CONSUMER PROTECTION IN SHARĪ'AH AND LAW: A COMPARATIVE STUDY OF PRODUCT LIABILITY IN ISLAMIC AND ENGLISH LAWS

Thesis submitted in partial fulfilment of the requirements for the award of degree of Doctor of Philosophy in *Sharī'ah* (Islamic Law & Jurisprudence)

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CONSUMER PROTECTION IN SHARĪ'AH AND LAW

(A Comparative Study of Product Liability in Islamic and English Laws)

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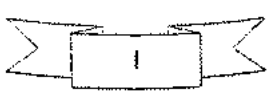
Dedicated to

The Holy Prophet Muhammad Mustafa

(Peace be upon him)



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ABSTRACT

CONSUMER PROTECTION IN SHAR'IAH & LAW

A Comparative Study of Product Liability in Islamic and English Laws

Muhammad Akbar Khan

Supervisor: Prof. Dr Muhammad Zia ul Haq

This study begins with a brief look at the evolution of consumer protection as a law in modern legal systems, particularly English and Islamic laws. The entire debate is based on the presumption that the protection of consumers has become significant due to the advancement of science and technology. The study focuses on the product liability that deals with the issues of damages and harms caused by a defective product in a sense that in contemporary times many products are production mysteries and that they have caused accidents. The thesis presents a discourse of various product liability regimes in the United Kingdom such as contract and tort with analysis in the light of Islamic *Sharī'ah*. The study explores the theoretical foundation of consumer protection in general and product liability in particular in both English and Islamic laws. In this regard, the European Union Directive on product liability (1985) is widely referred which became part of the English law through enactment of the Consumer Protection Act, 1987. It is appreciated that today the English law to a large extent is capable of solving the disputes of product liability and a valuable amount of case law has been developed in this regard. The regime, however, has various deficiencies, which have been pointed out in this thesis.

Similarly, the thesis explores the protection of consumers in the context of product liability from the perspective of Islamic law. It also explores the juridical basis for the adequate protection of consumers in general and product liability in particular. The classical Islamic law has been evaluated to analyze the concept of consumer protection from an Islamic perspective. The thesis also analyzes the reasons of Muslim community for lagging behind in scientific and technological advancement and that it could not enact laws to cope with modern legal challenges. It stresses on the dire need to reconsider the Islamic law on product liability in the context of modern scientific and technological developments. It urges the Muslim jurists to learn from the experiences of modern product liability regimes in order to make the Islamic law on the subject up-to-date, adequate and effective. Similarly, the thesis recommends the English legal fraternity to learn from the Islamic legal tradition on the subject. The research is a comparative analysis of the subject of consumer protection in the context of product liability in a sense that the key notions of modern product liability have been thoroughly examined in both English law and Islamic *Sharī'ah*. This thesis concludes by making recommendations for drafting a comprehensive set of rules based on the divine principles of Islamic law in the hopes that such a code will effectively contribute in the development and preservation of consumer rights against defective and dangerous products in Muslim countries in contemporary age of advance technology.

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LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
ASA	Advertising Standards Authority
BCP	Bureau of Consumer Protection
BIOA	British and Irish Ombudsman Association
BSI	British Standards Institution
CA	Consumer Association
CAB	Citizens Advice Bureau
CPA	Consumer Protection Act
CPD	Consumer Protection Department
CPR	Consumer Protection Regulation
CPUTR	Consumer Protection from Unfair Trading Regulation
DTI	Department of Trade and Industry
EU	European Union
GBP	Great British Pound
NGOs	Non-Governmental Organizations
OIC	Organization of Islamic Conference
OFT	Office of Fair Trade
PBUH	Peace Be Upon Him
UK	United Kingdom
UN	United Nations
US	United States
UTCCR	Unfair Terms in Consumer Contracts Regulations

CHAPTER 1

INTRODUCTION, SIGNIFICANCE AND SCOPE OF THE RESEARCH

CHAPTER 1

INTRODUCTION, SIGNIFICANCE AND SCOPE OF THE RESEARCH

1.1. Introduction to the Research Topic

Consumers- by definition include 'us all'.[1] Consumers are the largest economic group in economy, affecting and affected by almost every public and private decision.[2] They are the lifeblood of retail and satisfied consumers are the key to success for retailers. Human beings are consumers, by default, as consumption is basic to human survival and endurance. They have certain

[1] The word consumer is derived from consumption and consumer is the one who consumes. Individual who purchases, uses, maintains, and dispose of products and services. Users of the final product. A member of that broad class of people who are affected by pricing policies, financing practices, quality of goods and services, credit reporting, debt collection, and other trade practices for which state and federal consumer protection laws are enacted (http://definitions.uslegal.com/c/consumer/). Consumers are to be distinguished from manufacturers (who produce goods), and wholesalers and retailers (who sell goods). A buyer (other than for purpose of resale) of any consumer product, any person to whom any such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product, and any other person who is entitled by the terms of such a warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligation of the warranty (or service contract), *(Black's Law Dictionary* 6th Ed., Also see "Vehicle lease not covered under warranty act.", Daily Record (Rochester, NY), Feb 19 2002 Issue). According to Rachagan "Consumer" means a person who; acquires or uses goods or services of a kind ordinarily acquired for personal domestic or household use of consumption: and does not acquire the goods or services, or hold himself or herself out as acquiring the goods or services, primarily for the purpose of: re-supplying them in trade, Consuming them in the course of a process of production or manufacture, or in the case of good, repairing or treating in trade other goods or fixtures on land; "Acquire" in relation to: Goods, includes obtain by the way of gift, purchase, exchange, and taken on lease, hire- purchase: Services, includes accept; Interests in land, includes obtain by the way of gift, purchaser, exchange, tendency, or license (Rachagan sothi. "*The Asian experience with consumer protection law and redress mechanism*", the paper was presented at 6th international conference on the issue of consumer protection in Malaysia organized by University of Malaysia, 1997). However, no universal definition of the term 'consumer' can be found so far.

[2] Kennedy, John, F., *Special Message to the Congress on Protecting the Consumer Interests*, 15, March, 1962 available at: http://www.presidency.ucsb.edu/ws/?pid=9108, last accessed on 29.05.2015.

innate rights as consumers called 'Consumer Rights' a concept very close to 'Human Rights'.[3]

The background of consumer protection development in many countries is similar. The history of consumer protection and control of dishonest traders goes back to the B.C. (Before Christ) era. Ancient Mesopotamia, China and India all used to enforce laws related to short weighting, adulteration and harmful products.[4] Food and drug laws were also legislated but all these laws were regulatory in nature and not as such responsive to different aspects of consumer's rights. The historical evolution of consumer protection legislation can be traced in different phases of history i.e. during the pre-industrial period; the period of industrial revolution (18th Century), the period of industrial society (19th Century) and the period of Mass Consumption Society (20th Century). However, it was in 20th century that consumer protection was given due importance.

In the 20th century, consumer protection was placed under the supervision of special organizations which were specific to consumers' rights like establishment of Office of Fair Trading in UK, Federal Consumer Agency in Alaska in 1930 and The Consumers Union 1936 in America. These led to the

[3] From the comparison of UN (1985) 'Guidelines for Consumer Protection' and the UDHR (1948), both documents establish the basic rights for Human beings like Article 25 of UDHR "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services" same as the consumer rights established in the UN guidelines for consumer protection, right to have adequate food, clothing, shelter and health care etc. are also established.

[4] A. Rajendra Prasad, *Historical Evolution of Consumer Protection and Law in India: A Bird's Eye View*, Journal of Texas Consumer Law, available at http://www.jtexconsumerlaw.com/v11n3/jccl_india.pdf, last accessed on 12.05.2013.

formation of Consumers Association in UK 1956, Consumer Federation of America (1960) and many others in different countries. The consumer legislation in this era was modified to include many other features, for instance, extensive and exaggerated advertising that exploits, various methods governing consumer's choices and shaping the consumption patterns, unsafe products, and unilateral contract terms set by seller, which consumers can't influence.[5]

1.1.1. United Nations Guidelines for Consumer Protection (1985)

In 20th century many steps were taken by the international community to protect rights of the consumers in which the United Nations guidelines for consumer protection are a great contribution in the field of consumer protection. One of the aims of the United Nations is to facilitate cooperation in economic development.[6] The idea of the UN Guidelines for Consumer Protection was originated in the late 1970s, when the Economic and Social Council recognised that there consumer protection was strongly linked to social and economic development. The initial work was done primarily by the Economic and Social council (ECOSOC). Special emphasis was placed on problems in the developing countries and insisted that adequate policies

[5] Ammara Waheed, *Consumer Protection in Pakistan*, (Unpublished LLM thesis), pp.23-4.

[6] See O'Brien, *How and why trade can enhance economic development*, Remarks by the Legal Counsel of the United Nation, meeting on "Trade Law as a Means to Promote Economic Growth" - New York: 7/02/2012, available at: http://untreaty.un.org/ola/media/info_from_lc/2_POB%20AALCO-UNCITRAL%20workshop.pdf, accessed date 10/02/2012.

should have to be formed in these countries.[7] Furthermore, it was emphasised that once a good policy document is made, it should be taken as a guide line for the judicial actions to be taken in this regard. In addition to it, the consumer policy should be flexible enough to invite new changes coming up due to the developments in this field. Such a policy should also require the involvement and co-ordination of all government agencies. Consumer policy should actively empower and support consumer organizations. For a good consumer policy, the interest of the poor should be given paramount consideration.[8]

In July 1981 the Economic and Social Council of the United Nations (ECOSOC) had requested the Secretary-General to continue prior consultations on consumer protection with the aim of pursuing, inter alia, the elaboration of a set of general guidelines for consumer protection, taking particularly into account the needs of the developing countries.[9] A drafted version of guidelines was submitted to Governments for comment in 1982 and in May 1983 the Secretary- General submitted to ECOSOC a further report containing a revised set of draft guidelines. Considerable debate followed, and submissions were received from non-government organizations.

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[7] As clearly specified in *its objectives resolution* 39/248; Also see http://www.pakistanlaw.net/law-articles/consumer-protection/consumer-protection-law-in-pakistan/, last accessed on 06.03.2013.

[8] In this respect Universal Declaration of Human Rights states: "Everyone has the right to a standard of living adequate for the health and well-being of himself and his family; including food, clothing, and housing and medical care and necessary social services (Art. 25. (UDHR) Universal Declaration of Human Rights).

[9] Harland, David, *The United Nations Guidelines for Consumer Protection*, Journal of Consumer Policy 10 (1987) 245-266.

Ultimately the draft was further revised with quite extensive alterations being made.

On 9 April 1985 the General Assembly of the United Nations unanimously adopted a set of general guidelines under Decree 347/39 for consumer protection and requested the Secretary-General to disseminate them to governments and other interested parties.

The adoption of the guidelines was welcomed by the then International Organisation of Consumers Unions (IOCU) now Consumer International (CI) as a major development, though in some respects the guidelines do not go so far as IOCU would have wished. IOCU saw strength of the guidelines as lying in the fact that 'they map out a comprehensive set of rules for what would governments, through their unanimous vote in the UN, have set out as fair principles for protecting the interests of consumers'. CI is now working to encourage its member organizations to press their own governments to implement fully the principles of the guidelines, seeing them as a solid foundation on which demands for better consumer protection can be based.[10]

The UN Guidelines for Consumer Protection continue to be a very valuable tool in national policy development, and in the design and implementation of consumer protection legislation.[11] These guidelines represent an international framework for governments, particularly those of developing countries, to use in developing and strengthening consumer protection policies and

[10] Ibid.

[11] Boddewyn, J., *Advertising Self-Regulation: True Purpose and Limits*, Journal of Advertising, Vol. 18, No. 2 (1989), pp. 19-27.

legislation. These guidelines are also intended to assist the international community to develop consumer protection policies and promote further international cooperation in this area.[12]

The main UN objective was to 'assist countries in curbing abusive business practices by all enterprises at the national and international levels which adversely affected the consumers'. Further guidelines were set out where countries would be able to provide protection to consumers from hazards to their health and safety; to facilitate consumers to make informed choices, provision of adequate infrastructure to develop, implement and monitor consumer protection policies. Enterprises are to follow not only the indigenous laws but also international standards for consumer protection; that such provision should be consistent with international trade obligations.[13] The member countries were further guided to ensure that goods produced were safe for either intended or foreseeable use. Hence, the consumers would be instructed about the proper use of goods and be informed of the risks involved in intended or foreseeable use.

Moreover, such an environment is desired by the International community where countries would be able to protect consumers against harmful products to their health and safety; to facilitate consumers to make informed choices,

[12] See United Nation, (2000), *Consumer protection under a liberalized trade system in selected countries of the ESCWA region*, Economic and Social Commission for Western Asia, New York, NY, p 1.

[13] Zilli Atif, *Consumer Protection Law in Pakistan,* PLJ, July 2008 available at: http://www.pakistanlaw.net/law-articles/consumer-protection/consumer-protection-law-in-pakistan/, accessed on 12.05.2013.

provision of adequate infrastructure to develop, implement and monitor consumer protection policies; enterprises are to follow not only indigenous laws but also international standards for consumer protection; that such provision should be consistent with international trade obligations.[14] The member countries were further guided to ensure that goods produced were safe for either intended or foreseeable use.[15]

1.1.2. Basic Consumer Rights and Responsibilities

A-Consumer Rights

The well-known eight consumer rights are based on UN Guidelines for Consumers Protection and Consumer International Charter[16]. These are as given below:

1. *Right to Basic Needs:* It means the right to basic goods and services which guarantee survival. It includes adequate food, clothing, shelter, health care, education and sanitation.[17]

2. *Right to Safety:* Consumers have a right to be protected against marketing of goods which are injurious to health and life. As a consumer if a person is conscious of this right, he can take precautions to prevent the injury or if injury is caused in spite of precaution, he (consumer) has a right to

[14] Ibid.
[15] Ibid.
[16] Consumers International (CI) is the world federation of consumer groups that, working together with its members, serves as the only independent and authoritative global voice for consumers; see (http://www.consumersinternational.org/who-we-are/about-us/).
[17] United Nations Guidelines for Consumer Protection (as expanded in 1999); available at: http://www.un.org/esa/sustdev/publications/consumption_en.pdf, last accessed on 12.10.2013.

complain against the dealer and even claim compensation. For example, if a consumer buys any medicine, the pharmacy selling it can be held responsible if the medicine proves to be harmful because it was substandard. Again, if gas cylinder is used for cooking, consumer has to check that it does not leak when it is supplied to him. If it starts leaking afterwards, the supplier will be liable to pay compensation if the leakage of gas leads to fire and causes injury or death to anyone.[18]

3. *Right to be informed:* It means access to adequate information needed to make informed choice or decision. Consumers must be protected against misleading or inaccurate publicity material. They also have the right to be informed about the purity, quantity, quality, standard or grade and price of the goods available so that they can make proper choice before buying any product or service. Consumer must also be informed about the safety precautions to be taken while using the product to avoid loss or injury. Taking the example of gas cylinder again, the supplier must inform the user to stop the flow of gas with the help of the regulator when it is not in use.[19]

4. *Right to Choose:* It means access to a variety of products and services of competitive prices, in case of monopolies, to have an assurance of satisfactory quality and services at a fair price.[20]

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[18] Priya Rao, *Consumer Justice System in India*, available at: http://www.scribd.com/doc/234586100/Consumer-Justice-System-in-India-by-Dr-Priya-Rao#scribd, last accessed on 05.09.2014.

