfiguring scar on that part of the body. These are categorised under the following:

2.3.2 Injuries or Wounds.

In cases that do not involve death, but infliction of grievous injuries to human body, the Shariah has also allowed Qisas to be applied as one of the punishment to be inflicted on the tortfeasor. The Qur'an has beautifully put it this way:

> "We have ordained therein for them:
> Life for life, eye for eye, nose for nose,
> Ear for ear, tooth for tooth, and wounds
> equal for equal. But if anyone remits the retaliation
> by way of charity, it is An act of atonement
> for himself. And if they fail to judge by

(the light of) what God Hath revealed, they
are (No better than) wrongdoers."[50]

It is clear from the above verse that a person's eye is destroyed if he destroys another's eye. Here there is no distinction between the eye of a man and that of boy and man. A person's nose is also cut off when he cut off the nose of another person. Here also no difference between long and perfortrated one. The same rule applies to ear, tooth, legs, and hand e.t.c. Qisas can only be applicable if the injury inflicted is on those parts of the body that are specific and distinguished, e.g. finger, wrist, elbow, ear, eye, nose e.t.c. Therefore Qisas cannot be applicable, for injuries that are sustained on the sculpt, stomach, and throat e.t.c. This is for the simple reason that those parts are very sensitive, and there is the danger of causing the death of the tortfeasor for a slate mistake on the process of inflicting the Qisas. One other possible reason is that you cannot inflict the same injury sustained by the plaintiff and this will lead to inequality. The only alternative here is either the payment of diyyah or remission by the plaintiff.[51]

The prophet (S.A.W.) did substitute Qisas with diyyah. For injuries that affected the brain i.e. Ma'mumah, and that which affected the sculpt i.e. Muliha.[52] Qisas was substituted with diyyah in all the above mentioned cases for the danger that is attached to those parts and the uncertainty of inflicting equal injury or wound sustained by the plaintiff, since the said parts do not have joint. And the holy Qur'an said equal for equal. To inflict what is not equal to what was sustained will amount to transgression of the provision of the verse and the law of Allah (S.W.T.). Islamic law is, therefore, based on equality.

For these type of injuries as pointed earlier, will only attract the payment of diyyah. The amount to be paid will come up later while discussing types of diyyah.

Where two or more people joint hand in amputating the hand of another person or destruction of another person's eye or inflicting any injury on any person which Qisas can be applicable, the Hambalis are of the opinion that if their acts can be distinguished, (e.g. one person held the plaintiff tight in his arms and the other cut the finger), they will all be liable to Qisas. They relied on the decision of Ali (R.A.) of a case brought before him of a person who was alleged to have committed theft and two people testified against him. Based on their testimony the thief's hand was amputated. Thereafter another man came and the two persons who earlier on testified against the first person (the alleged thief) said, "this is the thief, we are mistaken." Ali rejected their testimony against the second person and imposed on them diyyah to be paid to the first alleged thief. Ali further remarked that

> "If I were certain that you deliberately lied against the first person, I would have cut off your hands."[53]

Maliki and Shafi'i hold the same view with Hambali that if people inflict injury on another and their actions could be demarcated from that of one another, they will receive same injury, just like a situation where people jointly killed another, they will all be killed. But according to Abu Hanifa and Zahiri, two or more hands should not be cut off for the cutting of a hand. If for example two

people conspire and cut-off the hand of another, none of them should have his hand cut-off, but they will be responsible for paying half diyyah each.[54]

Apart from the above kind of injuries that are henours in nature, there are other kinds of injuries that do not go to cause physical harm to human life or body, but rather affect the honour of a person. This includes of simple beating, slapping, abuse, and false accusation e.t.c.

It is allowed under the shariah for a person who is slapped by another person to retaliate with the same slap or beating or abuse, he received from the tortfeasor. What the shariah insists, in this regard, is equality i.e. the plaintiff should not use more force than the one used by the tortfeasor. He should also use the same words use by the tortfeasor in abusing him. This is because Islamic law of Qisas is solely based on equality i.e. equal for equal, no more no less.[55] Allah (S.W.T.) in this regard says:

> "... If then anyone transgresses the prohibitions against you, Transgress Ye likewise against him. But Fear God..."[56]

And in another verse the Almighty Allah put it thus:

> "The recompense for an injury is an injury equal here to (in degree)..."[57]

One important thing that the Shariah put as a condition of applying Qisas is that beating or slap should not be on the eyes or any part of the body that can lead to the death of the fortfeasor. One condition, which is peculiar to an abuse, is that you should not address someone as an unbeliever even if he addresses you as such. You should not also attribute falsehood to him even if he does so to you.

You should likewise not curse his father or abuse his mother. The reason being that addressing a believer as an unbeliever or attributing falsehood to him, is totally forbidden under the Shariah and is one of the forbidden innovations; and that the father or mother, as the case may be, did not abuse you and you should equally not abuse him or her. It is the son that abused you and not the parents. You should curse or abuse whoever curses you or abuses you and should do so in the same wordings[58].

Says Qurtabi:

> "If anyone harms you, you should harm him equally; If he abuses you, you should retaliate in the same wordings; Whoever touches your honour, you should retaliate in the same way, you should not go to touch the honour of his parents Or his relations; you should not attribute falsehood to him even if he attributed so to you, for wrong is not removed by the commission of another wrong. For example, someone says to you "O you unbeliever or Kafir", you can say to him you are an unbeliever. But if he says to you "O you adulterer", you should say to him "O you big liar O you who testify falsely." If at all you said to him you are also an adulterer, you have then committed the offence of falsehood and you will be punished for that. And if someone consumes your property without any justification, you can say to him "O you consumer of people's property in vanity." The prophet (S.A.W.) has said: "The consumer of people's property and who is not bankrupt, his honour can be tempered with and it is allowed to punish him"[59]

The issue of Qisas in cases of slapping, beating and abuse was the practice during the companions and their successors. Reported Bukhari from Abubakar, Aliyu, Ibn Zubair and Suwaid

bn. Muqarran that they all agreed and affirmed Qisas in cases of slapping, abuse and beating. Ibn Mundir opined that whoever is beaten with lash or stick or stone if it is intentional then retaliation is due. This is the view of the As'hab al-hadith.[60]

Bukhari reported that Umar bn. Kasttab (R.A.) decided that Qisas should be applied in a case brought before him in which one beat another with lash. And also Aliyu bn. Abi Talib (R.A.) applied Qisas in a case brought before him in which the tortfeasor beat the plaintiff thrice with a lash. So also Shurayh, the great judge, and Khumish.[61]

The Muslim jurists differed in applying Qisas in cases of slapping, beating and abuse, for, according to them, in most cases, you cannot inflict the same beating or slap as you received. So if that is the case, the best form of punishment should be Ta'azir but not Qisas. But according to Ibn. Taymiyyah, Qisas should be applied and not Ta'azir. It is a well known fact that if the person who is beaten by another beats in retaliation that person in the same way he was beaten or almost the same way, that is more close to equality than to punish him with Ta'azir.[62] Sayyid Sabiq, the author of Fiqh al-Sunnah is of the opinion that those who refuse to apply Qisas for fear of inequality, they legalise inequality

more, for it is a known fact that whatever is certain in the sunnah is the most equitable and should be copied.[63]

In cases of rape, the Muslim Jurists differed on whether the compelled woman is entitled to any compensation in form of Sadaq or not. Maliki and Shafi'i are of the view that compensation is due to the woman. Malik reported in his book Muwatta, from Ibn Shihabin that Abdulmalik bn Marwan decided, in a case where a woman was raped, that Sadaq should be paid to her. But according to Imam Abu Hanifa the woman is not entitled to anything, once the man is punished that is all.[64]

The basis for this disagreement is whether Sadaq is a compensation for having intercourse or it is just a free gift. If it is the former then Sadaq is due whether the intercourse is legal or illegal. But if it is the latter, it is peculiar to married women and as such is not due in cases of rape.[65]

In cases of Qadhaf or rather defamation, the Muslim jurists differed on the question whether it is, the right of Allah (S.W.T.) or the right of human being. Shafi'i is of the opinion that it is the right of an individual who is accused and that the judge has no right to punish the person who made the accusation until the plaintiff chose for that. If the person accused forgives the person no hadd punishment will be inflicted on him, the legal heirs of the plaintiff

can also inherit the right, they can demand hadd punishment on the tortfeasor or remit it. According to Abu Hanifa Qadhaf is the right of Allah and that any case of Qadhaf that reaches the judge, then punishment must be inflicted on the person who made the accusation even if, the plaintiff does not demand for that. And no remission will stop the infliction of the hadd punishment.[66]

Having discussed different kinds of injuries that are inflicted on the human body and those of his honour, we will now discuss those injuries that are inflicted on the property of people.

This will be discussed under the following heading:-

2:4 Offences Against Property.

The inviolability of property belonging to people is like that of lives of the people; for the Prophet may peace and blessing of Allah be upon him said: "Life and property are Sacred." The Shariah, therefore, on the authority of many Qur'anic verses and traditions of the holy Prophet (S.A.W.) prohibits a person from dealing with other people's property without their consent or if he is not a trustee. The Almighty Allah, in this regard, puts it thus:

> "And do not eat up your property among yourselves for vanities, nor use it as bait for the Judges, with intent that ye may Eat up wrongfully and knowingly A little of (other) people's property."[67]

Ibn Kathir commenting on this verse says: "Aliyu bn. Dalhat and Ibn. Abbas said: this is in respect of a person who owes people and dres not have witness to testify in his favour, for that he bribes the judge knowing fully well that he is a sinner for squandering peoples property unlawfully. It was reported from Mujahid and Saeed bn. Jabeer and Ikramah and Hassan and Qatadata and Sadiya and Muqatil bn. Hayam and Abdur rahman bn. Zaid bn. Aslam who said. "do not litigate if you know you are a cheat", It is reported in Bukhari & Muslim from Ummu Salmah that the prophet (SAW) said: "Listen! I am a human being and you bring your cases before me and I decide according to the evidences available before me. It may happen that some of you excel others in oration and I give judgement in their favour. Whoever I apportioned to him another person's right should know that it is a portion of a hell-fire that I apportion him, he should either take it or reject it". Vol.I pp.226.

Therefore, if any person forcibly takes a valuable things or property from another person without his consent or authority, with the intention of depriving the owner his possession, such act is called Ghasb. If he does the act knowingly and wilfully, he is held in law to be an offender and has to pay compensation. But if he does it unknowingly and unintentionally (as for example, where he destroy another's property upon supposition that it belonged to him) the law does not hold him liable for Ghasb, but still he will be held responsible to pay compensation, on the principle that compensation is the right of man.[69] And compensation here means that the actual article usurped must be restored to the owner if it is still

intact and available. If it is lost, the Qadhi will imprison the offender (Ghasib) till he makes up the loss.

According to Shafi'I, usurpation or Ghasb includes all acts of encroachment, in bad faith, upon the right of another. The usurper should immediately restore an object he has taken possession of and will be responsible for any injury, even if accidental, that may happen to it while in his possession, in the same way as if he had caused the loss of an object in someone's lawful possession. So also a person who derives possession from the usurper is responsible for the accidental loss of what he thus holds, even if he was unaware of the usurpation.[70]

But according to Imam Abu Hanifa Ghasb comes to effect when possession is taken from the rightful owner of the property.[71] The view of Shafi'I, that talks about all acts of encroachment, in bad faith, upon the right of another is the best, for it means that the said right must not be in the physical possession of any other person including a Ghasb.

Both Hanafi and Shafi'I worked out the application of the rules of usurpation by concentrating on the external action of the offender. They argued that since "God alone knows the motives of a man", usurpation is to be judged only by the external deeds. A tradition of the prophet (SAW) is quoted as an authority, it says:"..... I decide according to what I hear: If I give judgement entitling a party to what really belongs to the other party, he shall not take it, for it is really a portion of Hell-fire which I crave for him." This argument is made the

basis of the law of compensation by them and thus if the usurpation is committed without knowledge, since it is itself a sin to take other's property, compensation is due from the Usurper.[72]

On the question of retaliation or Qisas in regards to the destruction of property, the Muslim jurists are divided into two. If, for example, one destroys or cut-off the tree of another, or destroys another's plants or house or burns the cloth of another. Some of the Muslim jurists are of the opinion that in all the above-mentioned cases Qisas is not allowed by the Shariah for two reasons: Firstly, because Qisas in this case amounts to destruction and which Islamic Law is against. And secondly, because fixed property, like house, and cloth are never equal.[73]

But according to other jurists Qisas in those cases is allowed by the Shariah for the simple reason that Qsas is allowed in cases that involve life and limbs which is more severe compared with cases that involve property. Therefore, if Qisas is allowed in cases of life and injuries to human body then it should equally be allowed in cases of property. It is on this basis that the Shariah permits us to destroy the property of enemies of war if they destroy our own property. E.g. destroying or cutting off trees which produce fruits, even though that is not allowed without genuine reason. Ibn. Qayyum is of the opinion that if the property destroyed involves animals and slaves, the shariah does not allow the plaintiff to kill the animal or slave of the tortfeasor as he killed his own. But if it were property, like cloth, which is torn, or a container that is broken; the popular

view is that the plaintiff should not tear or break the cloth or container of the tortfeasor but he is entitled to receive compensation in cash or kind.[74]

By analogy, it is allowed for the plaintiff to destroy the property of the tortfeasor in the same way he destroyed his own. Thus he can tear the cloth of the tortfeasor as he tore his own, or break his container as he broke his own if they are equal in value. There is no any verse or tradition of the Holy Prophet (SAW) or any analogy or consensus of the Muslim jurists that prohibit this. This is not prohibited in the sight of Allah, and the sacredness, of life and limbs is stricter than that of property. If the Shariah will allow the extracting of the eye of another in retaliation what more of destroying property of another in retaliation. And since the wisdom behind Qisas is redress, removal of annoyance and any possible resultant hatred and enmity, that can not be achieved without application of Qisas if the plaintiff demanded for it.[75] It may also happen that the plaintiff is a well-to-do and may not be satisfied with compensation due to his richness, in this case Qisas will be the appropriate remedy for him.

The Qur'an did mention in several places that we should retaliate in the same way we are harmed. The Qur'an puts it thus:

> "If then anyone transgresses the prohibitions against you Transgress Ye likewise Against him ..."[76]

> "The recompense for an injury is an injury equal thereto (in degree)....."[77]

The Almighty Allah did allow the companion of the Prophet (SAW) to destroy the date-trees of the Jews in order to annoy them. This shows that the Almighty wants a transgressor to be annoyed.[78] Although the last portion of chapter 2: 194 encourages forgiveness, it should not be always for it will open way for other people to commit whatever crime they so wish against others in anticipation of being forgiven by those aggrieved. A good example in this regard is at the early stage of the prophet (SAW)'s calling when the non-believers persecuted the believers seriously, but the All mighty asked them to be patient. Later, the believers were given permission to fight the non-believers as well.

The Muslim jurists, therefore, unanimously agreed that whoever consumes or destroys anything, be it food or drinks or container, he will be liable to make good the-loss to the owner. Aisha (R.A.) the mother of the believers may Allah be pleased with her said that:

> "Saffiyah prepared food for the prophet (SAW)
> and sent it to Him. I was taken away by jealousy so
> I broke the container. I then asked the prophet (SAW)
> The attornment of what I did. The prophet (SAW)
> Said to her:" Container for container and Food for Food."[79]

But the Muslim jurists differed where the thing destroyed or consumed cannot be measured or weighted. Hanafi and Shafi'I are of the view that whoever consumes or destroys anything belonging to another should compensate the same, it is not just to ask him to pay compensation; this is only allowed where the equal

of the thing destroyed or consumed cannot be found. They backed their view with the provision of chapter 2:194. While Maliki is of the opinion that compensation is taken but not its equal.[80]

Before a person is said to have committed tort against another person two conditions must be satisfied. These will be discussed under the following headings:-

2.5 Shurut AL-Damanah – Conditions of Damanah

Life, property and honour are sacred in Islamic Law. The Prophet (S.A.W.) puts it thus:

> "There should be neither harming nor reciprocating harm."[81]

The Muslim jurists, notwithstanding the above tradition asserted that "not every injury is a tort" and for that they put forward certain elements as necessary before an injury can be classified as a tort. These elements are three:-

1. Al-Ta'adi. I.e. Trespass and
2. Al-Dharar. I.e. Injury.
3. Linkage between Trespass and injury

2:5.1 Al-Ta'addi (Trespass).