[19] Ibid.

[20] Anwar Fazal, *The Consumer Movement: Global Opportunities, Universal Challenges*, available at: http://www.anwarfazal.net/speech-ConsumerGlobal.php, last accessed on 02.05.2015.

5. *Right to be heard:* It means sympathetic consideration of consumers' concerns in the making and execution of all consumer related policies that affect them in one way or the other. This right can be interpreted in the following three ways:

a. The consumers have a right to be heard and consulted by government and public authorities while formulating policies regarding consumer interests.

b. They have right to be heard by producers, dealers, retailers and advertising agencies etc. about their views on production and marketing decisions.

c. They are also to be heard in legal proceedings in courts.[21]

6. *Right to Redress:* It means the right to a fair settlement of just claims. The right to get compensation for misrepresentation of substandard products or unsatisfactory services and the availability of acceptable forms of legal redress for small claims where necessary etc. all are covered under this right.

7. *Right to Consumer Education*: This right means that the consumers must acquire knowledge to be an informed consumer. They must remain aware and educated in order to avoid consumer exploitation. It is not only the duty of the consumers to be updated about the consumer issues but it is also the duty of the consumer associations, educational institutions and government policy makers to work in an unformed manner in order to

[21] Ibid.

educate consumers about the relevant laws. The consumers should also have the knowledge of tactics used by dishonest businessmen and manufacturers to exploit consumers' interests. The consumer should be vigilant enough to protect their own interests.[22]

8. *Right to Healthy Environment:* It means that the quality life should be enhanced and the consumers should be protected against environmental degradation over which the individual has no control. This right asserts the need of protecting and improving the environment not only for present but also for upcoming generations.[23]

B- Consumer Responsibilities

The following consumer responsibilities are also based on United Nations Guidelines for the Protection of Consumers, 1985:

1. Critical Awareness be concerned and inquisitive about price and quality of products and services and be updated about changes from time to time.

2. Action-assert by action to ensure fair dealing. As long as consumers remain inactive, their rights will continue to be infringed.

3. Social Concerns considers impacts of various lifestyle and consumption patterns on others especially poor, disadvantaged and powerless group of consumers.

[22] Ibid.
[23] Ibid.

4. Environmental Awareness considers the responsibility of the consumers to understand the environmental costs of their unhealthy lifestyle and consumption patterns and wants them behave accordingly. It is a collective social responsibility to conserve natural resources for present and upcoming generations.

5. Solidarity-responsibility to be united and be disciplined in order to improve the strength and influence required to promote and protect consumers' rights.[24]

1.1.3. Consumer Protection Legislation

Today, almost all the developed nations have formulated policies and made laws to protect the above discussed consumers' rights and responsibilities. In fact, consumer legislation and policy is the manifestation of the government's commitment towards the cause of consumer protection. The developing countries now following the developed countries in this regard and they have started consumer legislation. A state or federal government is required to formulate a statute designed to protect consumers against unfair trade and credit practices involving consumer goods, as well as to protect consumers against faulty and dangerous goods.[25]

The movement towards consumer protection law is owed mainly due to the growth of Multinationals in the developed countries with pre-decided

[24] United Nations guidelines for consumer protection (as expanded in 1999); available at: http://www.un.org/esa/sustdev/publications/consumption_en.pdf, last accessed on 13.04.2014.

[25] Black's Law Dictionary, 7th Ed. 1999.

standard contracts necessitating protection to the consumer. In this context, Rachagan has described the scope of the model law and he opines that the following main issues should be included in the consumer protection law:

1. Misleading and deceptive conduct
2. False representations, and unfair practices
3. Prices, price indications and receipts
4. Consumer information
5. Safety of goods and services
6. Guarantees in respect of supply of goods
7. Guarantees in respect of supply of services
8. Unfair contracts
9. Product and services liability[26]

The focus of this research is on the product liability that is one of the most important areas of consumer protection these days as products often cause damage to consumers and their property. Society has long tolerated some risk in the products consumers buy, especially when the risks are understood to be inherent in the products' use. By their very nature, for example, cigarettes and fat-laden desserts pose risks to consumers, and, although some car models may be more crashworthy than others, driving any automobile introduces a degree of risk. But when two identical products sit side by side on a shelf, and one of them might be deadly and the other benign, we have a recipe for serious

[26] Rachagan Sothi, *"Model law for consumer protection in Asia-Reflection on its scope and content"* University of Malaysia's faculty of Law; Malaysia, 1997.

public health problems as well as major economic consequences from diminishing consumer trust.[27]

'Product liability' is the branch of law that deals with the liability of the manufacturers, distributors, suppliers, retailers, and others who make products available to the public are held responsible for the injuries those products cause. Although the word 'product' has broad connotations, product liability as an area of law is traditionally limited to products in the form of tangible personal property.[28] Product liability has to be distinguished from 'product safety', which is a separate regulatory regime imposing administrative penalties and regulating control of unsafe products. Both regimes have consumer protection as their common aim. In modern world on daily basis many cases are reported where consumers have been injured due to the use of defective products. This may be in form of physical injuries or death such as from car accidents due to a defect in its component parts, defective machinery, dangerous toys or adulterated foods, substandard medicines, or diminution in the value of one's property such as where flower beds are trampled or a reservoir bursts. All such matters are covered by the modern law of product liability which is a combination of contract law and tort law.

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[27] Coglienese, Finkel and Zaring, *Consumer Protection in an Era of Globalization*, This paper can be downloaded without charge from the Social Science Research Network Electronic Paper Collection:http://ssrn.com/abstract=1788921, last accessed on 15.05.2013.

[28] Restatement (Third) of Torts: Products Liability, § 19. See Appendix H, Restatement (Third) of Torts (Excerpts) available at: http://www.cengage.com/resource_uploads/downloads/0324595743_145752.pdf, last accessed on 12.07.2013.

1.1.4. Islamic Sharī'ah, Muslim World and Consumer Protection

On the other hand, Islamic law has provided detailed guidelines for the protection of consumers based on the divine principles set by Allāh (S.W.T.). Allāh Almighty promised the human beings rewards both in this world and the Hereafter for complying with Islamic principles. Hence, from a thorough analysis of the verses of The Holy Qur'ān and tradition of the Holy Prophet (pbuh), some fundamental socio-economic rights of human beings have been pin-pointed. These rights include: the right to safety; the right to be informed; the right to choose; the right to be heard; the right to satisfaction of basic needs; the right to redress; the right to education; and the right to a healthy environment. Islamic law binds the rulers to make various rules and regulations to ensure protection of the masses against harm and hardship and fulfil all their socio-economic rights.[29] Moreover, the Islamic institution of *Ḥisbah* was given the jurisdiction to look after all economic activities taking place in the market and safeguard rights of the consumers. The state must also eradicate institutional and other malpractices. These are almost the same rights that have been guaranteed and reproduced in the United Nations Guidelines for consumer protection in 1985.[30] This indicates that Islamic *Sharī'ah* had given concrete principles for the consumer protection from the

[29] Muḥammad Ayūb, *Understanding Islamic Finance*, John Wiley and Sons, Ltd., London, 2007, 25.

[30] General Assembly Resolution 39/248. It contains that the consumer rights are: right to safety, the right to be informed, the right to choose, the right to be heard, the right to satisfaction of basic needs, the right to redress, the right to education, and the right to a healthy environment.

time of its inception. Further, Muslim jurists explained and extended rulings of *Sharī'ah* in various chapters such as *Ḍamān*, contracts, *Tadlīs*, *Gharar*, hoarding, and law of options explaining consumer's safety from adulteration, deception, concealment of defect etc.

However, there is great need to understand and analyze these general principles of Islamic law dealing with rights of the consumers in a modern context. This is equally important to differentiate the ethical system on which Islamic law of consumer protection is based from that of the western regimes. Similarly, to know about the impact of Islamic law on Muslim consumers' preferences towards consumption of certain products, Islamic law has to be deeply analysed.

Today, most of the Muslim countries have characteristics of less industrialized nations In less industrialized nations product liability is even more important because in such societies most of the products are imported from foreign manufacturers who are often difficult to identify and subsequently difficult to sue. Moreover, consumers in these countries are less informed as compare to their counterparts in the developed nations. Hence the risks they run are higher, and potential damage or injury is more likely to occur.[31] There is lack of adequate and concrete consumer protection legislation in these countries.

Some of the Muslim countries have recently promulgated laws to deal with issues of consumer rights such as Pakistan, UAE and Egypt etc. However,

[31] Nagla Saad Maḥmud Naṣṣar, *Manufacturer's Liability under Islamic law*, LLM (unpublished) thesis submitted to the Law School, Harvard University, U.S.A. 1985.

these laws in their current form are inadequate and do not meet the International standards to protect and preserve rights of the consumers. Moreover, these laws are not based on the solid principles of Islamic law.

a) Pakistan

In this context, it is pertinent to discuss the statues of consumer protection legislation in Pakistan. Pakistan has inherited its legal system from England and as a general rule the principles of English law have been deemed to be applicable. The Pakistani Courts adopted English principles, if the same were in consonance with the concept of justice, equity, good conscience. In British India many measures were taken for the protection of citizens against the malpractices of suppliers, traders and manufacturers. The laws at this stage were general in nature and did not treat citizens as consumers.[32] The Sale of Goods Act, 1930 was the first law that gave the buyers some protection against the sellers. The Act regulated issues *inter alia* dealing with the delivery of goods, receipt of goods after scrutiny and examination, and the rejection of goods on unsatisfactory quality or non-conformity with the required standard. The Act also stipulated that a buyer could sue a seller for breach of warranty, if the latter wrongfully neglected or refused to deliver the goods. But the sale of goods Act was subject to the *privity*. The Drugs and Cosmetics

[32] Some of these laws were as the Fatal Accidents Act, 1855, Indian Penal Code 1860, Indian Contract Act, 1872, The Specific Relief Act, 1877, The Sale of Goods Act, 1930.

Act, 1940 protected consumers from malpractices in the drugs industry.[33] The basic purpose of these laws was to regulate the conduct of business or punish the one who violates the law.

After the creation of Pakistan, all these legislations were adopted and much new legislation that indirectly protects rights of the consumers was promulgated. The Pure Food Ordinance, 1960[34], The Pakistan Hotels and Restaurants Act, 1976,[35] The Pakistan Standards and Quality Control Authority (PSQCA) Act, 1996 (the authority is concerning the product safety and not the issue at hand i.e. product liability),[36] The Pharmacy Act was enacted in 1967,[37] The Drugs Act, 1976,[38] Pakistan Telecommunication Authority (PTA), Natural Gas Regulatory Authority, National Electric Power Regulatory Authority, Federal Ombudsman Order (1983), Price

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[33] Iram Khan, Muhammad Waqas, What Ails thee Knight sans Arms: Status of Consumer Protection in Pakistan, International Journal of Business and Social Sciences, vol.2, No.2: February 2011.

[34] The law binds all importers, manufacturers and resellers to comply with its provisions regarding the manufacturing, processing/ preparation, packaging, labelling, consignment, delivery and standard of quality of food items and various penalties have been prescribed for its violation

[35] The Act prohibits the sale of food and beverages which are injurious to health or contaminated due to lack of cleanliness in the hotel. The law is, however, limited because it does not provide procedures for lodging a complaint in case of injury to a consumer nor does it state compensation due to him.

[36] The Act has provided for necessary measures for the testing of products and services for their quality, specifications and characteristics. It also regulates the quality labelling standards which shall state ingredients, performance, specification, usage, methods and other relevant quality control matters. It also prohibits the manufacture, sale and storage of any article including food items which do not conform to the laid down quality standards.

[37] The Act provides the establishment of Pharmacy Councils to regulate the practices of pharmacy, and provides procedures and examinations to qualify a person as a pharmacist.

[38] The Act prohibits the sale, manufacture, import and export of any fake drug, counterfeit, misbranded, adulterated, substandard, drug after its expiry date, or drug which is not registered or is in conflict with the conditions of registration. The Drugs (Labelling and Packaging) Rule, 1986 specifies that drugs must have information about the weight, volume or dose etc.

Control and Prevention of Profiteering and Hoarding Act, 1997 and Pakistan Penal Code (1860). The basic concern of all these laws was not to protect consumers.

It was in 1994 that a debate on consumer rights legislation in National Assembly of Pakistan and the Senate was initiated. As a consequence of this debate firstly, The Islamabad Consumer Protection Act was promulgated in 1995.[39] This law incorporates definitions of unfair trade practices as well as provides for a mechanism to handle consumer complaints.[40] The jurisdiction as an Authority is vested in the Court of Sessions, Islamabad. The Authority shall receive complaints of the Consumers and those made on behalf of the Council for investigation and determination thereof. It shall be tried summarily by Special Magistrate appointed Under Section 14-A of the Code of Criminal Procedure, 1898. Appeal lies against the order of Special Magistrate before the Authority within 15 days. Unfortunately, there exists no provision in Islamabad Consumer Protection Act, 1995 related to the liability arising out of defective products. Government of Khyber PakhtunKhwa (K.P.K) and Balochistan passed the Consumers Protection Act in 1997 & 2003, respectively, but fail to establish mechanism for consumer protection. In 2004, Governor of Sindh promulgated The Sindh Consumer

[39] Islamabad Consumer Protection Act, 1995 available at: www.bu.edu/bucflp/files/2012/01/Islamabad-Consumer-Protecion-Act.pdf, last accessed on 15.05.2013.