In Islamic Law 'Ta'addi connotes trespass, which leads to any direct and forcible injury to property, life, body and so on. The Muslim jurists have given different definitions to the word Ta'adi. According to Maliki Jurists "Ta'addi" is an infringement of the rule of right and transgression against other person's right.

"Ibn Arfah on the other hand said" Ta'addi is an action of a person in a thing without permission of the owner..."[81]

The Muslim jurists have restricted the meaning of the word Ta'adi to its legal sense only. Its widest significance, which includes any wrongful act, infringement or transgression, is omitted. Similarly, intention and lack of proper care are not considered as elements of Ta'adi per se. It is unanimously admitted by the Muslim jurists that, an injury to person, chattel, etc. Without right or legal permission is Ta'addi. They, therefore, upheld that an injury, which emerged from lawful act or legal right, couldn't warrant damages, basing it on their principle, which says:

"Legal permission negates Liability".[83]

One question that needs to be answered here is whether al-Ta'adi per se can warrant liability or whether the wrongdoer must have acted maliciously, or omitted an act, or neglected to have taken proper care.

Unlike other legal systems, which take cognisance of fault in tortuous liability, Islamic jurisprudence takes the middle course. It makes intention a condition for the cause of an action of injury. This is to say that the injury does not amount to trespass where it is not direct. The cause is in need of linkage to connect it with the consequential injury, which will make it an actionable wrong. The linkage is found in al-qasad (i.e. intention or direction of one's volition towards an action), or al-Taqsir (dereliction of duty) and or Adam al-Taharruz (direction of one's attention to an act giving no damn to its consequence). But in

case of action of Trespass, Islamic jurisprudence sticks to the doctrine of alMukhatarah i.e. risk, when the injury is forcible and direct. The Muslim jurists have avoided the word "Fault" or "mistake" as a supposed justification. Instead, the word al-ta'ammud, i.e. determination, is used. If it could be proved that the consequence of the doer's act were intended, the liability would be attributed and no regard could be accorded to his motive. [84]

The word al-khata (mistake), is used specifically, under Islamic Law, in criminal cases. A Muslim jurist, Al-Dirdayr states: "Mistake means an intention to an act without any determination to injure the skin but unfortunately injured and killed. "e.g. a person aimed at a game or object but instead a man was afflicted and killed. In this instance the heirs of the deceased could not demand for Qisas, but can choose to accept diyyah only or remit it in toto for the killer had not acted maliciously and without reasonable cause. There is so authorities in this regards among which is the prophetic tradition, which says:

> "My Ummah has been forgiven in cases of mistake,
>
> Forgetfulness and what they are coerced to do." This shows that the mistake in criminal case of murder is simply a non-determined act.[85]

Al-Ta'addi has been divided into either direct or indirect act. The actor of a direct Ta'addi is liable in all circumstances; even then he did not intend the injury. The minority or insanity of the trespasser is neither an excuse nor a defence against liability. But when the act is made indirectly no liability could be

attributed unless there was a ta'addi and Ta'ammud either by intention, omission or negligence. Under the direct act, al-Ta'addi can therefore be divided into three kinds:-

a. Al-Ta'adi with intention.

b. Al-Ta'addi by omission. And

c. Al-Ta'addi by negligence.

Al-ta'addi with Intention: When a tortfeasor directed his intention to an act of injury even though he acted indirectly, he should be held liable. This situation is the most serious Trespass. No dissidence has been reported on his liability among the Muslim jurists. The author of Majma al-anhar states as follows:

> "If two persons were tugging and a third person left the rope in the middle with an intention to knock down the tugging parties. If they eventually fell down and died, he – The third person – is liable because of his Malicious intention. But supposing he cut The rope to reconcile between them, he Would not be held liable because his act has not been direct and forcible and there is no malice.[86]

Al-Ta'addi by Omission: 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 jurists exemplified this with a case of a person who took away a little child from his parents and it happens that a wild animal or snake killed the child, the person was held liable. This is the popular opinion of the Hanafi jurists contrary to that of Imam Shafi'I

and Zufar who held that he was not liable. The first group argued that the child was not only removing from his parents' protection but was also opened to the danger without care from the man. The second group of the jurists, argued that since the man did not himself cause the injury and had no such intention, he is immune from liability.[87]

Al-Ta'addi By Negligence: When a tortfeasor commits 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. Muslim jurists asserted that nobody is permitted to sit, or put something on the public high way without prior permission from the authority. If someone disregarded this rule he would be liable for any injury or damage which, emerged from his act.[88]

A person is, therefore, said to be liable for erecting a building on a highway. If that building happens to fall upon and kill someone, or animal or destroy any other person's property. Similarly, if a person stumble over the ruins of such building, and fall upon another person, and they both die, the person who erected it is responsible for both, and nothing is due from him who fell upon the other; for as the builder was the primary cause of the accident, the case is therefore the same as if he had struck the person who fell, and so caused him to fall upon the other, and they had both died in consequence.[89]

2.5.2 **AL-DARAR – INJURY.**

Element number two is al-darer or rather injury, which denotes "a wrong suffered by the wronged person in his life, body or sacred property. The property must satisfy the condition laid down by the Shariah. I.e. it must be Mutaqawwam – which means inviolable. It is then that it will attain the sanctity and protection of the Shariah.[90]

In order to give rise to the liability. It is necessary that:

a. the act must be injurious (including physical acts, words and behaviour);

b. the injury must be unlawful (for injuries from lawful acts or exercise of rights do not attract compensation except in misuse cases); the injury must be either the direct or indirect result of the tortfeasor's act. (e.g. a person who causes the hanging lamp to fall and break by cutting the rope from which it is suspended is said to be the direct cause of the destruction of the rope and the indirect cause of the destruction of the lamp;[91]

c. an illegal act resulting in indirect destruction must have been done intentionally, which applies also to cases where the destruction is caused by animals or inanimate objects."

"Intentionally" is used by the Muslim jurists also to cover cases of neglect or carelessness. In acts of direct destruction, intent is not a condition. The Mujelle explains it thus: "A person who does an

> act, even if he does not act intentionally, is responsible, "and" the person who does an act on one thing which leads to the destruction of another thing (Mutasabbab) as long as he does not act intentionally, does not become responsible."[92]

On the basis of prohibition of the use of properties, the law lays down the rule that if a Muslim destroys wine or porth belonging to another Muslim, he is not liable. However, if he does so in relation to the property owned by a non-Muslim, he is to pay compensation to the non-Muslim. This is the view of Imams, Malik, Hanafi and Hambali. But Shafi'I holds him not liable in the latter case.[93]

The Shariah, therefore, makes the aggressor liable for committing any injurious act against the property of others and this rule is specially applied by broadening the principle to all kinds of injuries whether to property or to person so that every type of destruction is incorporated. Liability in the process of the above legal obligation of the sanctity of others' property is so strict in that it includes minors and insane persons. If an insane or an infant person destroys anything, he is liable to make a recompense in order that the right of the owner may be preferred. The reason of the rule lies in the fact that destruction occasions responsibility, independent of intention and design. Thus where a man's property is destroyed, from being fallen over by a person walking in sleep, or from the falling of an inclined wall, after due warning, in which case the sleeper or the owner of the wall is responsible although he did not design the destruction.[94]

Having discussed al-Ta'addi and al-Darar, it is important to briefly discuss the relationship or rather linkage between the two.

25.3. Linkage Between Trespass And Injury.

It is worth noting here that, under Islamic Law, before there can be tortuous liability, the injury suffered by the plaintiff must be as a result of the act or rather trespass, direct or indirect, of the tortfeasor. This, in effect, means that before a plaintiff can succeed in his demand of Qisas or diyyah, he must prove that there was trespass against either his person or propert5y and that trespass resulted to the injury he suffered.[95]

2.6 Ahkam AL-Damanah – General Principles of Tort

2.6.1 Concept of Tort.

In our earlier discussion we have seen how Islamic law ordains the removal of any injury or hardship that could be or has been suffered by any person. A prophetic tradition in this regard puts it thus:

"Injury should be removed."[96]

For the infliction of any injury or harm the shariah provides certain remedies to the wronged-person. The remedies for tortuous actions provided by the Shariah and as discussed in the Fiqh books are Qisas or diyyah in cases of violation of an individual's right to safety of person and related matters. The remedies for violation of property right are restitution of the usurped and/or compensation. The former is dealt with under Uqubah (punishment) and the latter are part of the law on civil wrongs.[97]

Before an injury can be removed certain conditions have to be satisfied. It is not right for an individual who is wronged by another person to just embark on retaliation. He has to request for the removal of the injury from the authority – to do so. The Almighty Allah in this regard puts it thus:-

> "Nor take life – which God has made
> sacred – except for just cause. And if
> Anyone is slain wrongfully we have given
> His heirs Authority (to demand Qisas or
> To forgive) : but let him not exceed bounds
> in the matter of taking life, for he is helped (by
> the law)."[98]

Abdullah Yusuf Ali while commenting on this verse says that:

> "Under strict limitations there laid down,
> a life may be taken for a life. The heir is given the
> right to demand the life; but he must not
> exceed due bounds, because he is helped by
> the law. Some commentators understand "he"
> "in" he is helped (by he law) to refer to the heir of
> the person against whom Qisas is sought.
> He too will be helped by the law, if the heir
> Of the first slain exceeds bounds of the law."[99]

From this, it follows, therefore, under Islamic law, that a person cannot inflict injustice upon another person even if the person is his tortfeasor without following due process of law. For as the Qur'an puts it "he is helped by the law." If he does so, both of them, the wronged and the wrongdoer, are liable. The jurists further assert that if a person fell victim of a deceit, he has no right to inflict similar deceit upon the person. If, for instance, A is tricked and given counterfeit

money, he has no right to spend that counterfeit money to B. If he does he is liable.[100]

On the measurement of damages, the shariah proceeds, as it has been recognised by other systems that in usurpation and wrongful appropriation cases, damages are awarded as a way of exchange of what has been damaged or wronged by destruction in tortuous actions. The Muslim jurists opined that compensation of any property, which is not weighted or measurable, is to be measured by means of price valuation. If the original property subjected to tort is not replaceable, the trespasser is liable to provide the actual value price of the thing destroyed. Accordingly Sarakhsi says that a person's ownership is of two types: It may be an ownership termed Kamil (which by nature and meaning has equivalence) or an ownership by Qasir, which has equivalence only in actual valuation. The trespasser is liable to restore the ownership of the former description. If that type of ownership cannot be restored, the Ghasib is to provide the replacement of the other kind.[101]

Both Abu Hanifa and Imam Shafi'I opined that if the property destroyed or damaged belongs to the category of fungible things i.e. Mithli or that which is available in the market, the same kind of property should be replaced. This is what is known as restitution intergrum.[102]

Where the usurped property is completely destroyed by the tortfeasor, he is liable to pay the owner the cost of the property. But where the damage is partial and minor, it is a consensus among Muslim jurists that the tortfeasor would only

be asked to compensate for the minor damage. Where the damage is still partial but the injury is so vital that it causes the loss of the intended amenity of the property, like amputation of an animal's fore-legs, the wronged will be given option of either accepting damages for the injury suffered or giving the injured property to the tortfeasor and claiming the total cost of the property. This is the view of Imam Malik. But Imams Abu Hanifa and Shafi'i asserted that the wronged, in partial damage has no option than the compensation for the damage.[103]

The Muslim jurists are not unanimous about the amount to be paid as compensation in cases where the original property is destroyed, thereby incapable of being restored.

Imam Abu Hanifa is of the opinion that, in Mithli property, the amount to be paid should be equivalent to the actual cost of the property at the date of the action for tort. In other kinds of properties, the amount should be equal to the price of the property at the date of the trespass. Abu Yusuf follows the master. While Muhammad Shaibani holds that the determining factor is the date on which the usurped property is out of market or is not available. Shafi'i opined that, in Mithli property cases, the maximum price should be paid by measuring the value of the property from the date of usurpation till the date when the property is lost, destroyed or otherwise changed its original condition.[104]

Having discussed all the above, it is pertinent here to discuss types of remedies that are available to the plaintiff in individual cases. This can be seen as follows:-

2.7 Types of Remedies Under IslamicLaw.

Islamic law has provided two types of remedies that are available to the plaintiff in tortuous actions. These are as follows:-

1. Remedies for life and bodily injuries; and
2. Remedies for damages to property.

The first one takes the form of al-diyyah, al-Arsh and or hukkumat al-Adl. Let us take them one by one.

2.7.1 Al-Diyyah: is a kind of compensation paid to the heirs of the deceased person by either the murderer or his family. The institution of diyyah was known and practiced prior to the coming of Islam. With the coming of Islam, it was retained in a more significantly modified way.

The prophet (SAW) fixed the diyyah of a slain person who is free and a Muslim, as one hundred camels for those who have camels; And/or two hundred cows for those who have cows; And/or two thousand sheep for those who have sheep; and/or one thousand Dinar (Gold); or twelve thousand Dirham (Silver) or its equivalent. And whichever among the above mentioned is presented by the murderer or his family, as the case may be, the legal heirs of the slain must accept it even if what is presented is not what was available in that place. What is important is the payment of the diyyah in whatever form.[105]

The diyyah for a wilful murder, if the heirs of the deceased consent to blood money, would be twenty-five bnt Malhad (i.e. pregnant) and twenty-five bnt labun (those that suckle) and twenty-five hiqqah (Young ones) and twenty-five Jadh'ah (elderly ones).[106]

The diyyah of a woman when she is slain wrongfully is half a diyyah of a man. This is also applicable to cases where her hands/or legs is cut off or other cases of wounds. It was reported from Umar (R.A.) and Aliyu may Allah be pleased with him, and Ibn. Mas'ud, and Zaid may Allah be pleased with them all. They said that with regard to the diyyah of a woman: Her diyyah is half that of a man. And there was no report of any contrary opinion from other companions and as such it was unanimous. And because a woman in inheritance takes half share of a man and in the issue of testimony, two women stand the position of a man.[107]

The blood money for unintentional or unpremeditated murder is twenty bnt Makaad, twenty bnt labun twenty hiqqa and twenty jaah'aah.[108]

The diyyah for a child in the womb is to give a slave or a slave-girl, and the equivalent of which is either fifty dinar or six hundred (600) dirhams.[109]

The diyyah for Ahl-al-dhimmah when they are slain wrongfully is half-that of a free Muslim. Ahl-al-dhimman here means the Jews and chritians who live and enjoy the protection of Islamic state. Yahya bn. Said reported that Suleiman bn. Yasar used to say that the blood money of a Magi (fire worshipper) is 8000 dirhams[110]

2.7.2 Al-Arsh

Al-Arsh is *another form of* diyyah *or rather compensation which is* assessed and awarded for damage suffered by the plaintiff and which resulted into his loss of some parts of his body like the nose, tongue penis, eyes, ear, lips, legs, hand e.t.c.

The prophet (SAW) in one tradition did explain various kind of compensation payable to the plaintiff for the loss of some parts of the body. In the tradition reportd by Abdullah bn. Abubkar bn. Muhammad bn. Hazam, from his father, said that the book that the Apostle of Allah (S.A.W) wrote for Amr bn. Hazam on the subject of blood money stated that:

> "the compensation of life is one hundred (100) Camels and the nose, if cut in full, one hundred (100) Camels, and in the case of Mamumah (head injury down to the skull) one third of the blood money and in Ja'ifah (injury to the inside of stomach) also is one third and in case of injury to the eye fifty camels, of the foot, fifty and of every finger ten, and of every tooth, five, and for Mudiha (bone breaking or fracture) five camels."[111]

A complete diyyah (100 camels) is paid in cases of beating if as a result of which the plaintiff lost his senses, for what differentiate human being and animal is the sense. So also if the beating results in losing his hearing, sight, breath or desire for sex (made him impotent) or power of speech. E.t.c.[112] This is for the simple reason that these parts of the body have purpose and importance of which is beauty and complete life.

Calip Umar (R.A.) was reported to have decreed the payment of four different complete diyyah (100) camels x 4 = 400 Camels) in a case brought before him where the tortfeasor beat the plaintiff and as a result of which the plaintiff lost his hearing, sight, penis, and sense. This means that 100 camels was awarded to compensate for the hearing, and another 100 camels for the loss of the sight, 100 camels also for the loss of penis and another 100 camels for the loss of the sense.[113]

2.7.3 Hukumat al-Adl.

Hukumal al-Adl is another form of diyyah awarded to the plaintiff who sustained an injury from his tortfeasor. This form of diyyah does not fall within the first or second category mentioned above, and as such has no specific or fixed amount. It is left for the judge to award any amount that is fair and reasonable to the plaintiff and the tortfeasor. This normally covers cases of wounds.

Two other important things worth noting here are:-

1. no payment of diyyah until the wound or injury heals.[114] This is so because some injuries or wounds inflicted on some sensitive part of the body may at the end of the day lead to the death of the plaintiff and as such the amount of the diyyah earlier on fixed will certainly change. So there is reason to wait for the healing of the injury. And
2. the payment of the diyyah should be made within the period of three or four years.[115]

3. The second type of remedy provided by the Shariah is in respect of destruction of property by any way, such as usurpation, destruction, theft, etc. This takes various forms according to the type of property as well as the degree of damage inflicted on it.

The remedies for violation of the property rights and similar civil cases, are restitution of the property if the property remains in existence and/or compensation when it has been consumed or destroyed in the process of usurpation.[116] If the property usurped is in existence but was partially damaged and the damage has caused the property a devaluation, it is incumbent upon the usurper to restore the property and pay damages for the devaluation he caused on it by way of compensation if otherwise.[117]

On the question whether the plaintiff can get special damages in addition to the material damages for the price of the property subjected to tortuous action as obtained in English law the jurists differed. Imam Abu Hanifa differs from this point i.e. according to him the plaintiff is only entitled to the material damage and no more. But according to Shafi'i school, the plaintiff is entitled to special damages also on the basis of the profit-desired by the trespasser by use and occupation of the property. Thus, in addition to the restitution of the original property or its equivalent to the owner, he is entitled to get additional damages for the use, enjoyment and occupation of the property.[118]

One question that needs to be asked here is whether or not the Shariah has set a limited time within which the plaintiff must bring an action before the court for any wrong done to him. This will be discussed under the following headings:-

2.8 Limitation of Action.

Limitation of period for actions founded on tort is known and recognised by the Muslim jurists since the early times of Islamic jurisprudence. The Arabic term for it is murur al-Zaman, which means expiration of period. It has been stated in Hashiyat al-Dasuki that:

> "If a person takes the possession of another person's house or any landed property, and the owner is of legal capacity and is also living in the place where the house situate, for the period of ten years, and the owner did not take any step to recover his house/land, it is said to belong to the person in occupation or possession. The said "ten years" time limit does not cover cases of dispute between relations and thus relationship includes that of blood or affinity. The time limit in this case is fifty years but not ten years. This is the popular opinion of the followers of Imam Malik.[119]

But according to Imam Malik, in his book Mudawanat al-Kubra there is no fixed period within which the owner of a usurped property must bring an action, that depends on the custom and usages of a particular place.[120]

Going by the first opinion of the followers of Imam Malik before the owner of a house or any landed property can be barred from reclaiming his property from a usurper after the expiration of the said ten years three conditions have to be satisfied. These are as follows:-

1. that the owner must, at the time of he usurpation or within the said ten years, be of legal capacity i.e. mature;
2. that he had every opportunity to recover his property, if at all he wanted to, within the said ten years, but did not make any attempt to do so; and
3. that he was living, at the time of the usurpation or within the said ten years, at the place where the property is situated, and as such presumed to be aware of the usurpation.

It seems, therefore, that the Muslim jurists are not unanimous on this issue and as such some Muslim countries do make some reforms to suit with the present circumstance. It has been stated in a book called Radd al-Mukhtar that:

> "The authorities of nowadays are instructing their judges in every province not to attend to any litigation on tort upon which fifteen years has elapsed, except in cases of Waqf (endowment, and Irth (interitance."[121]

The prophet (SAW), was in this regard, reported to have said:

> "Whoever possesses a property for ten years owns it."[122]

The issue of limitation of period does not apply to cases of absence from the place where the property is situated or cases of ignorance. If, for instance, after the said "ten years" or "fifteen years" or "fifty", as the case may be, has elapsed and the owner goes to the court and pleaded absence or ignorance of ownership to the property, if he proves his allegation, the court will hear the case.

There is no doubt to the fact that the wisdom behind putting this limitation is desirable in the interest of justice that actions for tort should be brought to the court as soon as possible while the evidence is still fresh in the minds of the parties and witnesses.

Lastly, one other issue, the mention of which is of utmost importance, is whether it is, under the shariah, allowed to enter into agreement to commit any tortuous act against one another or a third person. This will be discussed under the following heading:-

2.9 Agreement Affecting Rights and Duties.

Any agreement entered into between two or more persons that goes to affect or alter their rights or duties for tort, is null and void. For it is one of the principles of the Shariah that "there should be neither harming nor reciprocating harm." Therefore any agreement that goes contrary to this principle or that which legalises the illegal is void ab initio. For this reason it is not allowed for a person to engage another person to kill him or kill a third person, for Allah (S.W.I.) said:

> "Nor take life – which God Has made sacred –
> Except for a just course..."[123]

The prophet (SAW) is also reported to have said:

> "The life of a Muslim can only be taken in
> three situations: a married person who committed
> Zinah; a person who kills another; and he who
> Apppostates and deserted the Muslim Ummah."

The above tradition and the Qur'anic verse did explicitly show that no any agreement between two or more persons will justify taking one's life, for that is

not "for a just course as explained by the Qur'an. The prohibition does not stop to cases of taking life only; it extends to cases occasioning injury, disputing honour and destruction or damage to property. The prophet (SAW) has said in his farewell pilgrimage that:

> Your life and property are sacred....the life,
> Property and honour of a Muslim is forbidden
> To the other Muslim."[124]

It is, therefore, the view of the shariah that whoever intentionally or carelessly, causes harm to others, be it on their persons, property or honour, should pay for the damage he caused, unless if the wronged-person has waived his right. The waiver can only be accepted in the eyes of the shariah after the infliction of the injury or causing of the harm, but not prior to it.

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CHAPTER THREE

3.0 VICARIOUS LIABILITY

It was the practice among the Arabs during Jahiliyyah period to hold the whole community or clan responsible for any crime or any tortuous act committed by a single member or some members against a member(s) of another clan or community. All the members will be liable to contribute and pay diyyah to the aggrieved clan or else they should hand over the Tort-Feasor to the plaintiff's clan to be punished there accordingly. The members are responsible to pay diyyah collectively for the simple reason that it is the duty of the whole members to train every member and watch over his affairs. It was therefore, presumed that the wrongdoer would not have acted the way he did unless they neglected their duty. This custom or rather practice served a very important purpose. This includes, inter alia:-

1. It contributed legally to the Social security, because the tribe in view of its collective responsibility to pay compensation a strict watch over the activities of its members.
2. It alleviates the burden of the individual member in case he is liable to pay compensation.
3. It avoids retaliation in he form of blood feuds, which would, otherwise result in a complete destruction of the tribe involved.

Going by the provisions of some Qur'anic verses one can go to the conclusion that the Shariah is against vicarious liability and has no place at all in

Islamic Law. It is true that the Shariah primarily confirms the notion of individual liability where every person is liable for his own action or omission and not that of another person. Says Allah:-

> "Who receiveth guidance, receiveth it for his own benefit: who goeth astray Doth so to his own loss: No bearer of burdens can bear the burden of another..."[1]

In another verse Allah the Almighty says:

> "It (soul) gets ever good that it earns, and it suffers every ill that is earns."[2]

He also says:

> "Every soul will be (held) in pledge for its deeds."[3]

Yet in another verse Allah puts it thus:

> "Then shall anyone who has done an atom's weight of good see it! Anyone who has an atom's weight of evil, shall see it."[4]

To every general rule there is an exception. A hadith of the holy Prophet (SAW) in this regard, seems to create an exception to the notion of individual responsibility. It says:

> "Everyone of you is a Guardian and is responsible for his charge; the Imam (Ruler) is a guardian and is responsible for his subjects; the man is a guardian in the affairs of his family and responsible for his charge; a woman is a guardian of her husband's house and responsible for her charges; and the servant is a guardian of his master's property and

responsible for his charges.[5]

The assertion here is that the hadith has served as an exception to the generality and sublimitness in the above-named verses of the Qur'an. And this has been supported by the juristic opinions of all the orthodox schools of law. The following will serve as an example of the juristic opinions.

> "A three year old child is under the care of his/her mother. If the mother went out and left the child without any care the child fell into the fire, the mother is tortuously liable."[6]

> "If a father handed over his small son to a skilful swimmer to teach the child the act of swimming and the child is allowed to drown, the tortuous liability will be upon the teacher, i.e the skilful Swimmer. This is so because the father gave his son to the teacher to be under his guard and when the child drowned in the process, the negligence is attributed to he teacher prima facie except if he can prove otherwise."[7]

> "If a child is commanded to destroy another man's property and he did, the person that commanded him is held liable for the tort."[8]

From the foregoing one can rightly conclude that vicarious liability is an established institution of its own under the shariah even though it stared as an exception. Additionally, the ordained duties on individuals go beyond one person and cover the liabilities of the persons mentioned under vicarious liabilities.

3.1 Liability of a Guardian For The Act of His Ward.

A legal guardian, in Islamic law is known as a Waliy. He is a mature person responsible for the protection of a minor or those who are in the position

of minor like insane, bankrupts and imbeciles. The Waliy is to manage the personal affairs of the minor both psychologically and physically.[9]

Guardianship is the responsibility of the father of the minor. It is in his (father) absence that this responsibility can be shifted to another close male relative to the father like the uncles. A father has the right to delegate this responsibility to any other person, who satisfies the conditions of Guardianship, he wishes even in the presence of the uncles. At the death or absence of the father, the uncles step into the shoes of the father, and they enjoy the same privilege of transferring this responsibility to who they feel suitable for the minor. In rare cases, where no relative can undertake this responsibility for the minor, the state i.e. Al-Amir, will be the sole guardian of the minor and the state will be treated accordingly as guardian in any eventual liability.[10]

It is this duty to take care of the minor that makes the guardian vicariously liable for the act of his ward. Some jurists from the Maliki School of Law opined that a minor, even if unintelligent, is liable if he destroyed or caused damage to another person's property. Damages must be paid from the minor's property, if he has got any. And if he has no property, the damages will remain a debt on him until he will be able to liquidate it. This is where the damage has been inflicted upon the wronged person directly by the minor. The jurists further opined that no minority or non-intelligence or insanity can debar the wronged person access to obtain damages.[11]

But in the opinion of a group of Maliki jurists, an unintelligent minor should not be made liable for his tort. Their torts are like that of animals. Whether these torts are direct or indirect, it is the Guardian who should be held liable vicariously for his negligence.[12]

It is stated in a book called al-Mabsut that:

> "If a child rode a camel and the camel transgressed upon a man and the man died. If the child is known to be riding the camel usually, the diyyah of the deceased is on the family of the child. But if the child is not known for that for his tender age and inability, the diyyah would be overlooked.[13]

Having seen the relationship that exists between the Guardian and his ward and when the guardian is or not liable for the act of his ward, another type of relationship that needs to be discussed here is that between the master and his servant and see when the master will be held liable for the act of his servant and when he is not.

2:2 Master and Servant.

Historically, under the common law, in the olden society vicarious liability was common enough based as there was on the concept of revenge in an indiscriminate manner?. The mosaic code took a departure by stating that a man should be pit to death for his own sin and not for that of his father or son.[14]

The early Anglo-Norman period was transitional one in which the idea of complete liability of the master for the wrong of his servants or slaves began to

change to the idea of liability only where there has been command or consent on the part of the master to the servant's wrong. Between A. D. 1300 and 1700 the change continued. In the early part of the " command theory became established. During the 16th century 16th and 17th centuries, the doctrine was established that the master was not liable unless he had particularly commanded the very act done by the servant. Between A. D. 1700 and 1800 this doctrine developed to make the master liable if an implied command could be inferred from the general authority given by him to his servant. This change was necessary because following upon commercial prosperity trade had become too complicated to allow the "particular command" theory to cover persons like factors or agents who were not accustomed to take their orders like a slave or private soldiers.[15]

By the beginning of the 20th century it was formally established that the master's liability was based not on the fiction that he impliedly commanded his servant to do what he did, but on the safer and simpler ground that it was done in the scope or course of his employment. Hence the relationship of master and servant of itself gives rise to the liability.[16]

So many reasons were advanced to justify the holding of a master liable for the act of his servant. These are, among other things, as follows:-

a. Since the master trusts his servants it is reasonable that he should suffer for the wrong of his servants than the stranger injured by them;

b. No man should be allowed to take advantage of his wrong;

c. The master undertakes for the servants case;

d. The act of the servant is the act of the master. This is otherwise known, in Latin, as "qui facit per alium facit per se," i.e. he who does something through another does it himself.

e. Respondiate superior; (Let the Superior answer). The maxim does not explain why he (superior) should answer.

f. The master should conduct his business with due regard to the safety of others.

g. The master profits from the act of the servant's employment so he must bear its burden too.

h. The master is usually in a better position to pay while the servant is not.[17]

Under the Shariah the doctrine of vicarious liability, in relation to "master-servant relationship" comes into existence on the satisfaction of the following conditions:-

1. That there exists a contract, which warrants the servant to give out his service for the benefit of the master. It is also necessary that the job to which the servant gives his service is lawful and as such the employer, i.e. the master, has the right to control the agent i.c. the servant.
2. That the occurrence of an injury or wrong to a third party in the course of employment, either directly or consequential.[18]

Habitually, a servant is selected by the master to perform for him a certain duty, however there are many situations where the master is not free to choose his servant. In such situations, the master remains liable vicariously for the shariah has given him the right of control over the servant and also to benefit from the accrued interest of the service. Moreover, the right of control and giving directives to the servant who has to obey wily nilly. This order might have given a fright to the servant in some other situations.[19]

Having said the above, we are now going to discus cases of coercion and command under this heading.

2:3 **Coecion – Al-Ikrah**

Coercion or Ikrah implies to an act which men exercise upon others, and in consequence of which the will of the other is set at nought, at the same time that his power of action still remains. It applies to a case where the coercer has it in his power to execute what he threatens, whether the coercer is the state or any other person. The features do not exist unless the person coerced be put in a great fear and apprehends that if he does not perform what the coercer desires, the threaten evil will fall upon him. The fear and apprehension cannot take place unless the coercer be possessed of power to carry his menace into execution, provided this power does not exist; it is of no importance whether it exists in the state (Sultan) or any other person.[20]

Some other jurists defined Ikarh as "a situation that creates fright in the mind of a person even though the injury has not been practically inflicted on him.

"The high probability of the occurrence of the injury is sufficient in this regard after looking into the circumstance that surrounded the Ikrah, i.e. the coerced, and the influence that the fright has had upon him.[21]

Having seen the definition of Ikrah, one other important thing to now be considered is the division or rather classification of Ikrah.