[40] Kishwar Khan, Sarwat aftab, Consumer Protection in Islam: The Case of Pakistan, article published in the Australian Economic papers, vol:39, issue:4 http://onlinelibrary.wiley.com/doi/10.1111/1467-8454.00106/pdf last accessed on 23-07-2013

Protection Ordinance but it was lapsed due to the lack of interest shown by the then Government and the situation is still the same.[41] All these laws commend for the setting up of two legal bodies which are Consumer Protection Councils and Consumer Courts. Consumer Protection Council is main part of consumer protection regime. Along with these laws the Consumer Rights Commission of Pakistan (CRCP) was established under the Trust Act, 1882 which is an independent, non-profit, and non-governmental organization. It is not supported by any industry or commercial sector. It is the first national consumer organization in the country, which approaches the issue of consumer protection in comprehensive and holistic terms. Its vision and strategies have significant cross linkages with both market practices and issues of governance.[42]

Almost all the present legislations in some way or other have some inherent deficiencies, to quote some such as the core issue of making a "Consumer Protection Council" has not been taken into consideration as yet and so far no positive step has been taken by the government in this regard. One of the role of CPC is to create awareness about consumer rights and formulate policies for the interests of consumers against marketing of hazardous goods, compensation against unfair trade practices, to fight against the exploitation of consumers, and to ensure easy availability of essential items with provision

[41] Saeed Akhtar Ansari, The Role of Judiciary in Consumer Protection: The case of Pakistan, paper presented at the International Judicial Conference, Supreme Court of Pakistan, Islamabad, 2013. http://pcpc.punjab.gov.pk/?q=system/files/reseach_paper.pdf, last accessed on 18.08.2013.

[42] See http://www.crcp.org.pk/index.htm last visited on 12-08-2013

of information regarding quality, quantity, purity, standard and price of goods and services. The definition of the 'consumer' is restricted and less functional which needs a lot of improvement. All these ambiguities and deficiencies, which are found in the present legislation, are due to the conflicting approach and common perception that promulgation of the Consumer protection Law is the provincial issue. Therefore, the provincial Governments without having proper, standard guidelines are just moving ahead with the legislation and ignoring all the aspects of making harmonized law under which the consumers can find relief and satisfaction. There exist some ambiguities in regard to the inclusion of the public sector organizations such as education, health utilities etc upon which the state has monopoly and consumers have not been given any sort of protection if these services are not up to the satisfaction or defective from consumer's perspective. The governing procedural law for getting redressal from the courts when the consumer files a complaint is very vague. There is no time frame mentioned in the Act for disposing off the complaint, though it has been clearly reflected in the preamble. There is no provision as to facilitate the consumer to vicariously liable the employers who actually hide behind the employees who are just performing their duties. Additionally, the provision of governing procedural law is extremely confusing due to amalgamation of Civil and Criminal law. Presiding officer of the Consumer Court as provided would be District Magistrate mentioned in most of the laws, which has been redundant

due to the devolution plan under Local Government Ordinance, leaving the consumer law in somewhat confusing situation.[43]

The law of tort has not much grounding in Pakistani legal system. Litigants have not relied so much on this law as and whenever they looked for a remedy to their wrongs. This not been the position in Pakistan alone, many under-developed countries depict the same faint picture for its being as the law of less utility and negligible practical importance.[44]

All these reasons make the situation of consumers worse in Pakistan. The absence of national consumer policy and law result in great ambiguity on the part of the consumers, consumers association, lawyers and judges dealing with consumer protection related issues.[45] The average Pakistani consumer faces grave risks of injury to health and safety caused by the widespread use of counterfeit and substandard products in Pakistan. Medicines, foods, and beverages that are sold under brand names are actually counterfeit goods, frequently contain impure or adulterated ingredients, and manufactured under conditions that lack the hygiene standards followed by the authentic manufacturers. The owners of these brand names are placed in a dilemma because if they warn the public about counterfeit products being sold under their name, the consumers may switch from their brand to another to avoid the risk of buying counterfeit goods. Consumers are vulnerable to

[43] Aziz ur Rehman, Consumer Protection Law and Policy, paper presented at Seminar on Consumer Protection Laws in Pakistan, Marriot Hotel, Islamabad, 2005.

[44] Muhammad Naeem, The Scope and Application of Tort Law in Pakistan, PhD thesis submitted to the Department of Law, University of Punjab, Lahore, p.C

[45] Aziz ur Rehman, Op. Cit.

exploitation by producers, misleading information, ignorance about their rights and non-availability of redress mechanisms. Their case in Pakistan is quite pathetic. Absence of an entry on 'consumer' in the indices of law books in Pakistan indicates the absence of consumer concerns in the juridical debate and statues of Pakistan.[46]

Pakistan being a member of UNO has adopted the resolution on Guidelines for Consumer Protection puts extra responsibility on the government to insure protection of all consumer rights.[47] Thus, consumer rights like other parts of the world should have to be adopted in Pakistan in its true spirit and consumers should be provided standard products and quality services in their daily livings.[48]

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[46] Ansari & Hafeez, *Consumer Protection Laws in Pakistan, 2000*, p. 8 http://www.lawteacher.net/commercial-law/essays/developments-in-consumer-protection-rights-in-pakistan-commercial-law-essay.php last visited on 19-08-2013.

[47] UNO Resolution No.39/248, 1985. UN (2003) advocates a strong case for government intervention to protect the rights of consumers. It provides detailed guidelines for their guidance and protection. According to the United Nations (2003: 1) "Governments should develop or maintain a strong consumer protection policy ... [E]ach Government should set its own priorities for the protection of consumers in accordance with the economic, social and environmental circumstances of the country and the needs of its population, bearing in mind the costs and benefits of proposed measures." This means that the onus for consumer protection falls on the government of each respective country. It is for the governments to implement or promote the implementation of suitable measures, including legal systems, safety laws, domestic, global or voluntary standards, and the keeping of safety records to make sure that products are safe for either planned or normally anticipated use. (http://www.lawteacher.net/commercial-law/essays/developments-in-consumer-protection-rights-in-pakistan-commercial-law-essay.php), last accessed on 12.06.2013.

[48] Saeed Akhtar Ansari, *The Role of Judiciary in Consumer Protection: The case of Pakistan*, paper presented at the International Judicial Conference, Supreme Court of Pakistan, Islamabad, 2013. http://pcpc.punjab.gov.pk/?q=system/files/reseach_paper.pdf, last accessed on 15.07.2013.

b) UAE

The UAE's Consumer Protection Law which was introduced in 2006 (the "Law") and its implementing Regulations were enacted in 2007 (the "Regulations"). It is a great start in the field of Consumer protection legislation in the UAE. Product liability law is addressed by provisions in Chapter 4 of the Law and in the implementing Regulations.[49] However, the current consumer protection laws in the UAE have failed to introduce several issues that would remedy the current situation and achieve an adequate level of confidence and protection for consumers. Thus, immediate action is needed for sound and solid principles to be in place if consumer protection law is to achieve its various purposes.[50] There are some areas that need quick intervention by lawmakers in the UAE because they have a direct negative impact on individuals and country alike. Areas such as misleading advertising, unfair business practices, unfair terms, monopolies and seeking of redress were mentioned in previous chapters with no clear legal provisions to cover those areas, thereby leaving consumers' position vulnerable in the UAE market.[51] Currently, consumer protection law is plagued by serious threats to consumers' ability to detect risk, enforce their rights, and seek redress. These

[49] Marcus Wallman, *Consumer Protection in the UAE*, available at http://www.mondaq.com/x/102564/Product+Liability+Safety/Consumer+Protection+in+the+UAE, last accessed on 20.04.2015.

[50] Abdulla M. A. AlGhafri, '*The Inadequacy of Consumer Protection in the UAE: The Need for Reform*, a thesis submitted to the department of law, Brunal University, UK for the degree of doctor of philosophy in law in 2013, p.280. Available at: http://bura.brunel.ac.uk/bitstream/2438/7691/1/FulltexThesis.pdf, last accessed on 10.04.2015, p.283-4.

[51] Ibid. p.280.

threats were more obvious by technological advances and consumers involvement in e-commerce. UAE legislature should accommodate other vital remedies such as ombudsman, arbitration and mediation to support the courts role in settling disputes.[52]

Hence, a new model of consumer protection law has to be adopted by the UAE legislature. The proposed model firstly must not contradict with the *Sharī'ah* law, which is the first source of legislation in the UAE. Secondly, the proposed model is a more comprehensive version of consumer protection law that can provide an adequate level of protection for consumers, easy access to redress, and other important steps that should be taken in order to facilitate the implementation of a sound consumer protection scheme in the UAE and achieve the desired results."[53]

c) Egypt

Similarly, in Egypt the well known scholar Al-Sayed M. Omran has indicated in his study that the Egyptian legislation is inadequate to provide sufficient protection to the consumers during formation of a contract and recommended that it is necessary to develop consumer protection legislation in this area by enacting a separate consumer law.[54] However, recently there are many developments in the sector of consumer protection law in Egypt especially after enacting the Consumer Protection Act, 2008. This law has

[52] Ibid. p.284.
[53] Ibid. p.289.
[54] Al-Sayed M. Omran in his research entitled '*Himāyat ul Mustahlik athn'a takween alaqed*, Egypt: Alexandria, al-ma'arif press, 1986.

been enacted in line with EU consumer rights and legislation, but adjusted to Egyptian needs. But the Islamic ethical system has not been invoked while promulgation of the law and no provision is based on the principles of Islamic law rather the EU legislation has been transposed on the subject.

Hence, from the survey of consumer legislations of various Muslim countries it becomes manifest that the current implementation of *Sharī'ah* law in the sector of consumer protection in Muslim countries is very weak and need to be revised in order to establish codified legislation based on true Islamic teachings and harmonised with the development of international standards.

1.2. Significance, Scope and Limitations of the Research

Consumer protection is an emerging area of law. There are many aspects of the subject such as product safety, product quality, consumer redress, defective consumer services, holiday laws, consumer insurance, consumer finance, exemption clauses and other unfair terms in consumer contracts, the relationship between criminal law and consumer protection, product quality and safety under the criminal law, food law, regulation of marketing, advertising and sales promotion practices, trade descriptions in relation to goods, mis-descriptions of services and property, misleading price indications, sales promotion and institutions and policies of consumer protection. However, the scope of the thesis in hand is limited to the study of product liability which means liability of the producers/manufacturer, suppliers, retailers and sellers etc. for selling defective or harmful products that cause

damage to the consumers. Product liability is an important aspect of modern consumer protection law. The advancement of technology and change in trading methods has made product liability a very important legal issue of modern times. This change in trading methods and the sophistication of products make product's liability a very important legal issue in modern societies. This phenomenon is due first to the higher standards of living which have led to an increase in the amount of consumer products and a corresponding increase in the possibility of damage caused by defective products. The quality and quantity of damage and injuries which these new manufactured products may cause has increased. This is due to the increase in number of dangerous products that are used by relative ignorant customers. Damage caused by a defective wagon in the tenth century is not as serious as injuries caused because of a car with a defective brake or a drug with dangerous side effects. Therefore, someone must be held liable for products that prove to be unsatisfactory or that cause damage.

The product liability law emerged as a crucial legal topic after the industrial revolution starting in the 18th century while Islamic laws which stopped developing at the tenth century did not provide for such liability in the strict sense of the word. The society at that time did not need such rules because, even though some primitive industry existed, manufactures sold their products directly to consumers, and the contract of sale was the basis of their

relationship. Hence, the traditional rules of law of contract and that of torts were considered sufficient to protect rights of the consumers.

In this context, the well known contemporary Muslim jurist Dr. Wahba Al-Zuhaylī writes:

> "…. the Muslim jurists in classical *fiqh* could not discuss the liability arising out of the use of manufactured goods and products due to absence of such incidents in their age because in that period the technology and production processes were not much advanced as these are today."[55]

Even in contemporary times, the topic of product liability in its modern sense is still an undiscovered territory for Muslim intelligentsia and there is dearth of solid literature on the topic from Islamic law perspective. The research in hand has looked into consumer protection in the context of product liability from the perspective of Islamic law by comparing it with English law.

Hence, the scope of thesis in hand is limited to the study of the civil liability arising out of the defective products. This research traces the principles and rules regulating product liability under *Sharī'ah* law because some of these countries apply *Sharī'ah* while others are under reforms and will apply it within a few years. The study is looking into the Islamic *Sharī'ah* and English law on product liability and compare between the two on the subject. In this regard principles of Islamic law of contract and that of English law are analysed and compared. It has also looked into the principles of English law

[55] Zuhaylī, *Nazriat ul-ḍaman*, Dār ul-Fikr, p.258

of tort and Islamic law of tort on the subject of product liability and compared between the two. The notion of strict product liability in English law is analysed and weighed in the light of Islamic *Sharī'ah*. To determine the scope of product liability under Islamic law, the term producer, product, defect, harm, consumer, defences, time limitations etc. have been defined in an Islamic perspective. Moreover, these notions are evaluated in the light of traditional Islamic law in order to determine their compatibility with Islamic law and whether they may be adopted under an Islamic legal system.

1.3. Statement of the Research Problem/s

Developing an Islamic model for the protection of consumer rights in the context of product liability has become inevitable in contemporary times to protect rights of the consumers against defective/faulty products as we live in an age where almost all products are the outcome of process mysteries and they often cause harms to our life, health and property etc. especially in countries where consumers are less informed. The proposed model must not contradict with the *Sharī'ah* law that is a direct or indirect source of law in almost all Muslim countries. The contemporary consumer law is a hybrid-a collection of inter-connected aspects of law. It is, therefore, not an easy task to explore the Islamic legal thought on civil liability of the producers, suppliers, retailers etc for producing defective products without having recourse to the principles of Islamic law of contract and Islamic law of tort along with a deep understanding of their English counterparts. Similarly, it is

not an easy task to compare the Islamic law on the subject with that of English law without understanding the English law in depth. During the course of this study the following major issues are raised:

a) What is the meaning and scope of consumer protection and how it evolved in both English and Islamic legal systems? What are the theoretical and jurisprudential foundations for consumer protection in both the legal systems? What kinds of institutions have been established to preserve the basic consumer rights under both the legal systems?

b) What is the concept and philosophy of the contemporary notion of product liability? Whether or not Islamic law recognise the notion of product liability as English law does? What are the theoretical foundations for Product Liability in both the legal systems?

c) What is the role of Islamic and English laws of contract in consumer protection and how they offer protection to the consumers in cases of defective product that may cause damage?

d) What is the role of English law of torts and Islamic Law in consumer protection especially in the context of product liability?

e) What is the scope of application of strict product liability in England? Does Islamic law recognizes the notion of strict liability in cases of defective products?

f)Whether or not the contemporary English regime of strict product liability is in conformity with the principles of Islamic law? What are the substantial

similarities and differences between Islamic *Sharī'ah* and English regime of product liability?

g) Does Islamic law permit the application of regimes of other jurisdictions in Muslim territory i.e. whether or not Muslim jurisdictions can benefit from the English strict product liability regime?

These and many other important questions have been tackled in this research in order to compare the subject between the two legal systems.

1.4. Hypothesis

a) Islamic *Sharī'ah* and English law, both the legal systems, protect rights of the consumers in cases of product liability and ensure compensation to the victims of defective products. Both the legal systems are compatible with one another and no substantial variations exist between the two. Moreover, there are no jurisprudential constraints in the way of application of English product liability regime in Islamic jurisdictions.

b) Islamic *Sharī'ah* and English laws both have given detailed rules in order to protect rights of the consumers in cases of dangerously defective products by holding producers, retailers and sellers etc. liable and make them to compensate the victims of such products. However, these rules and nature of liability in both the legal systems are totally different from one another and they cannot coexist in a place. Moreover, the English product liability regime is repugnant to Islamic *Sharī'ah* and therefore cannot be adopted in Islamic jurisdictions.

c) Islamic *Sharī'ah* and English law both offer adequate protection for dangerously defective products in terms holding producers, suppliers and retailers etc. liable to compensate the victims of their products. However, nature of the rules and liability between the two legal systems are partially compatible with one another and partially at variations. Therefore, an Islamic jurisdiction, in order to promote consumer welfare, can benefit from the English regime of product liability by application of those rules that are not violating any norm of Islamic *Sharī'ah*.

1.5. Research Methodology

The research is basically a *legal doctrinal research* which is essentially a library-based study.[56] Therefore the basic aim of the research is to discover, explain, examine, analyse, present and compare in a systematic form the facts, principles, provisions, concepts, theories related to the consumer protection in the context of product liability in both English and Islamic legal systems. In this regard almost all the methods of doctrinal research have been applied where required such as:

1. Descriptive and Exploratory Method to ascertain about the state of affairs in respect of consumer protection in the context of product liability and the kind of legal and administrative mechanism that has been designed to ensure safety of the products and remedies available for the consumers who are injured by defective products and it also covers the theoretical and applied

[56] For further details on legal research see Anwarul Yaqin's *Legal Research and Writing Methods*, Lexis Nexis, Butterworths, Wadhwa, Nagpur, India, 2008.

aspects of the laws related to consumer protection in the context of product liability;

2. Explanatory Method while answering the questions as that *how* and *why* something happened in the area of consumer protection viz a viz product liability;

3. Analytical and Critical Method to understand the English law on consumer protection in the context of product liability and evaluate the same in the light of *Sharī'ah*;

4. Historical Method to find out that *how* and *why* certain rules, principles and institutions concerning consumer protection law in the sphere of product liability have come to take their present form and to discuss the historical evolution of consumer law in general and product liability in particular both in Islamic as well as English laws; and

5. Comparative Method to compare the rules, principles and concepts of English law on consumer protection in the context of product liability with those of Islamic law. The Comparative method is the prime approach of the research. The title of the research reflects that the aim of the study is to look into the consumer protection in the context of product liability in a comparative way prevailing in Islamic *Sharī'ah* and English laws. Comparative law research does not mean the study of legal rules only but it is also an in depth study of the varying methodologies of different legal systems to see how one system achieves a given result through interpretation and another by

legislation, how one legal system handles a given problem through the law of property and another through the law of tort, how one system achieves flexibility through judicial decision and another through juristic activity. The in-adequacy of a legal system in a particular issue can be streamlined and improved by comparative insights.[57] It is sufficient for the importance of comparative law that a lawyer trained entirely in one legal system and knowing no other cannot step back from his legal system and look at it in perspective, for he has no comparative standards by which to judge its merits and demerits. Knowledge of other legal systems provides fresh insights by which a particular legal system can be better understood, its weaknesses detected and its strength highlighted.[58]

Comparison between Islamic law and English law in general and in the area of consumer protection has many practical uses as well, especially in an age of increasing transnational activities and foreign investment. Advice is often required by clients of a Muslim country such as Saudi Arabia, Malaysia, Pakistan etc. on the attitude of common law countries such as England, Australia USA etc and vice versa. However, the task of comparing Islamic and English law on the subject is not an easy one, as English law is codified, consolidate and up-to-date and loads of case law is being developed on the subject while Islamic law is not in a codified form, consolidate and there are various schools following different interpretations.

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[57] CG Weeramantry, *An Invitation to the Law*, Lawman (India) Private Limited, New Delhi, p.53.

[58] Ibid. pp.52-53.

This research provides a comprehensive analysis of data in Islamic *Sharī'ah* on consumer protection in a systematic manner and compares the same with English regime. It also provides bases for further research on the topic. Due to the requirement of this research, the researcher has covered two models of consumer protection in the context of product liability i.e. UK Model and *Sharī'ah* law Model. The data in present study has been presented in a manner that reflects the position of English law on a point and then reference is made to Islamic law on it. This approach has been followed throughout the thesis. While discussing the English law on the subject case law method is also followed. Dealing with and analyzing the issues related to Islamic law the principles of Islamic jurisprudence *(usul al-fiqh)* have been followed especially in interpretation of the texts of Islamic law and derivations of rules from them. The views of Muslim jurists have been frequently quoted where required. Moreover, the method of transliteration is followed for the Islamic legal terms of Arabic language. The uniformed methods of citation of legal sources have been adopted in the thesis. In this regard *the Chicago Manual of Style* has been followed. The English translation of the verses of the Holy Qur'ān has been taken from the authentic commentary of the Holy Qur'ān by Abdullah Yusuf Ali.

CHAPTER 2

LITERATURE REVIEW

CHAPTER 2

REVIEW OF LITERATURE

In modern legal literature there is dearth of solid work on consumer protection from an Islamic law perspective. There is scarcity of exclusive material on the subject of consumer protection especially that compares between Islamic *Sharī'ah* and English Law. Recently some of the Muslim writers have started working on the subject of consumer protection as few of such works have been discussed in the following literature review. However, still no sufficient literature is available on the subject particularly which covers the comparative aspects of the topic.

This research is an attempt to compare Islamic and English laws on the subject of consumer protection in the context of product liability. The focus of this work is on the primary sources of Islamic law and in order to form the concept of consumer protection in general and product liability in particular from an Islamic law perspective. The Holy Qur'ān, *Sunnah* of the Prophet (pbuh) and *Ijmā'* have been consulted with a view to find out the position of Islamic law on the subject. The authentic sources on ḥadīth such as *Ṣaḥīḥ Bukhārī, Ṣaḥīḥ Muslim, Sunan Al-tirmidhī, Sunan Nasā'ī, and Sunan Bayhaqī* etc. have been widely referred in this research.

Beside the above mentioned primary sources of Islamic law the classical *fiqh* literature has been frequently consulted and quoted in order to understand the views of different schools of thought in Islamic law on various issues of consumer protection.

Muslim jurists had described the general principles and rules for the protection of consumers in detail in various topics of *fiqh* such as liability (*ḍamān*), contracts (*'uqūd*), fraud (*tadlīs*), *uncertainty (gharar)*, hoarding (*iḥtiḳār*), law of options (*khiyārat*), and ombudsman (*ḥisbah*) explaining consumer's safety from adulteration, deception, concealment of defect etc. but there is no specific chapter in the classical *fiqh* literature about the protection of consumers in general and product liability in particular. This study presents the principles of Islamic law based on classical sources of *fiqh* that provide solid bases for the protection of consumers.

In this regard, in Ḥanafī school the well known work of Muḥammad b. Aḥmad b. Abī Sahl Abu Bakar al-Sarakhsī, traditionally known as Shams al-A'immah, an influential Ḥanafī Jurist, entitled *Al-mabsūṭ that* is considered to be one of the best manuals of the Ḥanafī School of thought has been frequently quoted. *Al-mabsūṭ* is well-organised, covers topics of Islamic *fiqh* in a comprehensive manner and explores points of disagreements thoroughly. This is one of the most influential works in *fiqh* literature and has been frequently consulted while doing this work. Similarly, the book of well-known Ḥanafī jurist Muḥammad Amīn Ibn 'Ābidīn (d.1252 A.H.), entitled

Radd-al-Muhtār is widely referred in this research to understand the position of Ḥanafī school of thought in different notions under discussions. The well-known work *Al-Hidāyah fī Sharḥ al-bidāyat ul-Mubtadī* commonly referred to as *al-Hidāyah* i.e. *The Guidance*, written by Shaykh ul-Islām Burhān ud-Dīn al-Farghāni al-Marghinānī that is considered an authoritative guide to Ḥanafī *fiqh* among Muslims is highly appreciated and widely quoted in this research. The other works in Ḥanafī fiqh includes *ḳitāb al-Kharāj* written by Abu Yusuf, Ya'qūb b. Ibrāhīm b. Ḥabīb al-ḳufī al-Anṣārī (d.182 A.H.); *Badāi' al-Ṣanā'i' fī tartīb ul-Sharā'i'* written by Al-ḳāsānī, Abu bakr b. Mas'ūd; Al-*ashbāh wa al-naẓā'ir* and *Al-baḥr ul-rā'iq Sharḥ ḳanz ul-daqā'iq* written by Ibn-e- Nujaym, Zain al-'Ābidīn ibn-e-Ibrāhīm (d.970 A.H.) etc.

Moreover, the Ottoman Civil Code (*Majallat ul aḥkām al-'adliyyah*) that is based on the Ḥanafī school of thought has been frequently consulted. The Majallat was compiled by a committee of eminent jurists in the reign of Ottoman Sulṭān 'Abdul 'Azīz Khan in 1867-1877 A.D. The code was operative in courts and remained until the 1950s the Civil Code of Syria, 'Irāq, Jordan and Palestine etc.

In Shafi'ī school, the classical sources that have been consulted in this research include *ḳitāb al-'Umm* written by Imām Al-Shafi'ī, Muḥammad b. Idrīs. Similarly, the books written by well-known scholar Abu ḥāmid Muḥammad b. Muḥammad, Al-Ghazālī (d.505 A.H.) *ḳitāb al-wajīz fī fiqh Madhhab al-Imām al-Shāfi'ī* and *Ihyā 'ulūm al-dīn*, have been widely referred to in this work.

The other works in Shāfi'ī school that have are referred in this research include *Mughni ul-Muḥtāj,* written by Al-Shirbīnī, Shams ul-dīn; *Al-aḥkām al-Sulṭāniyyah* written by Al-mawardi, Abul-ḥasan 'Alī b. Muḥammad b. Ḥabīb (d.450 A.H.); *ḳitāb Ma'ālim al-Qurbah fi ṭalab al-ḥisbah* written by Ibn al-ukhwwa, Ziā' ul-dīn, Muḥammad b. Muḥammad b. Aḥmad b. Abu Zayd (d.729 A.H.); *Minhāj ul-ṭalibīn* written by Imām Al-Nawwawī (d.676 A.H.),etc.

In Ḥanbalī school, the work of Imām Mawaffaq al-Dīn 'Abdullāh b. Aḥmad b. Qudāma al-Maqdisī entitled *Al-Mughnī* that is an authentic treatise on jurisprudence and the most widely known text book of *Ḥanbali fiqh*), is consulted to understand the viewpoint of *Ḥanbali* school of thought. The other works in *Ḥanbali* school that are consulted while doing this research include *Al-Qawānīn al-Fiqhiyyah* written by Abul Qāsim Muḥammad b. Aḥmad b. Muḥammad b. 'Abdullāh, Al-gharnāṭī (d.741 A.H.); Al-furūq written by Imām Al-Qarāfī, (d.684 A.H.); *Al-Ashbāh wa al-Naẓā'ir* written by Jalal ul-Dīn Al-Suyūṭī, (d.911 A.H.) ; *Al-muḥarrar fi al-fiqh al madhhab al-imām aḥmad b. ḥanbal* written by Majd ul-dīn, 'Abd ul salām (d.652 A.H.); *Maṭālib 'Uluvv al-Nuḥā fi Sharḥ Ghayāt al-Muntahā* written by Al-Suyūṭi, Muṣtafā b. Sa'd b. 'Abduhū (d.1243 A.H.) etc.

Similarly, the works of Ibn-e- Taymiyyah, *Al-Ḥisba fi al-Islām, Al-'ubūdiyyah fi- al-Islām* and *Al-fatāwā* etc. have been widely referred to in this research. The work of Muḥammad b. Abu Bakr (also known as Ibn al-Qayyim) entitled

I'lām al Muwwaqi'īn 'an rabbi al' ālamīn' is also quoted in various discussions.

In Mālikī school, the well-known work entitled '*Al-Mudawwanah*' by Imām Mālik has been frequently consulted. The other works in Mālikī school that have been frequently consulted while doing this research include: *Al-Dhākhirah* written by well known Imām Al-Qarāfī (d.684 A.H.); *Al-muwafaqāt fi usūl al-shar'iyyah* written by Imām Al-shaṭibī, Abu Isḥāq Ibrāhīm b. Mūsa b. Muḥammad (d.790 A.H.) etc.

The well-known work of Abu Muḥammad 'Alī b. Aḥmad b. Sa'īd b. Ḥazam entitled *Al-Muḥallā'* is consulted to understand the views of ẓahirī school of thought of Islāmic *fiqh* in issues relevant to the topic under discussion.

In contemporary literature the works that have been consulted while doing this research include *Al-madkhal al-fiqhi al-'āmm* written by Muṣtafā Al-Zarqā, *Al-mansūr fi al-Qawā'id written by* Al-Zarkashi; *al-Wajīz fi Idah al-Qawā'id al-Fiqhiyyah al-kulliyyah* written by Muḥammad ṣiddīq b. Aḥmad al-Burnu and *Economics of Liabilities: An Islamic View* written by Monẓir Kaḥf etc.