3:3:1 **Types of Ikrah.**

Ikrah is divided into two, these are as follows:-

(a) Perfect Coercion: It is one in which the willingness and option or intention of the person coerced has been denied, and more importantly, the person coerced is threaten to be killed if he does not accomplish or do what he is coerced to do.[22] It is also very important in this regard that the coercer must be in a position to execute the threat he threatens the coerced. E.g. If a person is coerced to commit Zinah (adultery), and the coercer threatens to amputate the hands of the coerced if he does not do it. In this situation the coercer must be in a possession of deadly weapon e.g. cutlass, sword, etc. Which will enable him to execute his threat.[23]

Some jurists of the Hambali School opined that it is a complete or rather perfect Ikrah where a person is threaten with severe beating, jacking, cutting of

his legges etc., but not mere promise to punish the coerced person. To back their own opinion they cited the case of Ammar bn. Yasir when the Kuffar (unbelievers) captured him and tortured him and asked him to renounce his faith, but he refused. They then drawn him into a river until he was about to die, they brought him out and asked him again to enounce his faith or else they kill him. Ammar, then conceded to what he was compelled to do i.e. renouncing his faith, but his heart was firm on his faith. He then went to the prophet (SAW) rubbing some blood on his face. The Prophet (SAW) then said to him, "the unbelievers, drawn you into a river and asked you to renounce your faith and you renounced it; if they caught you again, do to them what they want you to do.[24]

Shortly after the incidence of Ammar and after the remark of the Holy Prophet (SAW), a revelation came down to the prophet (SAW) saying:-

"Any one who, after accepting faith in
God, utters unbelief-Except under compulsion,
His heart remain firm in faith..."[25]

Ibn Kathir Comments thus: Sha'abi, Qatada and Abu Malik said bn. Jeerer reported, Ibn Abdul Aala reported, Muhammad bn. Thauri reported from Ma'mar from Abdul-Kareem Al-Jazi from Abi Ubaidata – Muhammad bn. Ammar bn. Yasir who said: "The unbelievers kidnapped Ammar bn. Yasir and tortured him and forced him to renounce his faith to which he succumb. He then reported to the prophet (SAW) about the episode. The prophet (SAW) then asked him." How did you feel at the time you renounced your faith." To which he

answered, "his heart was tinted with faith." The prophet (SAW) then said to him if they (unbelievers) repeated you repeat likewise.[26]

The rationalists among the Muslim jurists opined that mere threat or promise to harm another person if he does not accomplish what the coercer asked him to do, amount to coercion. For most at times coercion comes into existence as a result of a threat with torture, killing, beating etc. If not because of the threat the person coerced would not have thought of doing what he was coerced to do.[27]

(b) The second type of Ikrah is one in which the intention or willingness of the person coerced is denied but not his option. And in it, normally, there is no threat to jail or tie or beat (which nobody expect it to result in the death of the coerced person. This type of coercion is known as imperfect Ikrah.[28]

Another important aspect of Ikrah apart from its classification is the conditions attached to it. These will be discussed under the following heading:-

3:3:2 Conditions of Ikrah

Ikrah is not considered unless certain conditions are fulfilled, and the coercion must occur without any legal justification. This is to refer to situations where forces can be administered with just cause. The coercer in such situations is immune from liability for legal permission negates liability, even though the coercion fulfilled all conditions. But when coercion is established without any

legal permission or justification the liability inevitably rests on the coercer if the following conditions are fulfilled. These are:-[29]

1. That the coercion must be constraining or complete in such away that the coerced is deprived of his consent and freedom or option to act. All the Muslim jurists unanimously agreed that if the threat, which may involve loss of life of the coerced, or any part of his body, is directed to the person of the coerced, is an excuse. But if the threat is directed not to his person but to the person of another – his near relative, the jurists differ.[30]

According to Maliki School if the threat is so directed to a near relation of the coerced that is considered as an excuse. E.g. if A gets hold of B's son in B's presence and said, "If you do not burn C's car I will kill your son." While Hanafi School holds two views: The first view says that if it is not the coerced that will be subjected to the threaten evil, then coercion in such circumstance is not considered as an excuse. The second view says that if the person to be subjected to the threaten evil is the father or son or a near relative of the person coerced then it is an excuse. Hambali Jurists supported the latter view.[31]

I think the latter, view is the better one, but it should also be extended to all other Muslim brothers, for the Prophet (SAW) did describe the Muslim Ummah as one building – one supporting the other. So the way and manner you will protect your life, property and honour and that of your near relative,

you should also adopt the same in helping your brother Muslim protect the same. This is in accordance with the prophetic tradition, which says:

"Help your brother the oppressed or the oppressor."

A threat to destroy property is, according to Maliki, Shafi'I and Ahmad bn. Hambal, considered as an excuse, provided that the property is small. The word small here is a relative term in that it all depends on the person concerned and the amount or quantity of the property. For what is small for one may not be so to another.[32]

But according to Hanafi School this kind of threat cannot be considered as coercion even if the destruction will cause a grievous harm to the owner. This is because the subject of coercion is the person of the person coerced but not his property. But some disciples of Hanafi considered a threat to destroy property as coercion although they differ among themselves as to whether the threat is to destroy the property in toto or part of it.[33]

2. That the coerced is under coercion without being capable of seeking for assistance. This means that the threat must be immediate or which is about to take place if the coerced person does not do what he is coerced to do. Thus, if the threat is not immediate then there is no coercion for the person coerced has an ample opportunity to protect him. However, whether the threat is immediate or not is relative for it depends on the particular circumstance and the apprehension of the person coerced.[34]

3. The coercer must be capable of executing his threat, because it is only then that the coercion can exist. If the coercer cannot execute the threaten evil then there is no coercion. It is not a condition that the coercer must be a ruler or any person in authority, what matters is the capability of the coercer to execute the threat.[35]
4. The coerced person must reliably apprehend that if he does not do what he is coerced to do the threat will be executed. But if the coerced is capable to flight, resisting or getting any assistance by any means, but went ahead to comply to the threat, that will not be an excuse for the coerced.[36]
5. That the person coerced is in the habit of refraining to carry out the coerced act before the coercion either because it would affect his personal right or right of another person, or because the law has prohibited the act.[37] This means that if a person is known to be professional thief or adulterer, his allegation of being coerced to commit theft or adultery will not be an excuse to him.
6. That the threat is more severe than the act coerced.[38] It is on this ground that the Muslim jurists opined that a person cannot comply to a threat to kill another person in order not to be killed by the coercer. That is never an excuse for him. You cannot similarly comply with killing another person in order to save your property from the threaten evil of a coercer.

Apart from the above-mentioned conditions for Ikrah, one other important thing worth discussing is the rule governing or related to it. I.e. Ikrah.

3:3:3 **The Rules of Law Related to Ikrah.**

Generally, the coercer, under the Shariah is held liable for the coerced act if the coercion fulfilled all the above-mentioned conditions and there is no justification or legal permission for the act. There are however, many rudiments under this rule. These rudiments necessitate the ramification of juristic views on the act of coercion.[39] The Muslim juristic, therefore, categorised the rules of Ikrah into two categories. These are as follows:-

(a) Coercion of action, and

(b) Coercion of Statement.

We will now go on to discuss them one by one in a more greater details.

(a) Coercion of Action: Coercion of action is divided also into two, and these are as follows:-

(i) Those offences in which Ikrah is not an excuse:-

The Muslim jurists unanimously agreed that a coerced person is not exempted from liability for the act he is coerced to do if the act is either, amputation of hand(s) or leg(s) or beating which can cause death. They backed their opinion with the following authorities:-[40]

Allah (SAW) in the holy Qur'an puts it thus:

> "....Take not life, which Allah Hath made sacred, except By way of justice and law..."[41]

Abdullah Yusif Alli comments thus: "For the comprehensive word haqq (as used in 6:151) I have used the two words "justice and law": Other significations implied are: right, truth, what is becoming etc. It is not only that human life is sacred. Even in killing animals for Food, a dedicatory Formula "in the name of Allah" has to be employed to make it lawful."[42]

In another verse the Almighty Allah puts it thus:

> "And those who annoy Believing men and
> women undeservedly, bear (on themselves)
> A calumny and a graving sin."[43] Yusuf Ali comments
> Thus:-
>
> "In that passage we were told that any one who
> was himself guilty but accused an innocent man
> of his guilt, was obviously placing himself in double
> jeopardy; First for his own original guilt, and secondly
> for the guilt of a false accusation. Here we take two
> classes of men instead of two individuals. The men and
> women of Faith (If they deserve the name) and doing all
> they can to serve God and humanity. If they are insulted,
> hurt or annoyed by those who sins denounce, the
> latter suffer the penalties of double guilt, viz, their sin
> to start with, and the insults or injuries they offer to
> those who correct them. Instead of resenting the preaching
> of truth, they should welcome it and profit by it"[44]

The Muslim jurists further argued that in cases where the coerced person is coerced to kill a person, the coerced would not be exempted from liability if he so complies with the orders of the coercer. The reason being that the coerced person killed the deceased deliberately in order to save his life, for he

believed that by killing the deceased he will save himself from the evil of the coercer.[45]

But the Muslim jurists differed on the type of punishment to be inflicted on the coerced person for killing the deceased. According to Imams, Malik and Ahmad, Qisas should be applied on the coerced. In the Shafi'I School, there are two views: The first view says that Qisas should be applied on the coerced; and the second view says that diyyah should be paid to the legal heirs of the deceased person. According to the profounder of the latter view, Ikrah tantamount doubt or rather creates doubt and doubt always stops the application of Qisas. This is in line with the prophetic tradition, which says: "Set aside hudud punishment where there is a shadow of doubt." Hanafi on the other hand have divergent opinion among his jurists. According to Fazafari, qisas should be applied. While Abu Hanifa and Muhammad are of the opinion that the coerced person should be punished with Ta'azir i.e. any punishment that the Judge thinks fit for the coerced person. And according to Abu Yusuf of the same school, the coerced person should be forced to pay diyyah.[46]

(ii)Those Offences in which Ikrah is an Excuse:

Ikrah is an excuse in those offences, which the Shariah allowed their Commission in cases of necessity. A good example to cite in this regard is the eating of a carrion or rather dead body of an animal; drinking of blood, commission of adultery, etc.[47]

The Almighty Allah, in this regard, after rehearsing what is really prohibited us from, says:

"....when He hath explained to you in detail what is forbidden to you – Except under compulsion or necessity?..."[48]

Yet in another verse He says:

> "...But if one is forced by necessity, without
> wilful disobedience, nor transgressing due limits –
> Then is he guiltless..."[49]

Eating carrion (dead body) and drinking of bear is forbidden not in cases of necessity, but it is permitted if one is forced to do it. For this reason the hadd punishment of these particular offences is set aside. For it is the rule of the Shariah that prohibition is removed by necessity.[50]

It is a condition in this regard; that the compulsion must be perfect, but if it is imperfect one the act remains forbidden and punishable by law.[51]

The Muslim jurists differed as to whether a person coerced to commit Zinah should be liable for the hadd punishment of the offence or he should be excused. According to Abu Hanifa, a person cannot commit Zinah until his penis gets up and the getting up of a penis comes as a result of a desire and option. So if a person complies with coercion and commits Zinah he is not considered as someone under compulsion and he will be punished accordingly, i.e. with the hadd punishment of Zinah. Abu Hanifa further argued that the standing or getting up of the penis goes to show your strength or rather your being a man and not

option. According to Imams, Malik, Shafi'I and Ahmad, Ikrah sets aside hadd punishment of Zinah and the coerced person is therefore exempted from liability. Some jurists support the view of Imam Abu Hanifa.[52]

But if a woman is coerced to have sexual intercourse with another person other than her husband, the hadd punishment of Zinah will not be inflicted on her. For the Prophet (SAW) has said:

"My people are exempted from mistake, forgetfulness and what they are compelled." And it so happened during the lifetime of the holy Prophet (SAW) when a woman was forced to have sexual intercourse with another person and the hadd punishment was not inflicted on her.[53]

There was also a case of a woman who was so much thirst in the desert and could not get water to quench her thirst. Then a herdsman appeared and she demanded water from him but he said to her until you submit yourself to me I will not give you my water. The woman was so desperate, and as such has only two options, either to submit herself to the herdsman and have the water or else she die of thirst in the desert. The woman then opted for the former and had the water. When her case was brought to the second Caliph Umar Ibn Khattab (R.A.), he referred the matter to Ali bn. Abi Talib (R.A.) to give a legal judgement or rather Fatwa. Ali said, "The hadd punishment of Zinah cannot be inflicted on the woman, for Allah (S.W.I.) in the holy Qur'an says in chapter (2:173) Supra.[54]

(b) Coercion of Statement: A part from the first type of coercion discussed above i.e. that of action, the second type of coercion is that of statement or rather

verbal coercion. And this is where the coerced person is forced to make a statement that will either go to touch his faith like the case of Ammar bn. Yasir (Supra), or the honour and integrity of another brother or sister. This covers the case of Qadhaf (false accusation of unchastely), abuse or any other contemptuous statement against another person believing or non-believing, man or woman. The prophet (S.A.W) in this regard is saying: "Life, property and honour are sacred..."[55]

And the Almighty Allah in chapter (33:58) Supra did warn against annoying believing men and women undeservedly. But for a person who is coerced to violate the message of this verse is covered or rather exempted. Says He:

"Except under compulsion, His heart remaining firm in Faith..."[56]

Majority of the Muslim jurists comprising Malik, Shafi'I, Ibn Hambali, Al-Awzai, Daud al-Zahiri, their followers and others, asserted that there should be no legal consideration or validity for any statement made under coercion. This is so because the coerced person lacked the intention of the statement and as such he is uncommitted to the course of action stipulated in the coerced statement. They did not differentiate between revocable and unrevocalble stipulations. Revocable stipulations are like ones related to acts of sale, rent age, gift etc. While irrevocable are like marriage, divorce and emancipation categorically.[57]

Hanafi jurists agreed with the majority on revocable stipulations made under coercion to be non-committed. But they disagreed on irrevocable stipulations and made the coerced committed to the course of action[58]

Having discussed coercion, its conditions and classification; one other thing that needs to be discussed at this juncture is Amr i.e. command. This is necessary in order to draw a line of demarcation between the two: i.e. between coercion and command.

3:4 Command.

Command under the Shariah is "to request the performance of a duty strictly without any coercion." This commanded duty is either permissible or impermissible. The commander is also defined as "a person who commands another person by way of superiority to carry out a duty in his own property or jurisdiction, or in a third party's right, with structure of command or without it."[59]

If the commanded act is within the property of the commander, the people commanded will be immunised from any liability because the command of the former is considered as an obvious permission. And a legal permission allows one to-exercise certain right in the property of the commander. But if the commanded act is in another person's property, the command will be null and void for the Shariah permits no one to exercise any right in the property or jurisdiction of another without his consent. A hadith of the prophet (SAW) has buttressed this tendency where it says: "No obedience is lawful for a creature on account of disobedience to the creator – Allah."[60]

The Muslim jurists only exempted from the general compass of this hadith if the commander is an unjust sovereign. And the commanded knew and was even afraid that if he failed to carry out the commanded act the sovereign might kill him. In this situation the commanded person is free from liability for he is coerced. In line with the inclination of the hadith they asserted: "If a person is ordered to usurp the property of another person, the liability is on the usurper because the order is void." And in any situation where the command is void, the commander shall not be held responsible as they have theorised that: Whatever is made unlawful the request for it is also unlawful."[61]

3:4:1 Liability of The Ma'mur i.e. the commanded.

The commander, in any case should not be held liable by his command; the Muslim Jurists made the onus of tort rest with the Ma'mur. They said if a person ordered another person who is sane and mature to kill a man or destroy the property of a third party, the liability is on the actor – Ma'mur. The Amir is not responsible provided he did not coerce the ma'mur. He is similarly liable though the tort is inflicted upon the Amir himself.[62]

The reason why the onus rests with the Ma'mur rather than the Amir is that since the command is not a kind of coercion, which could have affected the intention and option of Ma'mur, it is therefore contended that the Ma'mur has done the commanded act out of his own volition directly. Additionally he has been obliged by the law-giver-Allah not to harm or trespass on anybody's person, property or dignity. He is also under obligation not to obey anybody in matters of

Haram i.e. Forbidden acts, or matters of Makrouh i.e. the distasteful acts as the above mentioned tradition proves.[63]

Notwithstanding the above provision of holding the ma'mur liable for the commanded act, there are some categories of ma'murs who are exempted from liability in the following cases:-

(a) If the Amir is a sovereign;

(b) If the Amir is a father;

(c) If the Amir is a master;

(d) If the Ma'mur is an infant; and

(e) If the Ma'mur is a slave.

Imam al-Suyuti asserted that "If a person sought legal advice from a competent mufti, which the latter gave, and it leads to a tort. The legal advice was later on proved to be wrong. The liability is on the competent Mufti. Similarly, a civil servant is Immune from liability emerged from any act he did under the command of his superior, provided the command is a valid one.[65]

We are now going to briefly comment on the above-mentioned five situations where the Ma'mur is exempted from liability.

3:4:2 The Command of the Sovereign.

Hanafi jurists are of the opinion that any command exercised by the sovereign or his representative would free the Ma'mur from liability. But if the command is made by another person rather than the sovereign or his representative the Ma'mur would not be free from liability except if the command

is lawful, valid and came from sane and mature person. In addition the Ma'mur must regard the command a legal order that he ought to execute. Where the Ma'mur is an unintelligent minor or insane, he should be free of any liability however. Rather the liability should be upon his Amir.[66]

Shafi'i jurists opined that anybody who commands the destruction of another person's right-his person or property, would be held liable if he is mature and sane. Here, they did not draw a line of demarcation between a sovereign and any other person provided that the Ma'mur did not transgress the limit of the command and the command is proved to be lawful and valid but not otherwise; in which case the Mu'mur will be held liable.[67]

Maliki jurists contended that the liability should be upon the one whose command is considered as coercion alone. The Ma'mur would only be punished penitently. The Ma'mur had acted under constraint though, this constraint, according to Maliki School would not permit him the unlawful act. Juzai al-Maliki opined that if the command were invalid the liability would be on the Ma'mur alone.[68]

Hambali jurists, on the other hand, stipulated that the Ma'mur could be free from liability if the command is valid without differentiating whether the commander is a sovereign or not. The command is considered valid in this School, if it is made y a sane and mature person, and if the Ma'mur has contended that the act has a legal backing like a command from the master to his slave.[69]

3:4:3 The State.

The Qur'an defines "State" by the words like Ard or earth and Mulk or dominion, Hukum, wilayah, Imamah, Amarah, Khilafah, etc. relates directly or indirectly to Government and authority. The word Mulk signifies power in relation to what is concrete i.e. territory, whereas the word Malukut suggests Allah's dominion over what is invisible and far beyond human comprehension. Since the word mulk itself has two shades of meaning as understood from the context in which it is used in the Qur'an. Says Allah:

> "To God belongth the dominion of the heavens And the earth; And God hath power over all things."[70]

The word is used as an indirect connotation to territory and suggestive of domination in relation to all is concrete in other places. Says Allah:

"Blessed be He in whose hands is the dominion, And He over all things Hath power."[71]

The state is hence a concrete entity in which the Ummah attains righteousness. It means that the state is one where the Ummah achieves dominance.[72]

The state does not come into existence as an end in itself but takes shape only as a means for the righteous people to administer it on the basis of righteousness. It is stated in the Qur'an:

> "Thus have we made you an Ummah justly balanced, that ye might be witnesses over the nations, and the Apostle a witness

over yourselves."[73]

1 The nover me t bei g a represe tative of the Ummah it is admi istered o behalf of Allah by pri ciple of righteous ess. The power relati g to state is gra ted i the light of the Qur'a o the pri ciples provided by the Book – The pri ciple ru s: "Surely Allah does ot love the mischief-makers," a d moreover, "But my promise is ot withi the reach of the evil-doers." I.e. righteous ess is the co duct, which is prescribed for all i cludi g the Ummah a d also for the state formed after materialisi g for the same formatio .[74]

The state, therefore, is duty bou d to protect the life, property a d ho our of each a d every member of the state. The violatio of o e of the above three me tio ed rights attract the pu ishme t of Qisas or payme t of diyyah. The violatio ca either be i te tio al or u i te tio al; it ca be by a i dividual or *the state – i.e. through o e of its represe tatives.*

Just like all other i dividual offe ders, the state is liable to pay damages from its treasury i.e. Bayt al-mal, for a y i jury caused by its workers i the course of their services to the state. This is the opi io of Ha afi School o co ditio that the act or the omissio of the state's serva ts (that caused the i jury) is i obedie ce to a warra t issued by the state authority. They compared the warra t with a direct comma d of the sovereig whose authority o his subject is ge eral. This authority of the sovereig does ot permit him to i terfere with the perso , property a d or ho our of the subjects without disti ct rule of

law from the Shariah. No pretext to "public good" or necessity can allow such exercise. They also analogised this case with a case of coercion in which the official was under pressure of a superior whose awe had subdued the official. E.g. If an executor is ordered to hang a man by the command of the sovereign without justification but the hangman is ignorant of injustice, the sovereign would be held liable and not the executor.[75]

Imam Shafi'i on the other hand compared the state with the coercer or the commander and made it liable alone for the tort and crime committed by its servants in the course of their service. The Maliki jurists hold different opinion; some of them hold the official liable except if he is a minor or insane, in which case the state is held responsible. But the popular opinion of the school is to hold the state and the official liable simultaneously for any tort or crime committed in the course of state's service. Zahiri jurists hold the official alone responsible for they compared this case to that of coercion which cannot legalise the infliction of any injury to a person or property.[76]

It was narrated that Caliphs Abubakar and Umar bn. Abdul Aziz (R.A.) were in the habit of paying damages from the state treasury for any injury or damage committed by their officials in the course of their duties. On this Abu Yusuf narrated that a man came to Caliph Umar bn. Abdul Aziz and Said:" O Commander of the Faithful! I had a farm upon which a troop from Syria trespassed and they destroyed it. "The Caliph, after the establishment of the case, paid the man damages of ten thousand dirhams.[77]

But another narration says that Umar bn. Khattab (R.A.) disapproved the payment of damages for the tort of his officials. He rather subjects them to pernitent punishment. And he used to say: "I verily did not order them to trespass, for they, in the course of their service, are working for themselves (i.e. for their livelihood) not for me." This shows that the official is held liable unless if it can be proved that he did not trespass.[78]

Where nobody can be made liable for a tort that occurred, damages should be paid from bait-al-mal for the wronged. Similarly, if the injury happened as a result of a mistake in the process of state affairs, the state is held liale.[79]

Another relationship that needs to be discussed here is that between principal and his Agent.

3:4:4 The Principal and the Agent.

Sometimes an individual is prevented from acting in his own person, due to accidental circumstances (e.g. sickness or size of his business etc.) by necessity he may employ the services of another person to act as his agent on his behalf. The term Al-ajir means agent and it delineates "any person employed to do work for another." For this reason the Muslim Jurists classified al-ajir into two – private and general agent. The general agent can be termed "independent contractor" as in common law. The private agent is a servant whose employer will answer for the torts committed in the course of the employment because of the benefit the employer obtains thereby.[80]

Al-ajir has two instances of jurisdiction. They are either to work on the property of his principal under the contract between them, or beyond the terms; or to work on the property of a third party on the contract between him and his principal. In the first instance of his jurisdiction if it is under the contract between both of them without any transgression or trespass he should not be made liable. And since the damage could only occur on the property of the principal who could not be made liable vicariously for himself, the matter cannot come under vicarious liability. But if he worked outside the term of the contract it would definitely be regarded trespass per-se. And al-ajir would be made liable grossly for any tort emanating from his act.[81]

In the second instance where the ajir worked on the property on the terms of the contract between him and his employer, he should be considered as an agent of his employer, or an agent of the owner of the property, i.e. the third party through his employer, the second party. The ajir is then as agent – agent of the third party.[82]

An agent can be appointed for the management of suits or criminal prosecution, or for the payment or execution of all rights except in retaliation, or punishment and, according to Abu Hanifa, a person under accusation may employ an agent to conduct his defence, but if the agent makes a confession in such a case, the principal is not bound by the same.[83] But if the agent made the confession on the instruction of his principal, the principal will be bound by it.

3:4:5 The Rules of Law Relating to al-ajar.

A workman is not at liberty to demand his hire until his work be finished, unless an advance payment were stipulated; because some of his work still remains unobtained, hence he is not entitled to his hire before his work is finished.[84]

But al-ajir al-khas is entitled to his wages by the expiration of the fixed period for his work even though he might not perform a duty. The fact that he has submitted himself and made himself available for the job which was for the benefit of his employer sufficed him to get his payment.[85]

If a person hire workmen for the purpose of constructing a balcony, or a pent house, and such balcony or penthouse fall upon and kill a man before the workmen had finished it, the responsibility falls entirely upon the workmen; for the deceased was destroyed in consequence of their act; and so long as they continue engaged in the work, the balcony or penthouse is not held to be delivered to their employer. Their act is therefore construed into homicide, insomuch that they must perform an expiration for it. Besides, as their employer did not hire them to kill any person, but to construct a contract of hire, but attaches to the workman alone, hence the damage also attaches to them, as being a consequence of their act.[86]

If, on the contrary, the balcony or penthouse in question fall after the work has finished, the owner of the house is responsible, on a favourable construction; for in this case the contract of hire has been completely fulfilled, insomuch that the workmen have become entitled to their wages. Their act has

therefore devolved upon their employer, who consequently stands in the same predicament as if he himself performed the work; and he is responsible accordingly.[87]

In a restricted contract, any deviation with respect to the use renders the hirer responsible for the article hired. If a person let a quadruped to hire, on condition that a particular person shall ride upon it, or let a dress to hire, on the condition that a particular person shall wear it, - and the hirer set upon the quadruped some other than the specified, or gives the dress to some other person to wear, and the quadruped or dress be destroyed, he (the hirer) is responsible; because as men differ in their manner of riding and of wearing clothes, the specification of a particular person is valid and consequently it is not lawful for the hirer to swerve there from. The same rule also obtains with respect to everything liable to be differently affected by a different occupant. In other words, if a person who lets to hire, restricts the use, it is restricted accordingly; and if the hirer swerve there from, he is responsible in case of the destruction of the article, for the reason stated above[88]

Al-ajir al-khas would not be held liable for any damage which occurred without his own fault in the course of his duty because he is amin i.e. trusted person, and working with the permission of the owner of the property. He would however be held liable. If he incurred damage upon the property of a third party even though with the command of his principal. But he should be entitled to indemnity from his principal if he did not know that the act is unlawful. For

example, if the principal ordered him to dig a well on a piece of land which belongs to another person, or to kill a lamb of another man and he, the agent or the servant, thought that the land or the lamb belongs to the principal.[89]

So workman employed to dig a well in another's land are not responsible for any accident unless they be aware of the trespass. If a person hires a workman to dig a well at the precincts of his neighbour's habitation and they dig accordingly, and a man be killed by falling into it, the responsibility rests upon the employer, not upon the workmen, provided they dug the well under the idea of the place being within the precincts of their employer; because as a contract to hire, ignorantly engaged in, is lawful and valid in appearance, their act is therefore referred to the hirer, they themselves having proceeded under a deception:- The case being, infact, the same as where a person desires another to slay "such a goat", and he does so accordingly, and it afterwards appeared that the goat was the property of another, - in which case the compensation is paid by the person who gave the order. It is otherwise where the workman digs the well, knowing, at the sametime, that the place is not within the precincts of the employer. For in this case they are responsible; because the contract is not here valid in appearance, as they have not been deceived.[90]

Last but not the least, the relationship that exists between the master and his slave.

3:4:6 Master and Slave: A slave under Islamic law usually owns nothing, for he himself and his belongings are the property of his master. If under certain

circumstances a slave is allowed to own property, as in the case of Mukatab, i.e. a slave under contract with his master to emancipate himself, then the fundamental principle of "every tortfeasor is responsible for his wrong" will be applicable. This is where the slave committed the wrong without the command of his master. Majority of the Muslim jurists i.e. Hanafi, Maliki and Hambali Schools upheld this opinion,[91] But if the slave owns nothing, his master will be given the option of either surrendering the slave for punishment or paying pecuniary compensation to relieve him of the liability.

Maliki said it reached him that Umar bn. Abdul-Aziz decided that if a Mudabbir (a slave whose master declared free after his death) should inflict an injury on anybody, the owner should hand him over to the one injure who would extract service from him (slave) in compensation of the injury, and if the compensation be fully paid and the owner be alive, the Mudabir will go back to his owner.[92]

Imam Shafi'i disagreed with the majority where he opined that the slave is personally liable for the wrong, and damages should remain a debt on him (slave). But if it is proved that he will not be able to pay it, he the slave – should be sold o pay off the debt, except if the master is, voluntarily ready to pay off the debt.[93]

Going by the above juristic opinions i.e. that of Hanafi, Maliki and Hambali Schools on one hand, and that of Shafi'i school on the other, one can rightly say that there is no much difference, for both of them contended that the

liability is upon the slave except that the master may pay damages of the wrong, if not, the slave should be liable tortuously. Perhaps the difference is only in the basis of the master's intervention – while the majority gave the maser an option ab-initio, the Shafi'i School did not until it becomes a debt on the slave.

The Zahiri School, on the other hand held an entirely different opinion on the issue. They opined that the liability is on the slave though; this liability remains until he the slave is capable of freeing himself from it even if it is until after his emancipation from slavery. The master should not be asked to pay damages or to sell the slave in order to pay off damages.[94]

The same rule i.e. of holding the slave liable, will not be applicable where the master did command the slave to do a certain duty which resulted in the injury of a third party. The view of the majority in this regard is that the master is liable tortuously. They based their opinion on the principle of "he who has the right takes the duty" for the master takes the outcome of his slave work whether it is good or bad. They further cited the case of Hatib bn. Abi Balt'ah whose slaves stole the camel, which belonged to a man from Muzainab. The man sued them for damages before Umar bn. Al-khattab. Umar adjudged that the maser, Hatib, should pay the double price of the camel as a fine and damages for the act of his slaves. Imam, Maliki on this case commented that: "It is not our practice to double the price. The practice is to fine the master the actual price of the camel or the cattle, at the day of stealing it. I.e. with the market price of the camel as per the day it was stolen.[95]

The latter opinion is a better one and more preferable than the decision of Umar (R.A.), for it is more equitable to give the plaintiff the exact price of his property as at the time of its destruction than to ask the tortfeasor to pay double price – The Prophet (SAW) when Aisha (R.A.) out of sheer envy destroyed the Calabash (container) of one of his co-wives. He said "Calabash for calabash or its price." Meaning that Aisha should give a similar calabash or pay its price to the plaintiff but did not ask her (Aisha) to pay two or the double price of the calabash she destroyed.

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CHAPTER FOUR

LIABILITY FOR ANIMALS.

Under the English common Law of Tort, it is only straying cattle and animals of savage disposition that call for any special notice, the first because of its historical prominence in the dawn of nearly every system of law, the second because of the stringent liability which has been attached, especially in modern times, to dangerous things. Both may be bracketed under "strict liability akin to the rule in Rylands Vs Fletcher (1865)3 H & C (Court of Exchequer); but with considerable differences in the detailed rules connected with them.[1]

There are many possible ways in which a tort may be committed through the instrumentality of an animal under one's control; but the fact that the agent happens to be animate instead of inanimate is immaterial. Your liability is neither greater nor less whether it be a stick or a stone or any living thing with which you have inflicted the injury. Thus you can be liable for nuisance through the agency of your animals, just as you can be for nuisance through the agency of anything else, which belongs to you. A man who keeps pigs too near his neighbour's house commits a nuisance, but that is not solely because they are pigs. He would commit a nuisance just as much as if what he owned were manure cheap and not pigs. There is no independent tort called" nuisance by pigs," or "nuisance by animals."[2]

Again if a dog-owner deliberately sets his dog on a peaceable citizen, he is guilty of assault and battery in the ordinary way just as if he had flung a stone at

him or hit him with a cudgel. So, too, if a man teaches his parrot to slander anyone, that is neither more nor less the ordinary tort of defamation than if he prefers to say it with his own tongue rather than with the parrot's.[3]

Having a bird-eye view of what is obtainable under the common law, we will now go on to dig deep into the shariah provision.