The well-known book *Al-fiqh al-Islāmi wa adillatuhū* written by Dr. Wahba Al-Zuhaylī is of great help to understand various schools of Islāmic law on an issue. Similarly, Dr Zuhaylī's book entitled *Naẓaryiat ul ḍamān* is a very solid book on Islamic law of torts. The book has given the concept of tort in Islamic law in a very comprehensive and detailed form. This work has been

frequently consulted while working on product liability under Islamic law of torts.

As far as the contemporary literature on Islamic law is concerned that has covered various aspects of the consumer protection other than the topic under discussion there are many good books and article that have been consulted while doing this work.

The book written by Muwāffiq Muḥammad 'Abdu entitled '*Himāyat ul Mustahlik fī al-fiqh al-Iqtiṣād al-Islāmi: Dirāsat Moqāranah* i.e. Consumer Protection in Islamic Commercial Law: Comparative Study.[1] This is a remarkable book in Arabic language on the subject of consumer protection in Islamic commercial law. The book has covered a range of topics on the subject and tried to develop an Islamic theory of consumer protection. The book constitutes on three parts. In part-I, the meaning, scope, objectives and procedures of consumer protection etc. have been properly discussed. Part-II explains the Islamic perspectives on production and consumption. The most significant part of the book is part-III that analyses the tools and methods of consumer protection from an Islamic point of view. I have benefited to great extent from this book however there is nothing specifically addressing the issue of product liability from an Islamic law perspective neither comparing the same with any other legal system of the world.

[1] Muwāffiq Muḥammad 'Abdu, *Himayat ul Mustahlik fī al Fiqh al-Iqtiṣād al-Islāmī: Dirāsat al Muqāranah*, Majd La wi, Amman, Jordan, 2002.

A number of valuable research articles were presented by renowned Muslim scholars in International conference on "*Consumer Protection in Sharī'ah & Law*" conducted by the Faculty of *Sharī'ah* and Law of United Arab Emirates University from 6-7, December, 1998. Some of these research papers are of great significance in the area of consumer protection. In these research papers, the paper on "Consumer Protection in transactions advertised through television" presented by Prof. Dr Jathim 'ali Sālim al-Shamsi, chair of the Civil Law Department at the United Arab Emirates University, in Arabic language, has discussed the innovative nature of these transactions and its usage for the acquisition of different kinds of goods and services that is intended for private consumption. The paper then suggests different tools for the protection of consumers in these contracts. In this regard, the author refers to the Islamic notions of *Khiyār ul-'Ayb*, *Khiyār ul-Waṣf and Khiyār ul-Sharṭ*, *Khiyār* etc. as it is pointed out that the subject-matter is not present before the consumer at the time of the contract. Therefore, it is necessary to reserve these options. Then the paper discusses the nature of such transaction from Islamic law perspective and concludes that such contracts are non-binding on the consumers and he may have some time to revoke them. The paper is concluded with recommending simple procedure at the event of disputes between consumer and the seller. The research paper is well-written and innovative in its nature. It is evident from the title of the research paper that it is limited to the study of the Transactions made through television

from Islamic law perspective. It has no concern with other aspects of the consumer protection in *Sharī'ah*. It is also not a comparative study of *Sharī'ah* and law on the subject.

Another research paper is on the topic of "*The Role of Islamic Sharī'ah in Consumer Protection*" presented by Prof. Dr. Ḥamd 'abīd al Kaysī, in 'Arabic Language, explains the role of Islamic *Sharī'ah* in consumer protection and has focused on some important aspects of *Sharī'ah* through which it has guaranteed protection of consumer rights. First of all, the paper explores the importance of training of consumers for rational consumption according to *Sharī'ah*. To be a miser or spendthrift both are discouraged by *Sharī'ah* while moderation in consumption is highly encouraged by Islamic *Sharī'ah*. The second way through which *Sharī'ah* insures protection of consumer rights in the concept of Sin (*Ithm*). Thus giving short weight, adulteration, hoarding, concealment of defects, fraud and misrepresentation etc. is declared as sin by *Sharī'ah* and a believer is commanded to avoid committing such unfair practices. As all the people in a community are not pious, therefore Islamic *Sharī'ah* has also provided a punitive system to punish those who harm consumers. For this purpose the institution of *Ḥisbah* is devoted. The paper has also discussed that in order to protect consumers' rights Islamic state can provide punishments as *Ta'zīr*. The paper is a great piece of work and it has briefly covered many aspects of consumer protection in Islamic *Sharī'ah*. But it has not covered the topics in detail and many other aspects such as

Consumer protection in transaction; Sale or Hire, is not discussed at all. Secondly the paper is too much precise and the role of Islamic state and its other institutions such as *'āmil-Sūq* etc. has not been discussed. However, the paper has helped me in developing my thesis on the topic. The paper of Prof. Dr *Maḥmūd Aḥmad Abu Layl* on the topic of "*The Status of Price Fixation in Islamic Sharī'ah*", in Arabic language, has analysed the issue of price-fixation by the ruler for public utility and safeguarding public interest at large.

Prof. Dr Qasim *'Abdul-Ḥamīd Al-Watīdi* in his paper on the topic of "*Islamic Sharī'ah as a Basic Source of Consumer Protection*", in Arabic language, highlighted the importance of Islamic *Sharī'ah* as a source for the consumer protection legislation. He has mentioned number of verses of the Holy Qur'ān and traditions of the Holy Prophet (pbuh) to pinpoint that Islamic *Sharī'ah* carries a huge number of commandments for the protection of consumers.

Prof. Dr *Khalīfah Babakar al-Ḥasan*, in his paper on the topic of "Consumer Protection in Islamic *Sharī'ah*", in Arabic language, stated that consumer protection is a new concept and its definition according to the modern law is analysed. The Islamic *Sharī'ah*`s view is prescribed that though it is a new term but its rules and principles are contained in the verses of the Holy Qur'ān and *Sunnah*. The paper then analyzes the protection of consumers` rights from the perspective of objectives of *Sharī'ah* i.e. *ḍarūriyāt*, *Ḥajiyāt* and *Taḥsīniyāt*. The gist of the discussion is that *Sharī'ah* has a great regard for the

protection of consumer's rights. The paper is unique as it has mentioned some verses of the Holy Qur'ān and traditions of the Holy Prophet that provide evidence for not harming consumers in *Sharī'ah*. The paper has also discussed the methods of Islamic *Sharī'ah* for the protection of consumer rights. In this regard the paper reveals that preventive measures have been described by *Sharī'ah* in order to avoid violation of consumer rights that is training the consumer for rational consumption. *Sharī'ah* has also mentioned punishments for violating consumer rights. The paper discusses hoarding, *Ribā*, *ṭalaqi' ur rukbān*, *Bay' ul Ḥadir li bādī*, and their negative impact on consumer rights and *Sharī'ah* stance on it. The paper has also explained the importance of price fixation for consumers and the debate of Muslim jurists on it is reported. The research paper has also discussed the importance of the institution of *Ḥisbah* in consumer protection as the regulating authority of the Islamic state. In this paper the author is providing jurisprudential basis for the concept of consumer protection in Islamic *Sharī'ah* as it has looked to the matter from the perspective of objectives of *Sharī'ah*. Some verses, traditions and legal maxims are also quoted in the paper. The price-fixation is also discussed in the paper and its impact on consumer rights is highlighted.

The research paper written by *'Abd-ul-Sattār Ibrāhīm Al-Ḥaythī; ḳulliyyah Tarbiyyah, Sahhar*, The Sultanate of *Amman*[2], on the topic of *"Ḥimāyat ul-Mustahlik fī al-Fiqh al-Islāmī"* i.e. Consumer Protection in Islamic Fiqh" in

[2] The paper is available on: ArabLawInfo (www.arablawinfo.com); accessed on 15/01/2013.

Arabic language, is a great piece of work on consumer protection in Islamic law and economics. The research paper has discussed four major issues concerning the topic; Patterns of Consumption in Islamic *Sharī'ah*, Harms affecting consumer due to lacking of regulations, *Al-Ḥisbah* the Islamic tool for regulating the business and its role in the protection of consumer rights and at the end the role of other concerned bodies are discussed. The author has consulted the Holy Qur'ān, *Sunnah* and classical *Fiqh* literature while writing on the topic. The paper has pointed that Islamic law preceded to protect rights of the consumers as compare to any other legal system as Consumer International is formed in the 20th century while the Institution of *Ḥisbah* was devoted to the cause of safe production, supply and consumption 1000 years ago.

The article by Ḳishwar Khan and Sarwat āftāb entitled "*Consumer Protection in Islam: The Case of Pakistan*",[3] is written in English language and it is a great introductory work on consumer protection in Islam. The article is well-written. It explains that consumers whether in an Islamic State or otherwise face similar problems that need to be taken care of by the government and the individuals themselves. Islam as a religion gives a comprehensive framework for conducting business and protecting the consumers' rights. Apparently, this framework seems similar to the commercial laws but glaring differences between the two exist: commercial laws are relatively new phenomena and

[3] Ḳishwar Khan and Sarwat āftāb, *Consumer Protection in Islam: The Case of Pakistan" available at:* http://onlinelibrary.wiley.com/doi/10.1111/1467-8454.00106/abstract, last accessed on 10.02.2014.

are made by humans for the sake of convenience only. The writer asserts that Islamic law has provided such guidelines 14 centuries ago which are based on divine principles set by Allāh. Moreover, there is no reward in complying with the commercial laws but Allāh promised the believers rewards both in this world and the Hereafter for complying with Islamic principles. The research paper has given special reference to the case of Pakistan as an Islamic state and identified that the area of consumer protection has remained neglected in this part of the world. The research paper analysis the feasibility of creating an environment in Pakistan whereby the interests of consumers are best protected under the teachings of Islām. The Qur'ānic principles are delineated with reference to guidelines for Muslim businessmen and consumers; the role of state and institutions.[4]

The research paper written by Maḥmūd Fayyād on '*The Transposition of the European Directive 85/374/EEC on Product Liability into Palestine and Jordan: Is it Adaptable to Islamic Law?*'[5]; is one of the most authentic works of its kind that has looked into the EU Directive on product liability from the perspective of Islamic law. Moreover, the article has analysed the feasibility of adaptation of the same laws in Muslim jurisdictions of Palestine and Jordan.

The research paper written by Salvatore Mancuso; professor of comparative law, university of Macau and Attorney at Milan Bar entitled "*Consumer*

[4] Ibid.

[5] Maḥmūd Fayyād's *The Transposition of the European Directive 85/374/EEC on Product Liability into Palestine and Jordan: Is it Adaptable to Islamic Law?* Global Journal of Comparative Law 1(2012), pp. 194-224.

Protection in E-commerce Transactions: a First Comparison between European Law and Islamic Law", written[6] is well-written and a good effort to compare between the European and Islamic Laws on the subject of Consumer Protection in E-commerce transactions. The author explains the concept and importance of E-commerce in the modern time. In the context of electronic transactions the author highlights the need of consumer protection at the highest level. The author has analysed the European Law approach in this regard and then comprehensively looked at the issue from an Islamic law perspective. The author has discussed the notion of E-Commerce in the light of the Holy Qur'ān, the *Sunnah* and views of the Muslim jurists. The paper is concluded with the observation that there is not much difference between the two legal systems, except the European law approach is a bit detailed, on the subject. The research paper, as it appears from its very title, addresses the issue of consumer protection in a narrow area of E-commerce and it has not discussed the concept of consumer protection in detail. The study is based on the comparison between the European and Islamic laws related to protection of consumers in E-commerce.

Article of 'Abdul Baṣīr Moḥammad entitled as The *"Egg-shell Skull" Rule in Cases of Nervous Shock in Islamic Law of Tort*, Islāmiyyat 30 (2008): 3-28, is also very useful in order to understand the concept of Islamic law of tort. The

[6] Salvatore Mancuso, '*Consumer Protection in E-commerce Transactions: a First Comparison between European Law and Islamic Law*', *available at:* www.jiclt.com/index.php/jiclt/article/download/12/11 *last accessed on 05-07-2013.*

research paper has analysed the "egg-shell skull rule" i.e. is a rule that bears or shoulders upon a person the liability for all injuries resulting from his acts leading to such injuries to another person regardless whether they are foreseeable injuries or unforeseeable injuries. The focus of the paper is to analyse the rule in the light of Islamic jurisprudence in the context of nervous shock. The paper found that the rule is not a strange one to Islamic law however the Muslim jurists have not described it in a specific term in their works. The study is innovative and helped in the analyses of the role of Islamic law of torts in protection of consumers in cases of product liability.

Moreover, the general works on Islamic law in English language that have been consulted while doing this work include:

In this regard, one of the most valuable works that focused on Islamic business ethics is that of Rafik Issa Bekun entitled Islamic Business Ethics.[7] The book addresses the ethical aspects of business from an Islamic point of view. The author has presented key principles of management from an Islamic perspective. The book has embarked on issues like lawful and unlawful behaviour of the businesses and consumers and organizational behaviour within an Islamic framework. The book has attempted to prescribe punishments in Islamic law for unethical behaviour. Overall it is a great piece of work and I have benefited a lot from this book while doing this research.

[7] Rafik Issa Bekun, *Islamic Business Ethics*, IIIT (The International Institute of Islamic Thought), Herndon, Virginia, U.S.A., 1997.

However, the material is not focused on consumer rights protection neither the issue of product liability is raised.

Another book entitled Understanding Islamic Finance written by Muḥammad Ayūb[8] is very much beneficial to understand the *modes operandi* of Islamic commercial and financial institutions. The book has covered almost every aspect of Islamic finance and Islamic commercial law. It has been consulted on various occasions for understanding the contemporary applications of modes of Islamic finance. The book has solid material in a well-organized manner. However, the area of consumer protection in general and product liability in particular is not the main concern of the book. Therefore, nothing has been found in solid and concrete form on the topic.