The Almighty Allah, in the Holy Qur'an while narrating the story of prophet Daud and his son Solomon has this to say:

> "And remember David And Solomon,
> when they have judgement in the matter
> of the field into which the sheep of certain
> people Had strayed by night: We did witness
> their judgement. To Solomon we inspired
> The (right) understanding of the matter: to
> Each (of them) we gave judgement And
> Knowledge;..."[4]

Abdullah Yusuf Ali commented thus:

> "The sheep, on account of the negligence
> of the shepherd, got into a cultivated field
> (or vineyard) by night and ate up the young
> plants or their tender shoots, causing damage,
> to the extent of perhaps a whole year's crop.
> David was king, and in his seat of judgement he
> Considered the matter so serious that he awarded
> The owner of the field the sheep themselves in
> Compensation for his damage. The Roman Law
> of the Twelve Tables might have approved of
> his decision, and on the same principle was built
> up the Deodand doctrine of English Law, now
> obsolete. His Son Solomon, a mere boy of eleven,
> thought for a better decision, where the penalty
> would better fit the offence. The loss was the loss
> of the fruits or produce of the field or vineyard:
> the corpus of the property was not lost. Solomon's
> suggestion was that the owner of the field or vineyard
> should not take the sheep altogether but only detain

them long enough to recoup his actual damage, from the milk, wool, and possibly young of the sheep, and then return the sheep to the shepherd. David's merit was that he accepted the suggestion, even though it came from a little boy: Solomon's merit was that he distinguished between corpus and income, and though a boy, was not ashamed to put his case before his father. But in either case it was God who inspired the true realisation of justice. He was Present and witnessed the affair, as He is present every Where."[5]

4:1 General Concept and Scope of Liability for Animals Act.

Majority of the Muslim jurists adhered to the prophetic traditions, which say:

"Animals are exempted from liability."

And in another transmission it is said:

"Animals' torts are to be overlooked."

The jurists in turn opined, "Injury caused by animals is null and void."[6]

One can rightly say, going by the above quoted traditions, that no liability in the torts of animals whatsoever. But in the actual sense these traditions are not loosely left, some other traditions have restricted this general notion i.e. "no liability in the torts of animals whatsoever." The prophet (SAW) in one tradition says:-

"He who stationed an animal on one of

> the ways of the Muslims or in one of their markets until the animal injured someone by its fore-legs or hind-leg, is to be liable."[7]

Malik reported from Ibn Shahabin, from Haran bn. Saeed bn. Muhaisatah that a camel of Barra'h bn. Garib entered the farm of another person and caused destruction to the plants. Then the prophet (SAW) adjudged:

> "It is the duty of the owners of the farm land to look after their farms in the day-time, And whatever the animals destroyed at night, their owners will be held liable."[8]

Ordinarily, the tort of animals should not be compensated for. If we consider their inability to intend the torts. But since the torts of minors and insane persons are attributed to their Guardians for the breach of the duty of taking care of them (minors and instances), the torts of animal should also be compensated by their owners.

4:2 **Juristic Opinions on the varions circumstances of nimals' Tort:**

According to Shafi'I, Ibn Abi Lailah and Ibn Shubramah, if an animal injures another person with its fore-leggs or hind leggs or mouth, the owner will be held responsible. But according to Imam Malik, Laith and Auza'i, the owner of the animal will not be held liable for any injury caused by his animal to another person, if it is not as a result of his (the owner or the rider of the animal) own fault. But if the type of the injury inflicted by the animal is that which attracts Qisas and the rider intentionally caused the injury, then Qisas can be applied. The

reason being that an animal is just like an arm or tool to the commission or infliction of the injury.[9]

It is stated in the Hedayah that the rider of an animal is answerable for anything which the animal may destroy by treading it down, or by striking it with its head, its fore feet, or its body; but he is not responsible for anything which the animal may destroy by striking it with its hind fact or its tail.[10]

The rule here is that while a person has the right of the use of the high ways, he equally owes a duty of care for his own safety and the safety of others. He should always have in his contemplation the right of other users of the highway so as to avoid causing any harm either to his person or the person of others. This is in line with the prophetic tradition" there should be neither harming nor reciprocating harm."

Abu Hanifa is of the view that if an animal injures another person as a result of a kick with its hind feet the rider will not be liable. But if the injury was caused as a result of a kick with its fore feet then the rider will be held responsible. *This is for the simple reason that the rider of animals has control over* its front but does not have control of the hind. He is also of the view that if a person leads an animal and the saddle or its bridle happens to fall down and injure another person, the leader of the animal will be held liable for that.[11]

Imam Abu Hanifa went further to say that if an animal runs away and destroys some property of others or injures another person, in the night or day-time, the owner of the said animal will not be held responsible for he did not

intend it. Where a person rides an animal and another person beats or strikes the animal and as a result of which it kicks another person with its fore-feet or matches on him and caused him grievous harm as a result of which he died, the responsibility rests on the person who beat or struck the animal but not on the rider. For the rider did not intend it.

And if it injured the person who struck it and died as a result of the injury, his blood is of no account for he was the cause and will be said to have slain himself.[12]

If, however, the rider of the animal at the time of the other person striking the animal, had stopped it in the highway, the responsibility rests upon him and the person who struck the animal in equal shares, as in this case he (rider) also has transgressed, in having stopped the animal upon the road.[13]

If on the other hand the animal throws the rider and kills him, the fine for him is due from the Akilas of the striker, he having transgressed in producing the cause of the accident.[14]

If an animal, while travelling, discharges its dung or urine on the highway, and any person perish in consequence, the rider is not responsible, since it was impossible to guard against this; the same rule applies where the animal stands still while discharging its dung or urine, or when the rider stops it for this purpose.[15]

Having a bird-eye view of the juristic opinions on the various circumstances of animal's tort, we will now go further to discuss the liability of

some category of persons for the tort committed by an animal not necessarily because they are the owners of the said animals but because of their possession of the animals and the control they have over the animals. This will be discussed under the following heading:-

4:3 **Responsibility of the rider or Leader of an Animal.**

If, for an animal, there is a rider or leader, and the animal destroys the property of others or injures another persons, the said rider or leader would be held responsible for that. For Umar bn. Khattab, the second Caliph adjudged the payment of diyyah against a person. But according to the Zahiri School no liability will be put neither on the rider nor the leader for the prophet (SAW) is reported to have said: "Animal's torts are to be overlooked." While commenting on the view of the Zahiri School, the author of Fiqh-al-Sunnah – Sayyid Sabiq – said that the view of Zahiri is only applicable where the animal has no rider, leader or keeper. According to him the Muslim jurists unanimously agreed that, in such circumstance, no liability for what the animal destroyed.[16]

Ibn Hazam of the Zahiri School further cited only three circumstances, which they felt the keeper of an animal, rider or leader can be held liable. These are as follows:-

(a) When the damage happened through the load he put on the animal.

(b) When he incited the animal upon a person or property. And

(c) When he invited the animal knowing that the animal could inflict injury upon the thing or person on the way before reaching him.[17]

But it is written in the Jami'us Sagheer, that the rider or leader of an animal is responsible in all instances in which responsibility lies against the rider; for as they (as well as one who rides) occasion the damage by taking the animal to the place where it is committed, their so doing is therefore restricted to the condition of safety, as far as may be practicable, in the same manner as the rider.[18]

It is immaterial whether the hold of the animal by the keeper, is lawful or unlawful and whether the damage happened at day-time or night, he is liable because the acts of the animal can be attributed to him. But if the animal trespassed after it has run away from the keeper and caused damage the keeper will not be held liable for he has no control over it at the time of its tort.[19]

4:4 Liability of a Person who stationed an Animal.

If a stationed animal happens to destroy property of others or injure another person, Abu Hanifa is of the view that the keeper will be held liable and he will not be immune from liability even if he stationed the animal at a place where he is supposed to station the animal, i.e. at proper place. He relied on the hadith narrated by Nu'man bn. Basheer that the prophet (S.AW.) has said:" He who stationed an animal on one of the ways of Muslims or in one of their markets until the animal injured somebody by its fore-legs or hind –leg, is to be liable." But Shafi'i opined that if the keeper stationed the animal at a proper and suitable place, he will not be liable for any damage or injury to person or property. He will only be liable if he stationed the animal at an improper place.[20]

It is sated in the Hedayah that if a person stops the animal in the road he is responsible for any destruction which may be occasioned by a kick of its hind feet, or a stroke of its tail, since it is possible for him to avoid stopping, although it be not in his power to guard the animal from kicking, or so forth; and therefore, as he transgressed in so stopping, he is responsible for any damage which may ensue in consequence.[21]

A person is also responsible for any injury sustained from a large stone, thrown up by the animal's hoof. The reason being that it is possible to guard against the accident, since animals may easily be so guided as to avoid large stones. But in a situation where the animal's hoof strike upon and thrown up graves or small stones, and a persons' eye be put out, or his clothes damaged thereby, the rider is not responsible for the simple reason that it was impossible to guard against the accident, since an animal cannot move without being liable to it.[22]

Ibn Hazam of the Zahiri School does not consider the keeper who tied his animal on the highway to be liable though he considered him a wrongdoer. He did not convict the keeper of a mordacious dog or make him liable for its torts even though he considered him to be a transgressor. This tendency is based upon the view in the Zahiri School that the manufacturer of a sword is not liable if he gave it to an oppressor who used it to kill a man. And cannot be called a killer. The killer rather, is the oppressor.[23]

4:5 Liability for the Destruction of Plants, Fruits etc.

Majority of the Muslim jurists, among who were the Malikì, Shafi'i and many jurists of Hijaz, opined that. Whatever an animal destroyed in the day-time, be it life of another or property, no responsibility will be attached to the owner of the animal. For it is a known fact to everybody that it is the duty of the owners of farm lands and gardens to look after their farms or Gardens in the day time and owners of the animals send them for grazing in the day time and bring them back to their herds in the night. Whoever goes contrary to this custom is said to have violated a designed and well-known practice, which is of public interests. But it is further asserted by the jurists that the tort of the animal, in the daytime, will only be overlooked where the owner (be he the rider, leader or keeper) is not with the animal as per the time of the Commission of the tort. But if he was at the scene of the tort, then he is liable.[24]

The Muslim jurists, in holding the above opinion relied on a tradition reported by Malik from Ibn Hisham, from Haram bn. Saeed bn. Muhaisat that the Camel of Barra'bn. Azib entered and destroyed the farm of another person and the prophet (SAW) adjudged that:

> "It is the duty of the owners of the property
> to keep and protect their property in the daytime,
> while it is the duty of the owners of animals to keep
> their animals at night. Any injury committed by animals
> at night its liability shall be borne by their owners."[25]

Sahnun, Maliki jurists, is of the view that this hadith is only applicable to places like Madinah whose farm land is fenced, but in places where their farms are not like that of Medinah i.e. fenced, the owners of animals will be held

responsible for the tort of their animals committed whether in the daytime or in the night.[26]

In fact the view of Sahnun is the better view for in our own case for example, a person will possess a very large size of farmland or will have many farms in different places which will be practically impossible for the owner to look after the farms in the daytime or night. And it might be that because in those days there was no much concentration in other business, people concentrated more to farming and therefore had all time for it. But in our present day people cannot concentrate solely on farming so they must divert their attention to other day-to-day affairs or business. For this reason this hadith cannot be applicable in this present circumstance.

Hanafi School opined that if as per the time of commission of the tort the animal is straying one i.e. nobody looking after it, then the owner will not be held liable for any tort. They capitalized on the hadith, which says:

"Animals' Tort should be overlooked."[27]

4:6 Liability For the Owners of Birds

Some Muslim Scholars are of the view that, Bees, dove, hens and other birds are just like stray animals, and if they happen to eat the grains of another person, the owner will not be liable for that. For according to these scholars it is a well-known practice that birds are always free to move around.[28]

Other jurists do opine that the owners of these birds are liable for whatever they destroyed. So, if for example, someone has a vicious bird like Eagle, if it kills the birds or animals of others, then the owner will be held liable. And this is a better view.[29]

The latter view is said to be a better one for one obvious reason if the owners of these animals are immune from being liable, they can, through their own birds, deliberately destroy the property of other or send their birds to go and steel for them. We have earlier on seen that if a person, for instance, teaches his parrot how to slander anyone, that is neither more nor les the ordinary tort of defamation than if he prefers to say it with his own tongue rather than with the parrot's.

Another category of animal that needs special mention here is dog. The reason for this is the benefit people drive in keeping dogs in their houses, farms, herds etc.

4:7 **Liability for the Tort of Dogs.**

It has been stated in a book called "Mugni" of Ibn. Qudama, that:

> Whoever keeps a dog having vicious propensities,
> And lets it slip, in the day time or at night, if it
> Happens to injure a person or kill the animal of
> another person or tear the cloth of other people, the
> Keeper (owner of the dog) will be held responsible
> For the keeper has let it slip at his own peril.
> Unless if the plaintiff entered the house where the
> Dog is without the keeper's permission. In this case
> the keeper will be immune from being liable.
> But when the plaintiff entered the house with the
> Permission of the keeper then the keeper will be
> responsible for whatever tort his dog committed

For the keeper here is the cause of the injury."[30]

It is also stated in Hedayah that if a person lets slip his dog, and drives it (that is run after it), and the dog, without stopping, destroyed anything, the responsibility of it rests with the person who let it slip, the act of the dog being attributed to him because of his driving it.[31]

But Ibn Hazam of the Zahiri School does not hold the keeper of a mordacious dog liable for its torts even though he considered him to be a transgressor.[32]

There are some circumstances whereby the keeper of a dog will be immune from being liable for having causing no substantial damage to the property of others. A good example here is where the dog drinks from a dish or any other container of another person or urinates in it.[33]

Having some certain circumstances whereby the owner or keeper of an animal will be held responsible for the torts committed by his own animal, we will now go on to discuss cases where the owner or keeper of an animal will be compensated for any injury sustained by his animal as a result of a tort of another person.

It is stated in the Hedayah that if a person put out one of the eyes of a goat, he must compensate (not for any determinate part of the whole value, but merely) for the defect thereby occasioned; because, as the only use of a goat is its milk or its flesh, not its labour nothing more can be required than merely the determination occasioned in its value. For the eye, on the contrary, of an ox, or

camel, a dromedary, an ass, or a horse, of whatever description, a compensation must be made of one fourth of the value; because the prophet (SAW) has said "for the eye of every animal except a goat yet must pay a fourth of the value of the animal;" and two of its driver), the animal may therefore be said to have four eyes, - whence a fourth of its value is due for the loss of one eye.[34]

In cases of contract of hire, if a person hires an animal to carry a certain quantity of wheat etc., and load it with a greater quantity, and the animal perishes, he is responsible, in the proportion of the excess load. The reason being that the animal in question has perished in consequence both of what has been permitted to the hirer, and also, of what has not been permitted; as, therefore, the destruction has been occasioned by the whole burden, it is divided between both parts respectively; and accordingly, nothing is accounted upon the proportion allowed, but an indemnification is due upon the proportion unallowed. If, however, the hirer had overloaded the animal to a degree beyond what it was able to bear, he is, in this case, responsible for the whole of the value, since it is altogether unusual to do so.[35]

So also where a person hires an animal for riding and pull the halter, or beat the animal, so as to occasion its death, he is responsible for the whole value. This is the view of Hanafi. But according to Abu Yusuf and Muhammad Ashaybani, he is not responsible where he only pulled the halter or beats the animal in such a degree as is customary, since everything customary is included in the contract, and therefore the case is the same as if he were to perform those acts

by express permission of the owner whence he is not responsible. The argument of Abu Hanifa is that the owner's permission is restricted to the condition of safety since an animal may be driven without either pulling the halter or beating it, both of these being an excessive and unnecessary exertion: the use, therefore, is restricted to the condition of safety, in the same manner as the travelling upon the public highway.[36]

In a nut-shell, any injurious deviation from the prescribed condition of the use of culture of the hired animal attracts the payment of diyyah in part or in toto as the case may be.

Compensation is also due where a person kills the dog of another. This is on the authority of a decision passed y Abdullahi bn. Amr. Reported by Abu Muhammad, Ahmad bn. Umar, Abu Zaral-Hawawi, Ahmad bn. Abdan al-Hafit, Muhammad bn. Sahal al-Muqri, Muhammad bn. Isma'il al-Bukhari, Abu Na'im, Qutaibata, Hashim, Ya'la bn. Attain, Ismail bn. Jisas, said that Abdullahi bn. Amr adjudged fourty silver (dirhams) to be paid as the diyyah for killing a dog trained for hunting. In another narration from Abdurrazaq, from sufyan al-Sauri, from Ya'la bn. Attain, from Ismail bn. Jisas said I was with Abdullahi bn. Amr, a man asked him (Abdullahi bn. Amr) "what is the diyyah of a dog specifically trained for hunting?" He said "Fourty dirhams". The man asked again, what of a dog trained for rearing animals? He said "a goat." The man then asked what of a dog trained to guard a farmland or garden? He said a basket of grain. The man asked again what of a dog kept in the house? He said a basket of sand. The killer must

give and for the owner to receive. And also for a dog kept for no purpose if it is killed by another person and the owner claims compensation, a basket of sand will e given to him.[37]

Ordinarily the Shariah holds a person responsible for killing any animal except those that the shariah encouraged their killing. For example, a person will not be liable for killing a mad-dog, snake, scorpion, lion, fox etc. The prophet (SAW) commanded the killing of these animals, within or outside the holy shrines.[38]

There is certain type of animals the killing of which is prohibited by the shariah but no liability is enforced upon the killer. These includes, Ants, bees' bird etc. Nisai narrated a tradition from Ibn Amr that the prophet (SAW) has said:

"Any person that kills a bird without following the prescribed manner (i.e. slaughtering if for consumption), Allah, the Almighty, will charge him for that." Here, the killer can only atone by seeking forgiveness from the creator – God.[39]

Having discussed the liability that arise for a tort committed by an animal and that which is committed against it, we will now go on to discuss conditions for the animal's Tort and those conditions relating to the animals. These can be seen under the following headings:-

4:8 **Conditions for Animals' Torts.**

From our earlier discussion we have seen that the Muslim jurists hold the owner, keeper or rider of an animal liable for any tort it may inflict upon any person or property. Nevertheless these jurists have laid down certain conditions

without which no liability will arise. These conditions are as follows. Let us take them one by one.

4:8:1 The existence of injury.

This condition has been established through the famous juristic dictum, which says: "No liability where there is no injury." The injury at this juncture can be a nuisance or damage inflicted upon the person or property of another by the act of an animal.[40]

4:8:2 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 the tort happened when the animal was kept in its normal place of its owner, or in the normal public place for animals or on the property of another person who has invited the keeper and his animal, the keeper should not be held responsible for there is no trespass to be proved in this circumstances. But where the keeper happens to station the animal in another person's property, or a public place, which is not made for animals, or on the high way, or near a farm-land, or he incited the animal or he acted negligently when he knew that the animal is voracious, he is liable for he has trespassed upon others right in all these circumstances.[41]

4:8:3 **The Connection Between the Injury and the Trespass.**

The injury from the act of animals alone cannot inspire liability. There must be a person who is connected with the occurrence of the injury either

directly or consequentially. If the injury that emerged from the direct act of the keeper to the animal, which inflicted the injury, could be described as a trespass or a transgression of the limit ordained by the Lawgiver, the keeper is liable. His action could be considered as a linkage between the injury and the trespass. The animal, in this circumstance, is like a tool he used to commit the mischief, for this, he is the direct tortfeasor legally.[42]

In the case of consequential injury there will be no liability except if an intention can be proved. An intention here means a mistake, which emerges from a wrongful intent; or want of due care. If none of these instances can be proved there will be no liability. For instance, if a mordacious animal which is beyond the control of the keeper, inflicts an injury upon the person or property of someone nobody can be made liable.[43] For more explanation, let us discuss briefly these three circumstance mentioned above i.e. wrongful intent, negligence and want of due care.

Wrongful Intent: Imam Ibn Hazam exemplified this case hypothetically by the case of a hunter who short his gun with an intention to scare away an animal of another person, or to make the animal cause damage in the property of its owner or another person's property. He asserted that the hunter is liable for any damage that the animal might have inflicted. Imam Maliki also made the keeper of any animal liable for anything he, with wrongful intent, allows it to damage even if it is by its hind-leg.[44]

Negligence: Any negligence for the keeping of animals by their owners or keepers will warrant tortuous liability. The jurists gave an instance of a keeper driving on his animal along the road. In this process the saddle, or the bridle or the load on the animal mistakenly fell down upon a person or property and caused damage. The keeper of the animal is made liable for negligence to tie up the girth property. Similarly, where the keeper cast his animal loose is responsible for any injury or harm it may inflict on any person or property.[45]

Want of due Care: When a keeper or any person incites an animal and the latter hits or knocks down a person or property the keeper or the person who incited the animal is held liable, because the animal was incited without due care of what might be the result of the incitement. It is likened to the keeper who tied his animal to the street railings. If the animal injured a passer-by the keeper is liable for want of due care.[46]

Similarly, a keeper that reared his sheep around the farmland of another person is held liable for any damage they caused to the farm. These instances are sorts of inevitable legal mistakes of which judicial notice has been taken. The Muslim jurists have unanimously inclined toward this notion. They asserted that anybody who has control over an animal, either lawfully or unlawfully, is to be held responsible for the torts of the animal if he is found guilty of want of due care. And where there are many owners on the animal, such as a rider and driver, the one that has the upper hand in controlling the animal should be held liable.

But if their actual control on the animal is equal the liability should be equal as well.[47]

One important point to note here is the fact that before a person is held responsible for any tort committed by his animal, he must, as at the time of commission of the tort, have control over the animal. For instance if an animal break loose and moving on its own accord, kills a man, or tread down property, either by night or day, the owner is not responsible, because the prophet (SAW) has so ordained: and also, because the act of the animal can not, in this case, be attributed to he owner since the neither cast it off nor drove it.

4:9 **Conditions Relating to Animals.**

The Muslim jurists also laid down two conditions for the animals that their torts are redeemable. These conditions are as follows:-

i. that the animal must be alive, and
ii. that it is among the species that are allowed to be owned legally.

The law is indifferent as to whether the animal is known to have vicious propensities or belongs to dangerous species, tame or untamed, young or grown up, for the keeper of such a dangerous animal keeps it at his own peril. The law only requires him to prevent such an animal from going at large or from obtaining in any other manner an opportunity of exercising its mischievous instinct.[48]

To rely strictly on the above two conditions of the animal, will certainly tantamount to depriving the plaintiffs of animals' torts from being compensated.

For one to say that the animal must be alive will mean that if the animal, after committing the tort, happens to die, then the plaintiff will have no remedy at all. By so doing we are overlooking the fact that act of the animal is that of its keeper, rider or owner, as the case may be. The animal is just like a tool, which the keeper can decide to use in the manner he so desires. For instance, in a situation where a person kills another, whether deliberately or mistakenly, and before he or his family (Akilas) is/are made to pay compensation (diyyah), happens to die, his death will not stop the payment of the diyyah that is due. The Akilas should either pay it from his own estate or by the Akilas So similarly, the death of an animal in this case notwithstanding.

And secondly, to say that the animal must be of the species that the Shariah allowed to be owned, here also should not be attainable. This is so because in the first place he transgressed by keeping that animal and secondly he caused the destruction of another (i.e. the plaintiff) or property of others. And a transgressor should not be allowed to benefit from his own evil acts without incurring liability there from. For the animal here is just like an agent to the keeper.

What one should rely more on are the existence of an injury and the cause of that injury. It is also important to know whether the plaintiff has transgressed or not as at the time he sustained the injury.

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CHAPTER FIVE

DANGEROUS PREMISES AND CHATTELS.

5:0 NATURE AND CONCEPT OF TORTS OF INANIMATE CHOSES UNDER THE SHARIAH.

In our earlier discussion on the liability of animals we have cited a prophetic tradition and views of the Muslim jurists exempting animals, premises and chattels from tortuous liability. The hadith reads thus:-

"Torts of, animals, wells and mines are to be overlooked."[1]

The Muslim jurists by virtue of the above tradition do opine that if a person digs a well or mine in his own land and a trespasser falls into the well or the mine, the landlord is not liable. So also where the Landlord employs an independent contractor to dig a well for him on his own land, he – the landlord – shall be free from liability if the independent contractor falls into the well and is injured.[2]

The obvious reason for exempting animals and other inanimate objects from tortuous liability is the fact that they are not human beings and therefore lack faculty of thinking i.e. ability to differentiate between the good and bad. And it is apparent that if a human being lost his senses, he will be exempted from any liability.

We have earlier on cited a prophetic tradition in this regard which says:

"Three category of people are exempted from liability. Viz a minor until he is grown up; a sleeping person until he wakes up; and a lunatic until he recovers." To put it differently, animals, inanimate objects and insane persons are not bound by the Shariah and therefore not liable for whatever crime or tort they commit.

But this does not mean that the plaintiff will have no redress to the wrong or damage done to him. In the contrary the plaintiff can seek for compensation from the keeper owner, or Guardian of the animal, object or the insane person, as the case may be. Therefore, the occupier, owner of any dangerous premises or chattel is held liable for any slight negligence, contributory act or omission. But if he (occupier, owner) was not in any way negligent whether by his action or omission, he will not be held liable. This is what is known as an act of God, in which case the plaintiff cannot claim any compensation.

The Muslim jurists, in this vein, therefore, asserted that any person who makes a fire on a windy day without proper guard does so at his peril, and is liable if it causes damage. The same rule is applicable in case of use of water when it causes damage to another's property.[3]

5:1 **Liability of Defective Premises.**

A person is said to be liable for any damage caused by his building to any person or property of others if he is aware that the building was becoming dangerous to the neighbours and passers-bye.

If, for example, a wall belonging to any person lean towards a public highway and a person requires the owner to pull it down, and even calls people to witness his requisition, and the owner neglects taking it down until it falls and destroys either a person or property, the owner, in this circumstance, is responsible for the damage so occasioned, on a favourable construction. But analogy would suggest that he is not responsible for he has neither perpetrated the destruction, nor done anything transgressively to occasion it, as he had built the wall in his own right.[4]

One could argue that although the person neither perpetrated the destruction, nor did anything transgresively to occasion it, he is duty bound not to harm his neighbour or any other person having the right to pass-bye. His refusal to take down the wall after being put on notice of the eminent danger attached to it (wall) moved his intention of causing harm to his neighbours and those passing-bye. And this goes contrary to the prophetic traditions which says:-

There should be neither harming nor reciprocating harm."

"Injury should be removed."

But it would be a different case at the wall all of a sudden falls down and injured a man or property. Here the owner will not be liable for it is the act of God.

It is said that the reasons for a more favourable construction of the law in this particular case are two fold;

First, upon a wall leaning over towards a highway, the public communication becomes interrupted, and the way occupied by the property of the owner of the wall. When, therefore, any person makes application to him, and requires him to clear the way, it is incumbent on him so to do; and he is consequently guilty of a transgression in neglecting it, and therefore remains responsible for any damage it may occasion in the same manner as where a man finds his garment upon another, and demands it of him; in which case, if that other refuses to deliver it, he is guilty of a transgression and is consequently responsible for the garment if it should be lost whilst in his possession.[5]

Secondly, if the owner of the wall were not made responsible for any damage its falling might occasion, he would neglect to remove the nuisance, and consequently passengers would sustain an injury, as they would be deterred from going by the place- for fear of the wall falling on them. The removal moreover of anything injurious to the community is a duty incumbent upon the person to whom it belongs; and as the owner of the wall is the person immediately concerned in the present instance, it is therefore incumbent on him to take it down, notwithstanding his so doing may be prejudicial to himself, since private interest must yield to the public benefit.[6]

The Shariah commands every Muslim not only to remove anything dangerous to the public that is in his land or property, but also encourages him to remove anything he sees on the road that can, in one way injure any passer bye, for it attracts a high reward from Almighty Allah.

It is requisite, however, that such a time be allowed as may admit of the owner taking down his wall, this being indispensable to the establishment of offence from neglect or delay. If (after the requisition for pulling it down), any person be destroyed by the wall falling, a diyyah is due from the Aqilas of the owner, not from the owner himself; for as the offence, in this instance, is still short of homicide by misadventure lest the owner should suffer too severely:- but if, on the contrary, property (such as an animal, or household goods) be destroyed, the compensation for it must be paid by the owner of the wall, as the Aqilas are not implicated in the responsibility for property.[7]

It is to be observed here that the application (that is, the requisition for pulling down the wall) is a condition of responsibility, but not the taking of witness; for the latter is called in aid merely with a view to establish the former, in case the owner of the wall denying it, and is therefore used only out of caution. The application is made to the owner of the wall as saying:-

"Your wall has become dangerous:- You must therefore take it down lest it prove destructive;" and the taking of witness is affected by his saying to the bystanders, "be ye witness that I have required that person to take down his wall." It is proper, however, to remark that the taking of witness before a wall has become ruinous of crooked is not valid, as transgression cannot be established previous thereto.[8]

Having said the above, one other important point that need to be discussed here is the conditions that need to be satisfied before remedy can be awarded to the plaintiff, this will be discussed under the following heading:-

5:1.2 **Conditions for the Liability of Dangerous Premises.**

The Muslim jurists laid down two conditions, which are to be satisfied before a remedy can be awarded for damages emanating from dangerous premises.

i. The premises that inflicted injury must have a person who has proprietary rights to the premises legally, like the owner, the Guardian, the heir or the mortgagor. If the premises is owned by a group of partners or heirs, and if only a member among them could be informed of the suspected damage that the premises is to create, the group would be liable if nothing is done to remove the danger before it causes the damage. We have earlier on touched on this point in our discussion on application or rather requisition for pulling down a dangerous wall.

ii. That the actual damage has been suffered by the plaintiff on the highway or on adjoining land from the defective state of the premises after the defendant has been asked to abate the nuisance.[1]

It is important, at this juncture, to noted that Islamic Jurisprudence makes trespass and negligence the basis of liability in the case of dangerous premises.

Generally speaking, the owner of the premises is liable for all nuisances, which exist upon them. His duty is not only to refrain from positive act of misfeasance but also to take proper care that a nuisance does not come into existence, and to abate it if it does. Positive act and neglect of duty are thus put on the same footing. As to some Muslim jurists a duty to prevent his premises from becoming dangerous from want of repair connotes a duty to inspect and examine the premises. But if his knowledge of the dangerous condition of his premises can be proved against him the Landlord, the vast majority of Muslim jurists held him liable for any injury emanating from them.[11]

5:3 **Collective Ownership of Dangerous Premises.**

Under the Shariah if aminous wall be held in coparcenary by several heirs, and a person apply to one of the heirs requiring him to pull down the wall, the application affects that heir in particular; and accordingly, if anything be afterwards destroyed by the falling of the wall, the heir who was applied to is responsible in proportion to have remedied the nuisance by referring the matter to the Qadhi and representing the circumstance to him, requiring his order to his coparceners (if present) to full down the wall-or (if absent) his authority to do so himself.[12]

Another view says that he should not be held liable for he has no right to demolish the building without the others' permission. He is regarded as incapacitated.[13]

Imam Abu Hanifa and the majority of Ulama[c] however, made him liable proportionately to the degree of his own share in the property. Their argument is that he is capable of abating the danger of his own portion at least even though it might be through a lawsuit. But Abu yusuf and Muhammad, the two disciples of Abu Hanifa held him liable for us to one-half of the damages.[14]

While the Shariah talks of ownership as the basis of liability for any injury caused by a ruinous house or wall, the common law talks about occupation. It means in effect that under English Common Law that even a tenant will be held liable jointly with the owner of the ruinous premises and his liability will be determined upon the degree of control he had in the premises. Under the Shariah, it is only those persons having the ownership of the said premise or wall and who are put on notice about the dangerous state of their premises or wall that will be held liable.