The valuable work that has been frequently consulted while doing this research is Business Ethics in Islām written by Mushtāq Aḥmad.[9] This is actually an edited version of Mushtāq Aḥmad's thesis which he wrote under the supervision of the late Professor Ismā'īl al-Farūqī and submitted to Temple University in partial fulfilment of the requirements for Ph.D. under the title "Business Ethics in the Qur'ān". The book contains valuable material on the subject of business ethics in Islam properly decorated with arguments from Qur'ān and Sunnah. The book has thoroughly highlighted the ethical

[8] Ayūb, Muḥammad, *Understanding Islamic Finance*, John Wiley & Sons, Ltd., England, 2007.
[9] Aḥmad, Mushtāq, *'Business Ethics in Islam'*, Academic Dissertations-5, IIIT (International Institute of Islamic Thought) and IIIE (International Institute of Islamic Economics), printed by Islamic Research Institute Press, Islamabād, 1995.

aspects of business from an Islamic perspective. It has been consulted to understand the Qur'ānic view towards business and ethics.

The well-known book written by S.M. Yusuf entitled Economic Justice in Islām is a very concise and one of the most remarkable works on Islamic economic justice. The author has covered almost each and every aspect of Islamic economics in the light of Qur'ān and *Sunnah.*[10]

The book written by well-known scholar of Islām Mawlāna Muḥammad Taqī 'Uthmānī entitled 'An Introduction to Islamic Finance'[11] has presented all the modes of Islamic finance in a concrete and precise form. However, the topic of consumer protection is not the main concern of the book rather it gives an introduction about the main modes of Islamic finance and Islamic commercial law.

The book written by Muḥammad Ṭahir Manṣoori entitled 'Islamic Law of Contracts and Business Transaction' is a good effort to provide an overview of Islamic law of contract.[12] The author has presented an overview of Islamic commercial laws based on the Qur'ān and the Sunnah which can be helpful in legislation on the subject from Islamic perspective. The book is well organized and decorated with arguments from the Holy Qur'ān, the Sunnah and opinions of the Muslim jurists. This work was consulted to understand

[10] S.M. Yusuf, *Economic Justice in Islām,* D'awah Academy, International Islamic University, Islamabad, 1990.

[11] Muḥammad Ṭaqi 'Uthmāni, 'An *Introduction to Islamic Finance',* Qur'ānic Studies Publishers, Maktabah Ma'ārif ul Qur'ān, Karachi, Pakistan, 2010.

[12] Manṣūri, Muḥammad Ṭahir, *'Islamic Law of Contracts and Business Transaction',* Sharī'ah Academy, International Islamic University, Islamabad, 2009.

the general principles of Islamic law of contract that have been used to frame the idea of consumer protection in general and product liability in particular. Similarly, the book written by Muḥammad Ṭahir Manṣoori, entitled '*Sharī'ah Maxims: Modern Application in Islamic Finance*'[13] is also a very valuable work on *Sharī'ah* maxims in English language. The book has been frequently consulted while understanding the nature, scope and application of these maxims. The material related to the relevant maxims to the research topic is presented in a solid form. However, the focus of the work is to address the application of Islamic financial maxims in modern era.

The books written by Imran Aḥsan Khan Niyazee, '*Islamic Law of Business Organization: Corporations and Islamic Law of Business Organization: Partnership*' is a remarkable work and extremely beneficial in order to understand the salient features of Islamic commercial law. The main focus of the author is to develop an Islamic form of the modern corporations that would be free of *ribā* and of other infractions of Islamic principles from which the current forms of business organizations suffer. These books are well organized but they have not enough discussions on the product liability or manufacturer's liability. However, the debate of Muslim jurists on legal person has been referred to in this thesis in the context of establishing liability of the legal person (manufacturer/producer) for defective products.

[13] Manṣoori, Muḥammad Ṭahir, '*Sharī'ah Maxims: Modern Applications in Islamic Finance*', Shar'īah Academy, International Islamic University, Islamabād, 2012.

The book of Sir 'Abdur Raḥīm entitled "*The Principles of Muhammadan Jurisprudence: According to the Ḥanafī, Mālikī, Shāfiī and Ḥanbalī Schools*" is a remarkable work of its kind.[14] This book is based on the lectures of Sir 'Abd ur Raḥīm delivered in the University of Calcutta, as Tagore Professor for the year 1907. The book was a great contribution on *Fiqh* in English language and it has represented the ideas of Muslim jurists as accurately as possible. This work has been consulted as well while doing this research.

The book written by Sayyid 'Ārif 'Alī Shah entitled *Sharī'ah Ḥalāl* Standards for Edibles, Beverages, Medicines and Cosmetics (Urdu language) is an interesting work and has been consulted several times while forming views of consumer products from an Islamic law perspective.[15] The book has provided detailed standards on *ḥalāl* consumer product and it is equally useful for the consumers, researchers, Muslim scholars, *'ulamā'* and legislators etc.

In order to understand the concept of English law on consumer protection and product liability a variety of literature has been reviewed. It includes, EC legislation, UK legislation i.e. Statues, statutory instruments, loads of case law on the relevant aspects of contract, tort and product liability etc. and different reports such as *Molony Report on Consumer Protection*, books, articles, research papers, essays and news items etc. The following works are worth mentioning in this regard:

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[14] 'Abdur Raḥīm, *The Principles of Muhammadan Jurisprudence: According to the Ḥanafī, Mālikī, Shāfi'ī and Ḥanbalī Schools,* All Pakistan Legal Decisions, Nabha Road, Lahore.

[15] Shah, Sayed 'Ārif 'Alī, *Sharī'ah Ḥalāl Standards for Edibles, Beverages, Medicines, Cosmetics,* (Urdu language) Dār ul-Falāḥ, Karachi, 2012.

Consumer Law and Policy: Text and Materials on Regulating Consumer Markets, by Ian Ramsay, (pages-674), is a very comprehensive book to understand the landscape of English consumer law and policy.[16] The book provides a critical introduction to the legal regulation of consumer markets, situating it within the context of broader debates about rationales for regulation, the role of the state and the growth of neo-liberalism. It draws on inter-disciplinary sources, assessing, for example, the increased influence of behavioural economics on consumer law. Europeanization of consumer law and the tensions between neo-liberalism and the social market ground rules are analysed in the book. It has also assessed national, regional and international responses to the world financial crises as reflected in the regulation of consumer credit markets. The third edition has incorporated recent legislative and judicial developments of the law, blending substantial extracts from primary UK, EU and international legal materials. The book contains preface, acknowledgments, table of cases, table of legislation and nine chapters.

Another book entitled "*Textbook on Consumer Law*"[17] (pages-586) by David Oughton and John Lowry has presented the principle legal issues concerning English consumer protection law and the context in which they are in action and focused on the main consumer concerns of deficiencies in goods acquired

[16] Ian Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets*, Third Edition, Oxford and Portland, Oregon, 2012.
[17] David Oughton, John Lowry, "*Textbook on Consumer Law*", Oxford University Press, UK, 2000.

and services provided. The book includes materials on institutions of consumer protection, consumer redress, product safety, product quality, defective services, unfair contract terms and advertising and sales promotion law. The book has analysed the roles of the law of contract, the law of tort and the criminal law as instruments of consumer protection. The book has analysed the inter-relationships between these different branches of English Law. The role of different institution in consumer protection is also elaborated. The book is basically written for the students but it is equally beneficial for the practitioners, retailers, consumer advisers, enforcement officers and other concerned with consumer protection and trading law. The book is comprised on preface, table of cases, table of statutes and table of secondary legislation, twenty chapters and an index. The book is useful one for the beginners of the subject. This is a very good collection of all the grey areas of English Consumer Protection law and loads of case law has been cited in the book. The book gives students of consumer law with readable and an up-to-date text on the subject. It book has also covered some of recent judicial decisions in the appellate courts and below. It also analysis various provisions of the Human Rights Act 1998, Contracts (Rights of Third Parties) Act, 1999, the Access to Justice Act, 1999, the Civil Procedure Rules 1998, the Unfair Terms in Consumer Contracts Regulations 1999, the Food Standards Act 1999, and the EC Directive on Consumer Sales and Associated Guarantees 1999.

The book entitled "*Consumer Protection Law*" (pages-679) written by Geraint Howells and Stephen Weatherill[18] is a very useful book on the topic. It gives an introduction of the Consumer Protection Law in the United Kingdom. It has focused on the situation of UK within an evolving European consumer protection law by a comparative method. The book underpinned the position of individual consumer within the modern economy.

To understand the concept of product liability in English law, the researcher has gone through the "*Product Liability Law*,[19] (pages-971) by CJ Miller and RS Goldberg. The book has broadly covered the contractual liability of retailers and others for misrepresentations and for breach of express warranties and the implied terms as to correspondence with description, satisfactory quality and fitness for purpose. It contains the detailed discourse of the Consumer Protection Act, 1987 (hereinafter referred as CPA, 1987) and the European Union Directive on Product Liability 85/374/EEC (hereinafter referred as EU Directive) on which the CPA, 1987 is based. Keeping in view, the deficiencies in the product liability regime of CPA, 1987 in terms that it does not cover the damage to commercial property and pure economic loss etc. the book elaborated the general law of negligence that can be invoked in such cases. In this regard the famous case of *Donghue v Stevenson* is highly celebrated. The book has explained all the key notions of the modern product

[18] Geraint G. Howells, Stephen Weatherill "*Consumer Protection Law*" 2nd Edition, published by Ashgate Publishing Company, printed and bound in Great Britain by TJ International Ltd, Padstow, Cornwall, 2005.

[19] CJ Miller and RS Goldberg, "*Product Liability Law*, 2nd Edition, published in New York, United States by Oxford University Press in 2004.

liability law such as defects, products, producers, defences etc. It is highlighted that the modern English case law has discussed the defects in a number of cases such as infected blood, breast implants, vaccines, a condom, an all-terrain vehicle (ATV), a car tyre, a scaffolding plank, a child's buggy and even a coffee cup. Though the book is basically about the English law on product liability but it has also referred to other legal system on the subject such as USA, Australia, New Zealand, Canada, France, Germany etc. Thus the book is having a comparative approach in analysing the modern English law on the subject. Many differences have been pointed out that exist between the American and English regimes of product liability.

Another book entitled "*The Law of Product Liability*",[20] (pages-924) edited by Prof. Geraint G. Howells is equally beneficial in this regard. In introductory chapter, Prof. Howells canvasses the nature of product liability law in the modern world, providing an insightful overview of key issues of liability and defence in the UK, Europe, and the US; an exploration of theoretical foundations and policy debates that ground this area of the law; and various implications for an informed litigation practice. The book is contributed by the articles of various scholars. Chris Willett on 'The Role of Contract Law in product liability', Norma J Hird on 'the Negligence', Geraint Howells on 'Strict Liability', Richard Goldberg on 'Causation', James Fewcatt on 'Jurisdiction', Stuart Dustson on 'Choice of law', Mark Mildered on 'Group

[20] Geraint G. Howells, "*The Law of Product Liability*", 2nd Edition, LexisNexis, Butterworths, UK, 2007.

actions', Peter Cartwright on 'the regulation of product safety', Jhon Birds on 'Insurance'. All these important issues have been addressed with sensitivity, breadth and depth. The book ends with appendixes on I-European Legislation Council Directive of 25 July 1985 (85/374/EEC) on the approximation of the laws, regulations and administrative provisions of the Member states concerning liability for defective products (as amended), II- Statute-Consumer Protection Act, 1987, and III- Statutory Instruments- General Product Safety Regulations 2005. One of the strengths of the book is that it follows a comparative law approach, weaving perspectives of European and American law into the analysis of UK law. In this spirit, The Law of Product Liability addresses a number of distinctions among the differing legal systems it examines and so alerts lawyers to this important aspect of comparative product liability law. This book is one of the best treatises on the law of product liability as it covers many facets of this intriguing field of law.

The book written by Rodney Nelson, Jones and Peter Stewart entitled *Product Liability: The New Law under the Consumer Protection Act 1987*, (pages-218) is also very useful.[21] This is a brief book on the topic of product liability in England. The book is started with an introduction and discusses the notion of liability in contract, and tort covering joint liability, time limits and briefly introduces the EU Directive on product liability. In chapter 2 the book discuss the notion of Liability under the new Act i.e. Consumer

[21] Rodney Nelson, Jones and Peter Stewart, *Product Liability: The New Law under the Consumer Protection Act 1987*,Fourmat Publishing, London, First published in July, 1987.

Protection Act, 1987. In this regard all the key notions e.g. product, defendants, liability, defect, damage, claimant are thoroughly discussed. In chapter 3 the defences available to the producers and suppliers have been thoroughly discussed. In chapter 4 the effects of the new law (i.e. CPA, 1987) on the existing laws have been discussed. In this regard the judgments in the shape of examples of old cases are quoted in the light of new laws. Chapter 5 discusses the concept of Forum shopping and risk control. Chapter 6 discusses consumer safety legislation. The book appendixes certain important instruments such as The European Communities Council Directive on Product Liability, Consumer Protection Act, 1987, Consumer Protection Act, 1987 (Commencement No 1) Order 1987, The Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments, Articles 1 to 6A. The book is a good source for understanding the overall concept of product liability and much case law has been referred. The book is an old one and many developments took place after it on the topic in the shape of legislations, amendments, and new case laws. The book though did not critically analyse the new law and its advantages/disadvantages have not been discussed.

The book entitled "*Product Liability*"[22] written by *Alister* M. Clark (pages-223) published has analysed the central features of the new scheme of strict liability for loss caused by defective products which was introduced by Part-1 of the Consumer Protection Act, 1987. In this regard the key notions of product

[22] Alister M. Clark, "*Product Liability*, Sweet & Maxewell, London, 1989.

liability law such as the meanings of defect, product, liability, the role of warnings, recoverable and non-recoverable loss, the development risk defence, other defences, prescription and limitation etc. have been analysed in the book. The book has also referred to the American experience of product liability law. The book contains an introduction to the new regime, pre-existing legal position, and a discussion of the leading proposals for change. The book has discussed the contractual basis of product liability, the product and chain of liability, the role of warnings in product liability, recoverable loss, development risks, defence, prescription and limitation, conclusion. The book has elaborated the relevant provisions of the new law. The book is an old one as it was published in 1989 and much new developments have taken place after its publication. However, it has valuable discussions which helped in the writing of this dissertation and understanding the picture of product liability law.

In order to understand the comparative aspect of the topic the book entitled "*Product Liability in Comparative Perspective*"[23], (pages-363), edited by Duncan Fairgrieve, have been consulted. It has examined the law of product liability from a comparative perspective and analysed the European Directive on Product Liability along with a number of statutes of the member countries of European Union. The book has also compared the situation of EU with that

[23] Duncan Fairgrieve, "*Product Liability in Comparative Perspective*", Cambridge University Press, UK, 2005. The origin of this book is a research project undertaken by the Tort Law Centre at the British Institute of International and Comparative Law. Most of the articles have emerged from the Institute's work on product liability, whilst other articles were originally presented by their authors at Institute events.

of US and Japan. The book is equally useful for legal practitioners, academics, and students and other in the area of product liability. The country reports have great utility for the practitioners. The book contains contributions from the leading thinkers in the field of product liability. The book in general and the above mentioned chapters of it have played vital role in writing this dissertation.

Along with the above mentioned books, some important research papers have also been consulted. Some of them are worth mentioning here such as the paper written by Geraint G. Howells entitled "Product Liability: A Global Problem"[24] that has highlighted the importance of the evolving field of product liability law. The paper is comprised on four parts. In part 1 it has presented an introduction of the concepts, problems and tensions central to an understanding of the product liability debate. Part 2 analyses the development of the product liability law in Europe and assess the impact of EU Directive on product liability (85/337 EEC). In part 3 the "product liability crises" in the United States is discussed and various reforms have been suggested in the legal regime. The paper has compared between the United State and European positions on the product liability in its part 4 and a global uniform product liability law which recognises the social responsibility of the producer towards those injured by their products have been recommended.

[24] Geraint G. Howells, "Product Liability : A Global Problem", Managerial Law, Vol. 29 Iss: 5/6, pp.1 - 36 available at http://www.emeraldinsight.com/journals.htm?articleid=1655960, last accessed on 12.03.2014.

The paper by Peter Shears entitled *The EU Product Liability Directive-Twenty Years on Current Document* (25 pages) [25] has briefly analysed the cases decided under the EU Directive on Product Liability. I have consulted this article during my work and benefited a lot from its content and material on the product liability cases in different jurisdictions of European Community.

Maurice Jamieson, *Liability for Defective Software.*[26] The paper has discussed the issue of defective software that cause injury or death. Such software is described as safety critical software. This kind of software is often used in specialized situations such as flight control in the aviation industry and by the medical profession in carrying out diagnostic tasks. The paper has discussed the importance of Software in modern times and pointed out that software is having an impact on the average citizen in one way or the other. In this article the paper has attempted to analyse that how the liability of software manufacturer may arise.

The article entitled "*Product Liability*", has introduced the English law on product liability.[27] The article explored that it is a complex branch of law and amalgamation of common law and statutes along with EU Directive. The paper has explained the CPA, 1987 with full concentration along with the relevant rules of the law of tort.

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[25] Peter Shears, *The EU Product Liability Directive-Twenty Years on Current Document*, Journal of Business Law, available on Westlaw UK, last accessed on Friday, 12 July, 2013 at 15:03 BST

[26] *The article is available at* http://www.journalonline.co.uk/Magazine/46-5/1000702.aspx#.Ui4S-fm1FFA, last accessed on 09-09-2013.

[27] The article is available at http://www.insitelawmagazine.com/ch11productlaibility.htm last accessed on 01-09-2013.

A Guide to the EU Directive Concerning Liability for Defective Products (Product Liability Directive), edited by Helen Delaney and Rene van de Zande is basically prepared for the commerce industry to introduce in an easy way the European Union's Directive Concerning Liability for Defective Products (Product Liability Directive) [85/374/EEC]. The guide is prepared to help the businesses and government officials understand the purpose of the directive, its relationship to other directives; the essential requirements contained in the directive, and the basic steps necessary for compliance. The Guide has also explained all the key notions of the directive. [28]

I have also got the opportunity to read the thesis of Zalīna Zakariyyāh, on Cosmetic Safety Regulations: A Comparative Study of Europe, the USA and Malaysia, while my stay in Manchester, UK. [29] The thesis discusses the safety regulations related to cosmetic product as it is one the most popular consumer products. The thesis investigates the cosmetic safety mechanisms in order to see if consumers are adequately protected and if the safety mechanisms for cosmetics are efficient. In this regard the study takes three jurisdictions to compare, namely the EU, the USA and Malaysia. Through analysis, the ideal features of cosmetics regulations based on the larger picture of safety regulation generally are also considered. The research compares the situation

[28] Helen Delaney and Rene van de Zande, *A Guide to the EU Directive Concerning Liability for Defective Products (Product Liability Directive)*, National Institute of Standards and Technology, Technology Administration, U.S. Department of Commerce, 2011.

[29] Zalīnā Zakariyyah, *Cosmetic Safety Regulations: A Comparative Study of Europe, the USA and Malaysia*, (Unpublished) thesis submitted to the School of Law, University of Manchester for the degree of Doctorate of Philosophy in the Faculty of Humanities, 2012.

of EU and Malaysia (as Malaysia has followed the EU policy regarding the matter) with that of USA. The thesis then discusses that Malaysia has experienced some setbacks and encountered teething problems due to a lack of resources, structure, technical facilities and qualified personnel. However, as a developing nation Malaysia has benefited from the adoption of the EU system. Thesis assert that there is still much room for improvement, this borrowing has benefited consumers, in so far as safety is concerned, because of the common and standard safety assessments and the responsibility of safety now being placed on the manufacturers. The research has also pointed out that the consumers can enjoy more products due to the elimination of trade barriers through free movement and cooperation between member states.

Beside the above mentioned works the article written by Lorie Charlesworth entitled Consumer Protection in Sale of Goods Agreement: An Ancient Right in Modern Guise?[30] was of great use in this regard. Similarly, the articles written by Anne Ware and Grant Castle entitled Product Liability for Medical Devices;[31] David Harland, The United Nations Guidelines for Consumer Protection;[32] Duncan G. Smith, The European Community Directive on Product Liability: A Comparative Study of Its application in the

[30]Lorie Charlesworth, *Consumer Protection in Sale of Goods Agreement: An Ancient Right in Modern Guise?* (The Liverpool Law Review Vol. XVI (2) [1994]).

[31] Writers examine the product liability regime in Europe and provide guidance on how companies can protect themselves from claims.

[32] David Harland. "The United Nations guidelines for consumer protection", Journal of Consumer Policy, 09/1987, last accessed on 06-07-2014.

UK, France and West Germany; and Article on Product Liability,[33] etc. were of great help.

Various reports were also reviewed in this regard such as the report from the Commission to the European Parliament, The Council and the European Economic and Social Committee-fourth report on the application of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the member states concerning liability for defective products amended by directive 1999/34/EC of the European Parliament and the Council of 10 May 1999.

And last but not the least the lectures of Sir Gordon Borrie on The Development of Consumer Law and Policy- Bold Spirits and Timorous Souls was of great use.[34]

The nutshell of the literature review is that so far no one has presented a comparative study of the consumer protection in the context of product liability from the perspective of Islamic and English legal systems. There is no such an academic research that explores and evaluates the different theories, concepts and rules of consumer protection in the context of product liability from the perspective of both the legal systems. The researcher, therefore, aims to analyse critically the subject of consumer protection in the context of

[33] See INSITE LAW magazine: Daily online Law news and blogs, http://www.insitelawmagzine.com, last accessed on 15.09.2013.
[34] Gordon Borrie, The Development of Consumer Law and Policy- Bold Spirits and Timorous Souls, The Hamlyn Lectures, Thirty Sixth Series.

product liability and compare between English and Islamic legal systems on the subject. The researcher has tried his best and spent his every effort to make this research useful, valuable and productive. The researcher has tried to adhere to the qualitative research standards during the compilation of this research data. In spite of every effort to make this research appropriate and error free it is a human effort and needs improvement therefore all suggestions to its improvement are welcome.

CHAPTER 3

CONSUMER PROTECTION IN SHARĪ'AH AND ENGLISH LAW

CHAPTER 3

CONSUMER PROTECTION IN SHARĪ'AH AND ENGLISH LAW

3.1. INTRODUCTION

This chapter presents an overview of consumer protection in Islamic and English legal systems. The chapter explains the concept of consumer protection under Islamic law looking into the philosophy of Islamic jurisprudence. The consumer rights and responsibilities have been highlighted from an Islamic law perspective. The Islamic concept of a just market system is highly celebrated in this context and its impact on consumer protection has also been analysed. The methods to enforce Islamic law on consumer protection have been given due importance and the policy of an Islamic state is highlighted in this context with special reference to the institution of *Ḥisbah* (ombudsman). The chapter is based on the data from the classical as well as modern literature of Islamic law relevant to the topic. The chapter also draws a general picture of English consumer protection jurisprudence covering the historical development of the topic, principles and sources of English consumer law, the relevant statutes, English case law etc. The role of OFT (Office of Fair Trading) and other organizations is highly appreciated in this regard. The chapter is concluded with the most important results found and comparison of certain aspects of both English and Islamic laws on consumer protection.

3.2. CONSUMER PROTECTION IN ISLAMIC LAW (SHARĪ'AH)

3.2.1. Consumer Protection and Islamic Law

Islamic law is a communication from Allāh, The Exalted, related to the acts of the subjects through a demand or option, or through a declaration.[1] Islamic *Sharī'ah* is derived from the revelation of Allāh which makes it distinct from other legal systems of the world. There are four sources of Islamic law the Qur'ān,[2] the *Sunnah* of the Holy Prophet Muhammad, (pbuh), *Ijmā' (Consensus), Qiyās* (analogy). There are four major schools of law in Sunni Muslim legal thought i.e. Malikī, Ḥanafī, Shafi'ī and Ḥanbalī. The scope of Islamic law is very wide. It covers almost all areas of human interest such as contracts, torts, criminology, international law, administrative law, gifts, wills, pre-emption, trust etc.

Consumer protection and business ethics are amongst the more important aspects of human being's dealings with each other. In Islām, the rights and obligations of an individual towards others are stressed heavily. Where violations occur, the prerogative to forgive or otherwise is vested in the affected individual. Allāh's forgiveness or otherwise in such cases is dependent on the will of the individual sinned against; if he does not forgive, Allāh will punish the defaulter. Therefore, it

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[1] Al-taftāzānī (d. 793 A.H.), *Sharḥ al-talwīḥ wa attawḍīḥ*, Maktabah Ṣabīh Bi-miṣir, (n.d.), vol.1, p.20.

[2] The eternal and original sources of Islamic law are the Holy Qur'ān that Allāh communicated through the Prophet (pbuh) for the guidance of mankind. These messages are universal, eternal and essential. *Sunnah* refers to the exemplary conduct of the Prophet (pbuh). The Prophet (pbuh) has been declared to be interpreter of the Qur'ānic text. The Qur'ān for instance mentions *Zakāh* but does not lay down its details; the Prophet (pbuh) explained it to his followers in a practical form. *Ijmā'* i.e., the consensus either of the community or of the religious scholars is a principle of new legal content that emerges as a result of exercising reason and logic in the face of a rapidly expanding society.

is imperative for the individuals to deal with fairness in trade and commerce as well.[3]

The Arabic equivalent for the term "consumer protection" is *"ḥimāyat-al-mustahlik"*. *Mustahlik* is the agent noun (*Isim al-fā'il*) from the word *Istihlāk* (consumption). The word (*Istihlāk)* is derived from *'halākah'* that means destroyed i.e. conversion of something from beneficial to non-beneficial form. [4] Beneficial means it is used for the purpose it is made. The modern Muslim scholars have defined *Istihlāk* (consumption) that it is spending of money and losing of something its original shape or conversion of something from one form to another like cotton to dress or uniform etc.[5]

In Islamic law, the term *"himāyat ul-mustahlik* i.e. consumer protection" specifically does not appear in these exact terms in the classical books of *fiqh*. Also, the *Fuqahā'* did not mention this term in their writings. However, this is not a strange rule in Islamic law as it has provided detailed rules for consumer protection in various chapters of *Fiqh* such as liability *(Ḍamān)*, contracts, deception *(Tadlīs)*, uncertainty *(Gharar)*, hoarding, law of options, and ombudsman *(Ḥisbah)* explaining consumer's safety from adulteration, deception and concealment of defect etc. There is no specific chapter in the classical *Fiqh* literature about the protection of consumers.

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[3] Ḳishwar Khan and Sarwat Aftāb, *Consumer Protection in Islam: The Case of Pakistan,* Article published in Australian economic papers, December 2000, p.486.

[4] Ibn e Manzūr, Lisān al-'arab, Dār Ṣadir, Bayrūt, p.504.

[5] Consumption *(Istihlāk)* is some time of the goods that are consumable like vegetables, fuel, etc and some other time it is of those things that are not consumable like immovable property e.g. Land, houses etc., so here consumption means usufruct and benefit of something and not the corpus of that thing. *Istihlāk* is generally consuming something, finishing it or extracting its benefits, for getting benefit out of it. It is said that the water is consumed when it is drunk and the goods are said to be consumed when their benefit is used.