5:4 **Liability for the non Repair of Highways.**

It is incumbent upon every Muslim to remove anything dangerous that he may come across on the way. The prophet (SAW) in this regard puts it thus:

"... and to remove any dangerous thing (Adha) from the highway is a form of Sadaqa (alms)..."[15]

Therefore, dangers to the highway may be caused by either something done on the highway itself or by something done on the Land, which adjourns it. For instance, if a person allows his own house or any other structure immediately adjoining the highway, to become ruinous and dangerous; or leaving on the

highway or adjacent thereto a matter on which passengers are likely to trip or slip on and be injured.

The Muslim jurists, therefore, opined that the owner of the ruinous building, which has fallen on the highway, is to be held liable if he failed to remove the debris until a person stumbles on it and is injured. They did not ask the people to make any new request to the owner of the building for the removal of the wreckage if he has earlier on been requested to abate the danger of his ruinous building which he did not until it fell down. His action, therefore, is considered as an active misfeasance by which the highway was rendered dangerous.[16]

But Imam Abu Yusuf of the Hanafi School on the other hand did hold a contrary opinion with regard to the said earlier request. According to him the people should make another request of the removal of the debris from the highway to the owner of the collapsed building. He argued that the danger has been removed from the first instance of liability in which the owner is liable. And since the falling of the building to the highway was not made by his own volition, there is a need for him to be requested to remove the wreckage, which has started to cause another nuisance.[17]

Imam Abu Yusuf likened this situation to a case where someone obstructed the highway by placing a big stone there. Others later pushed the stone off the highway. Then a person stumbled on this stone after it has been removed from the highway and was injured. The first trespasser who put the stone on the

highway could not be held liable because the injury occurred not through the nuisance he had created on the highway.[18]

The better view is the former one i.e. the owner does not need to be requested again for the simple reason that it is one of the principles of the Shariah that "injury should be removed", and that is why the prophet (SAW) asked the poor amongst the Muslim to do Sadaqa (alms) by removing any dangerous thing they may find on the highway so that they can compete with the wealthy ones in getting rewards. If one is asked, by the shariah to remove anything dangerous on the highway notwithstanding who put it, what more of a danger caused by his building? I quite agree with the former opinion that the owner of the said building does not need to be requested for the second time.

Having said the above, one other thing that is worth mentioning here is the right of an owner of a Land within its boundary line and the liability that arises as a result of exceeding that right. This can be seen in the following heading:-

5:5 **Liability of Attachments to a Structure.**

While the public at large possess the right of access over a highway, an individual has a legal right over his own land. He can put any structure, dig well or do anything he likes within the boundary line of his land. But if the owner of a structure projected it beyond the boundary line of his land through the attachment of an elevator or a staircase, balcony, wing, sewer, or roof gutter, he is liable for any damage emanating from any of these attachments.[19]

Although the Shariah gives an individual a right to do any thing he so wishes on his land, he must make sure that it does not cause harm to the public at large or his immediate neighbours. This is in line with the prophetic hadith, which reads thus:

"There should be neither harming nor reciprocating harm."

The Muslim jurists consider the owner of such attachments a trespasser ab initio, for he utilized the space, which belongs to others without any legal right. It is stated by Ibn Qudama in his book Al-Mugni that:- "If he projected a wing into the highway and the wing accidentally fell on a passer-by or a property and caused damage, the owner of the wing is liable.[20]

Majority of the Muslim jurists have adhered to this view. But the Maliki jurists on their own part hold a contrary view. According to them the owners of the adjoining lands have certain rights of appurtenance over the neighbouring land.[21]

One can rightly say that the issue is not whether the structure is projected beyond the boundary line of the owner's land or not, the moment that building or attachment is dangerous to the neighbours and passers-by and the owner is requested to full it down, he will be liable for any injury any person may sustain from the fall of that building or attachment if he refuses to full it down.

Having talked about dangerous premises and when the owner of it will be held liable for any injury sustained by another person, we will now go on to discuss about dangerous things or rather chattels under the following heading:-

5:6 **Nature of liability for Dangerous Chattels Under the Shariah.**

Liability for damage done by dangerous chattels emanates from the breach of a duty of care, which the defendant owes to the plaintiff. For the prophet (SAW) is reported to have said: "there should be neither harming nor reciprocating harm." (Supra). And this said duty of care arises in cases of negligence with respect to unknown dangers. The prophet (SAW) is, in this regard, reported to have said:

> "He who passes through our mosque or our markets with an arrow in his hand should fold the arrow-head in his palm lest he injures one of the Muslims by it"[22]

> This is not restricted to only arrow but extends
> To all other dangerous weapons that is likely to,
> If utmost care is not taken endanger human life.
> We hear cases, time without Number, in which police
> Negligently handle their guns and it resulted in the
> Death of some innocent citizens. Therefore people
> Should take utmost care in the way and manner they
> Handle their weapons and other dangerous things.
> For it is on this basis the Muslim Jurists opined that
> "If an axe slipped from the hand of a butcher who
> was cutting bones accidentally and hit part of
> another person's body, the butcher is liable even
> if it is by mistake. And the compensation should
> be paid out of his own pocket or property."[23]

5:7 **The Fall of Some Moveable Objects.**

The Shariah also covers those cases of load that is being carried by either animals or any other vehicle. If, for instance, a person be carrying a load on his head, or animal or vehicle on the highway and it fall upon any person and killed

him or fall on the road and another car or lorry stumble and thereby caused the death of someone, the person carrying the load is said to be responsible for that.[24]

In a normal situation damage alone through the falling down of some moveable objects is considered consequential, on the tortfeasor of consequential injury is not liable unless with an intention. It means in effect that if intention, negligence or breach of duty to take care is lacking then the tortfeasor is immune from liability. For instance if a person placed a stone on the roof of his house or wall and it was carried away by wind and injured a person, the Muslim jurists held him not liable for the direct act of injuring was not his act and his placing of stone on the roof or wall of his building is part of his legal rights. But if he placed it at the edge of the roofing, or wall he will be held liable. This is because one can rightly contend, in this situation, that he intended to cause the damage through his act and it is therefore a trespass per se. The jurists likened him to an owner of a bending wall to the initial construction of the building.[25]

The Muslim jurists unanimously hold the actor of the above-mentioned case liable where breach of duty of care, intention to negligence can be proved in so far as the damage was caused at the very place of putting the stone. The jurists further cited the example of a person who parked his motor vehicle in a wrong place or on the highway, which resulted in causing injury to person. According to them (jurists) the person who packed the motor vehicle is liable. They also held liable a person who scars another person who got paralytic stroke as a result of that and died.[26]

The Muslim jurists did discuss, under the topic of dangerous chattels, the issue of collusion and cases of inevitable accident generally. On the issue of collusion, they opined that, where it occurred due to natural cause(s) (Act of God) which no human foresight can provide against, and of which no human endurance can recognise their possibility, the parties involved are exempted from liability. E.g. where two sailing ship collided as a result of a storm etc. But if it could be proved that one of the Captains was in one way or the other negligent, then he will be liable for any damage caused to the other ship.[27]

They further opined that if the collusion occurred when one of the vessels was sailing and the other was anchored, the liability is on the sailing vessel in so far as it could be proved that anchored vessels was properly placed. But where both of the vessels were sailing across each other-one descending and the other was ascending, the jurists hold the descending vessel liable. The reason being that it was declining, while the ascending vessel was considered as an anchored one. However, if it could be proved that the ascending vessel was in any way negligent, then liability will be shifted to it.[28]

And for cases of inevitable accident, the Muslim jurists opine that the parties are exempted from any liability for the simple reason that its consequence was not entered and more so no amount of exercise of reasonable care and skill could have foreseen or averted it. It could therefore rightly be said that inevitable accident is a ground for exemption from tortuous liability in so far as it could be proved that it was not the result of any negligence or misconduct of either party.

But if it is proved that either of the parties or both of them are negligent, then each will be liable in proportion to the degree in which he was in fault.[29]

It in effect means that the act of a person per se does not make him liable unless if it could be proved that he was in one way or the other negligent, or had intention or that he failed to exercise utmost care and caution at the time of doing the act.

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CHAPTER SIX

SUMMARY AND CONCLUDING REMARKS

In this chapter, which is the last one of this work, I intend to give a summary of the other previous chapters, including the introductory part and later give my observations and concluding remarks.

6:1 Summary

Chapter one of this work was centred to the historical development of Islamic Law of Tort or rather dhamnah. This was done in three parts. The first part focused on the pre-Islamic Arabian Society – the way and manner the Arabs used to avenge for any wrong done to a member or members of their tribe. We have seen here that a wrong done to any member is regarded to have been committed to the whole members of the tribe. The leader of the aggrieved tribe normally sends to the leader of the culprit tribe explaining to him what a member of his tribe has committed against their member and thereby asking him to surrender him to them for punishment. If the leader or kings man refuses to handover the culprit it will result to a war – between them for along period of time. The forms of punishment as at that time were retaliation, payment of blood money and oath taking which was the main important of setting disputes of claim.

To the Arabs, life is never the same, as such lives can be taken for taking only one live.

The second part focussed on the Islamic era. Here we have seen how Almighty Allah did introduce to the mankind the issue of equality, brotherhood and justice between Nations, tribes and individuals. Equality in the sense that all people are the same before the Shariah notwithstanding your tribe, nation or colour. And that people are not only equal but also brothers to one another regardless where you come from or the language you speak in so far as you profess Islam.

I also stated in this part how the Shariah took a different dimension from what was obtainable in the Jahiliyyah period. The Shariah gives the plaintiff or his representatives a sole right to decide for himself/themselves on whether to demand for Qisas, diyyah to be imposed on the tortfeasor, or to forgive him in toto.

I also touched on how the prophet (SAW) and His Companions and other believers suffered in establishing this divine law.

In the last part, I did state, inter alia, the legal basis or rather authorities of dhamnah, from the Qur'an, hadith of the Prophet (SAW) and the opinion of the Muslim jurists.

The second chapter of this work did discuss about dhamanah and those areas covered by it – viz murder injuries affecting human body, honour and property. It then continued to discus classification of rights, along which the tortfeasor is punished or the plaintiff is compensated. These said rights are that of Allah and that of mankind.

The chapter is then concluded by stating those conditions that must be satisfied before any remedy can be awarded to the plaintiff and those remedies provided by the Shariah for any injury suffered by him.

And chapter three talks about vicarious liability and it started with a brief historian background of the law right from the Jahiliyyah period. Here we noted that the Arabs used to hold all members of a clan or community for any wrong committed by one of their members. The reason being that it is their responsibility to train every member and watch over his affair, and the wrongdoer would not have done what he did if the community or clan discharged their duty very well.

The chapter then discussed and analysed some provisions or rather verses of the holy Qur'an. And it was concluded by discussing those relationships and circumstances that will warrant holding someone liable for the act of another.

Chapter four discussed about those offences committed or rather injuries caused by animals either to the human life, body or property and the liability of their keepers, owner or riders. Here I started by citing an example from the holy Qur'an of the two decisions of prophets David and Solomon on a case that was brought before them and they passed two different judgements. The chapter then categorised animals into categories and when their owners are held liable.

And chapter five discussed about dangerous premises and chattels and when the owner of the said premises or chattel is held liable for any damage

caused by his property either to the person or property of others. The chapter also talks about those conditions that must be satisfied before holding the owner of the premises or chattel liable. The chapter was then concluded by discussing cases of liability without fault. E.g. cases of inevitable accidents.

Chapter six consists of three parts. The first part is the summary of the first five chapters of the work. The second part consists of an observation made in the course of the research. Here I highlighted those problem areas and the causes of those problems. While the third part is the concluding remarks. Here I tried to find out or rather suggested ways of solving those problems.

6:2 **Observation.**

It is observed in the course of this research that in Northern Nigeria most of the areas covered by Dhamanah are either ignored or neglected for some obvious reasons. These can be seen in the following:-

1. In cases of homicide and other bodily injuries that are classified by the penal code of Northern Nigeria as heinous or rather capital ones only go to High Courts i.e. High Courts, Appeal Courts and Supreme Courts of Nigeria. And these courts apply only English Law. In these type of cases, the plaintiff is not even a party it will be between the state or Commissioner of police and the accused person. The plaintiff or his legal heirs have no right of either demanding for Qisas or diyyah or even to forgive the tortfeasor. And this contradicts the provision of the Holy Qur'an that gives the plaintiff or his legal heirs such three stated rights.

This infact made almost all the Muslim in this part of the country not to take up their cases to these courts, since their right as enshrined in the Holy Qur'an will not be given to them.

2. To the majority of Nigerian Muslims, especially in the northern part due to the cultural background, which is based on the Islamic articles of Faith – Destiny, whatever happened people will just say that this is how Allah decreed it. The tortfeasor will be allowed to go free. A good example in this regard is the recurrent accidents on our highways that are normally caused by our reckless drivers, which takes the lives of many innocent passengers. A driver, for example, who caused the death of let us say 10 passengers, can be seen driving another bus after one or two weeks of the incident without seeing any sign of wariness in his face that he caused. The death of others. Once he can settle with the authority (Police).
3. One other thing that seems to encourage some incorrigible offenders is the issue of forgiveness. The holy Qur'an encourages Muslims to forgive one another for forgiveness is an act of atonement (5:48) of the holy Qur'an). Chapter 16:126 also encourages forgiveness and patience.
4. Lastly, it is also observed in the course of this research work that this area Islamic Law of Tort, have not received proper attention in terms of research. For this reason most of academic staff assign to teach these area of Islamic Law do not show keen interest. Their complaint has always been that there are no written teaching materials in English

notwithstanding their abundance in Arabic language. Their reason is that they have no Arabic background.

6:3 **CONCLUDING REMARKS.**

6:3:1 To over come the above stated problems the Muslims should strive hard to see to the establishment of proper shariah courts whereby Muslims can take their case and be tried according to the provisions of the Shariah. For it is only in the Shariah courts that Muslim will have their God-given rights and an offender is punished accordingly.

6:3:2 On the issue of Destiny, it is true that destiny as one of the articles of faith compelled every Muslim to believe that everything that befalls him is pre-destined by Allah, whether good or bad, All Muslims believe that since day-one of creation when everybody's activity fortunes and misfortunes were recorded on him. And since the shariah after fully knowing of the issue of Destiny, says that life for life, an eye for an eye ear for an ear and wounds equal for equal, is not a reason for any Muslim to say he will not claim his right from another Muslim on the ground that it is Allah that decrees any thing to happen. Our Muslim scholars should therefore endeavour to enlighten our fellow Muslims on this issue i.e. difference between shariah and destiny, so that habitual offenders should not take that advantage to commit crimes.

3. It is true that Almighty Allah in so many verses of the holy Qur'an encourages forgiveness for according to chapter 5.48 forgiveness is an act of attainment. And according to chapter 16 : 126 Forgiveness and patience is least

(course) for those who are patient. But it is not every time that forgiveness is encouraged for it will encourage incorrigible or rather habitual offenders to continue with their mischief. If for instance the case involves murder, the tortfeasor should be made to at least pay diyyah more especially if the deceased person leaves behind children who cannot stand on their feet and the deceased did not leave behind for them what will sustain them until they grow up. In this situation the issue of forgiveness should not even arise. For is better to take the diyyah and maintain the children than to leave them destitute and at the end of the day become beggars.

I do recommend this research work to all academic staff, law students, judges of the area courts, upper area courts etc. to make use of it in solving some of their problems in this area. This by no means meant that the work leaves no stone unturned. The work is only intended to give a general idea on the principles of tort under the Shariah.

Lastly, Academic staff from centres for Islamic Legal studies, Department of Islamic Law and Departments of Islamic Studies of our various Universities, Colleges of Legal Studies where Islamic Law subjects are taught should take the challenge of conducting research in this area and other areas hat do not receive proper attention. It will be pertinent also if the University can sponsor some scholars who are good in Arabic and English language to go one of our African Arabic speaking countries to conduct research in this area so that enough materials can be available. The department should equally sponsor commission

papers, which will be gathered together for the use of students, Lecturers and other people that intend to conduct research in the area. By so doing I am very much sure that the area will be rich interns of materials and this will make Lecturers and students to develop interest in the area.

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