The reason, probably, is that when the general principles of Islamic law are practically implemented the purpose of consumer protection will be automatically served and no need will remain for specific code for the protection of the consumers.[6]

The Holy *Qur'ān* and *Sunnah* embody some very basic and important principles with regard to protection of consumers in commercial transactions. The sources of consumer protection in Islamic law are those of Islamic law itself i.e. *Qur'ān, Sunnah, Ijmā' ', Qiyās*, etc. thus, the Islamic guidelines for consumer protection should be derived from the above mentioned sources. However, an Islamic state may develop or adopt some new regulation on the basis of public interest (*Maṣlaha Mursalah)* provided it is not repugnant to Islamic *Sharī'ah* . The *Fuqahā'* after taking guidance from the principles provided by the Qur'ān and the *Sunnah* developed a comprehensive system of contracts and transactions. Rights of the consumers are discussed under different headings in different chapters of *Fiqh* literature. The Islamic law of contracts and commercial transactions has become a well-developed discipline now due to their contributions and *Ijtihādah.*

Islamic law has provided guidelines for the protection of consumers with its inception which are based on divine principles sent by Allāh (S.W.T.). Moreover, Allāh (S.W.T.) promised the believers rewards both in this world and the Hereafter for complying with Islamic principles. The Holy *Qur'ān* and *Sunnah* embody some very basic and important principles with regard to protection of consumers in

[6] Kishwar Khan and Sarwat āb, *Consumer Protection in Islam: The Case of Pakistan,* Article published in Australian economic papers, December 2000, p.486.

commercial transactions. The basic purpose is preservation and protection of property and material wealth of the people

3.2.2. The Philosophy of Islamic Law and Consumer Protection

Muslim scholars have explained that all the rules of *Sharī'ah* revolve around *Maqāṣid al-Sharī'ah* also known as high purposes of Islamic law as well as objectives of *Sharī'ah* . The basic objective of Law-Giver is the welfare of mankind. *Maqāṣid* and *Maṣāliḥ* are interchangeable terms. Imam Ghazālī writes about *Maṣlaḥah:*

> "As for *maṣlaḥah,* it is essentially an expression for the acquisition of *manfa'ah* (benefit) or the repulsion of *maḍarrah* (injury, harm), but that is not what we mean by it, because acquisition of *manfa'ah* and the repulsion of *maḍarrah* represent human goals, that is, the welfare of humans through the attainment of these goals. What we mean by *maṣlaḥah,* however, is the preservation of the ends of the *Shar*".[7]

The Muslim Ummah has unanimously accepted that Sharī'ah is promulgated for the protection and preservation of five basic objectives. These fundamental rights are recognized by *Sharī'ah* scholars in respect of individuals from an inductive survey of the sources of Islamic law. These are: preservation and protection of faith, life, progeny, intellect, and wealth.[8] These are actually the High Purposes of Sharī'ah . There are many principles, rules and legal maxims of Islamic law that revolve around the protection and preservation of these fundamentals. These objectives can be achieved by opening the ways to the means that ensure the advancement of these objectives on one hand and blocking all those means that lead

[7] Al-Ghazālī (d.505 A.H.), *Al-muṣṭaṣfā, Dār ul-kutub al- 'ilmiyyah, 1993, vol.1, p.174.*
[8] Al-Shāṭibī, Ibrāhīm b. Musa, *Almuwwāfaqāt,* Dār Ibn e 'Affān, 1st Ed., (1417 A.H.) vol.1, p.31.

to negate them. If we look into these *Maqāṣid* in the context of consumer protection, all the five objectives highly ensure the protection and promotion of consumers' interests. Such as the objective of faith (*Hifz ul-Dīn*) means to have belief in Allāh i.e. One God, Angels, Prophets and the Day of Judgment. It is completed when one performs all the required worships i.e. prayers, fasting in the holy month of Ramaḍān, Pilgrimage to Mecca and paying of *Zakāh* etc. Faith also requires a believer to speak the truth, do good deeds to others and never commit anything wrong that may harm anyone. When a person follows the said scheme in order to complete his faith and fulfill his ritual obligations, he would never enter in an unlawful business nor produce harmful products that may harm the consumers. He would always follow the approved business conduct and abstain from unfair trade practices.[9]

Similarly, the objective of life (*Hifz ul-Nafs*), the primary concern of, which is to protect and preserve human life is highly ensuring protection of the consumers. The original rule for consumption of goods and services in Islamic law is permissibility unless prohibited by it.[10] However, anything that may harm the consumers should be banned. It is, therefore, not allowed to endanger human life by producing harmful or defective products or rendering faulty services. In this regard it is pertinent to quote Imām Ghazālī: The objective of the wise men is to

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[9] See Khalīfah, Babakar al-Ḥasan, *Himāyat ul-Mustahlik fi al-Sharī'ah*, paper presented in the International conference on "*Consumer Protection in Sharī'ah Law*" conducted by the Faculty of *Sharī'ah* & Law of United Arab Emirates University, 6-7, December, 1998.

[10] See Ahmad, Abu Sayyid, *Himāyat ul-Mustahlik fi al-*fiqh al-Islami, Dar al-kutub al-elmiya, Beirut, Lebanon, 2004, p.311.

meet Allāh (S.W.T.) in the hereafter and there is no way to that except seeking knowledge and act accordingly. The punctuality of these deeds is impossible without having a healthy body nurtured with good diet according to the needs of the body.[11]

Human life and sound health is sacred in Islām and severe punishments i.e. *Qiṣāṣ*, *diyyah* and are prescribed for taking someone's life. Thus, any harm to human life or health is strictly condemned in Islām.

Another objective of *Sharī'ah* is the protection and preservation of intellect (*Ḥifz ul- 'Aqal*). All the commandments of God are addressed to a sane person and an insane person is not held liable for not following these commandments. A sane person can easily differentiate between beneficial and non-beneficial things. Intellect is promoted through education and critical awareness enables people to take sound decisions to spend their wealth. It helps consumers to examine the quality of products and services as well as securing and safeguarding their interests in commercial transactions. Sound judgments and rational decisions can only be made when a person is sane. Therefore, *Sharī'ah* has prohibited the consumption of alcohol as it affects the human mind. Islamic law has gone to the extent that insanity is considered a cause for the invalidity of a contract e.g. when a minor buys something that is harmful to him, the contract is not binding in the eyes of Islamic law.

[11] Al-Ghazālī (d.505 A.H.), *Ihyā' ul 'ūm al-dīn*, Dār al-ma'rifah, Bayrūt, vol.2, p.2.

Another objective of *Sharī'ah* is the protection and preservation of posterity (*Ḥifz ul-Nasl*).[12] This objective is achieved through the maintenance of healthy family and the institution of marriage while penalties are provided for those who would corrupt it and destroy its values.[13]Healthy family is possible when they are provided clean, healthy and hygienic food for consumption. For a healthy beginning, a child should complete his basic period of taking his/her mother's milk. This objective also promotes the protection of consumers.[14]

Last but not the least is the objective of *Sharī'ah* to protect and preserve wealth of the people (*Ḥifz ul-Māl*). It occupies a significant place in Islamic law. It regards the property of a person as sacred and inviolable as his life and honor. In this regard, *Sharī'ah* has legalized all the lawful and approved ways of producing wealth. On the other hand, all the unlawful and illegitimate ways of earnings are discouraged such as theft, usurpation, embezzlement, bribery, usury, *Gharar*, fraud, *Ghaban* etc. The Holy Qur'ān forbids the unlawful devouring of property by a believer.

"Do not devour another's property wrongfully – unless it be by trade based on mutual consent."[15]

Thus, taking someone's money without giving him his due right is strictly condemned in *Sharī'ah*. This objective highly ensures rights of the consumers.[16]

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[12] Al-Shāṭibī, al-muwafaqāt, vol.2, p.19.
[13] Niyazī, *Outlines of Islamic Jurisprudence*, p.154.
[14] Khalīfah, Babakar al-Hasan, *Himayat ul-Mustahlik fi al-Shariah*, paper presented in the International conference on "*Consumer Protection in Sharī'ah Law*" conducted by the Faculty of *Sharī'ah* & Law of United Arab Emirates University, 6-7, December, 1998.
[15] Qur'ān 4:29.
[16] Khalīfah, Babakar al-Hasan, Op. Cit.

Therefore, all the High Purposes of Islamic law highly ensure the protection and promotion of consumer protection. To take care of all these High purposes of Islamic law is the primary concern of Islamic law of consumer protection.

3.2.3. Consumer Rights and Responsibilities under Islamic Law

Keeping in view, the above mentioned objectives of *Sharī'ah* , can be of much help to derive basic rights of the consumers under Islamic law. It has been discussed earlier that every individual has right to faith, healthy and sound life; protection of intellect; a sound family system; and protection of property. These are their rights in the sense that no one should violate these rights. On the other hand these are the responsibilities of the consumers to ensure protection of these rights and do not let others to violate their basic rights.

In *Sharī'ah* a consumer is expected to behave rationally while consuming his wealth satisfying his needs.[17] This has been termed *rushd* in Islamic *fiqh*.[18]

Sharī'ah commanded Muslim consumers to consume only good, useful and pure products and services. They are asked to avoid wasteful and unnecessary things.[19] This gives great freedom of choice to different people according to their social and specific requirements in consuming products and services unless they are contrary to *Sharī'ah* .[20] It has put restriction that consumption should be from *ḥalal* means

[17] Qur'ān says: "Those who, when they spend, are not extravagant and not niggardly, but hold a just (balance) between those (extremes) (25:67)".

[18] Ibn e Rushd (d.595 A.H.), *Bidāyat ul-mujtahid wa nihāyat ul-muqtaṣid*, Dār al-ḥadīth, Cairo, 2004,vol.4, p.64; Al-ḳasānī, badā'I al sanā'i', vol.7, p.170; Ibn e Qudāmah, Al-mughnī, vol.4, p.350.

[19] Qur'ān 23: 1-5; 2:172; 5: 5; 16: 114; 5:4; 2:254; 17:29; 2:173; 6:146.

[20] Afzal-ur-Raḥmān, *Economic Doctrines of Islām*, vol. II, p.8.

on *ḥalal* products and services.[21] The believers should avoid the consumption of *ḥarām* products.[22] The general principle regarding things is permissibility unless that is prohibited by *Sharī'ah* . Therefore, Muslim jurists did not explain lawful consumption in much detail as it has been profoundly defined by *Sharī'ah* while they have explained in detail the unlawful consumption such as wine, pork, dead animal and blood etc.[23] Thus, consumption will be valid only if it is made in a lawful way and in lawful objects.

Ḥaḍrat 'Umar (R.A.) said:

> "And I see this *māl* will not benefit unless, it is taken by the right and given in the right prevents you from *bāṭil.*"[24]

Spending on one's self, wife, children and family as well as on needy people such as widows, orphans and the poor is highly encouraged by *Sharī'ah* .[25] The famous proverb "*charity begins at home*" explains very well the significance of the above principle of Islām. *Sharī'ah* has asked people to follow a middle path between materialism and asceticism. It forbids excessive expenditure on gratification of personal desires and condemns abstention from the enjoyment of pure things.[26] It has ordered people to look after their wealth and spend it wisely on satisfaction of

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[21] Qur'ān has provided a clear concept of permissible (*Halāl)* and impermissible (*Harām).* For details see: Qur'ān: 5:1, 5:5, 16:114, 22:28, 22:30; 2:219, 5:3, 6:145, 16:115, 5:90.

[22] Qur'ān 2: 267; 62: 10; 4: 32; 2: 198; 78: 11; 7: 10; 73: 20; 2:173; 6:146; 5:90.

[23] Usāmah Muḥammad Al 'abd, *Naẓriyyat ul istihlāk* , (thesis submitted for the award of PhD degree to the Al-Azhar University), p.21.

[24] Abū Yusuf (d.182 A.H.), *Al-Khirāj,* Al-Maktabah al-Azhariyyah li-al-turāth, p.130.

[25] Qur'ān says: "They ask thee what they should spend (In charity). Say: Whatever ye spend that is good, is for parents and kindred and orphans and those in want and for wayfarers. And whatever ye do that is good,--(Allāh) knoweth it well (2:215)".

[26] Qur'ān says: "O ye who believe! Intoxicants and gambling, (dedication of) stones, and (divination by) arrows, are an abomination,- of Satan's handwork: eschew such (abomination), that ye may prosper (5:90)" Other related verses are: 7:157; 2; 168; 6:142; 2:60.

their wants. Islamic law goes to the extent that it can even impose interdiction (*hajar*) against those who are spendthrift or wasting their wealth. *ḥajar* literally means, 'imposing restriction' i.e. when a person's actions are stopped to have their legal effects.[27] The concept has been derived from the *Quranic* instruction of restricting the minor orphans to have an access to their own resources until they obtain maturity. Hence, it denotes the meaning of imposing restrictions on someone to indulge in consumption of wealth or in any business activity. The legality of Ḥajar is based on the verses of the Holy Qur'ān and traditions of the Holy Prophet (pbuh). Qur'ān says:

> "To those weak of understanding Make not over your property, which Allāh hath made a means of support for you, but feed and clothe them therewith, and speak to them words of kindness and justice."[28]

> "Make trial of orphans until they reach the age of marriage; if then ye find sound judgment in them, release their property to them; but consume it not wastefully, nor in haste against their growing up. If the guardian is well-off, Let him claim no remuneration, but if he is poor, let him have for himself what is just and reasonable. When ye release their property to them, take witnesses in their presence: But all-sufficient is Allāh in taking account."[29]

> "If the party liable is mentally deficient, or weak, or unable Himself to dictate, Let his guardian dictate faithfully"[30]

Imām Shafi'ī (R.A.) interpreted the term mentally deficient in the meaning of spendthrift, weak in the meaning of minor and unable to dictate himself in the

[27] Al-Kāsānī, badā'i' al-sanā'i', vol.7, p.169.
[28] Qur'ān 4:5.
[29] Qur'ān 4:6.
[30] Qur'ān 2:282.

meaning of insane person. He draws the conclusion that Allāh (pbuh) informed that these persons should be represented by their guardians in their dealings. Hence, this is a proof on imposition of Ḥajar on all such categories of persons.[31]

In this context, it is reported from the Holy Prophet (pbuh) is that Mu'ādh. b Jabal (R.A.) was a generous man and always gave his possessions away. He used to be always in debt. Even his debts increased his actual assets. He came to the Holy Prophet (pbuh) and requested him to ask his creditors to withdraw their claims on the debts. They, however, refused. The Prophet (pbuh) imposed Hajr and sold Mu'ādh's property to pay the debts, to the extent that he had nothing left.[32]

Consumption of wealth is not restricted to necessities of life but includes comforts and even lawful luxuries (*taḥsīniyyāt*) of life. King Solomon was a prophet and at the same time enjoyed all the comforts and luxuries of life that one can think of in this world. One of the companions of the Holy Prophet (pbuh), Caliph 'Uthmān (R.A.), was one of the richest men of Arabia and was given the epithet of "richest" by the Holy Prophet (pbuh). Thus, the possession of wealth and enjoyment of comforts and even some of the luxuries of life is not considered contrary to piety provided the consumer is neither wasteful nor misery in his expenditure.[33]

The perfect model for a Muslim consumer is the personality of the Holy Prophet (pbuh). Holy Prophet enjoyed the simple pleasure of life without indulging into

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[31] Al-Shirbīnī, Shams ul-dīn, *Mughnī al-Muḥtāj*, vol.2., p.165.
[32] Dār al Quṭnī, Sunan, Dār al-Mahāsin, vol.4, p.231; Ibn Maja, Sunan, tradition no.2354, vol.2, p.788.
[33] Afzal-ur-Raḥmān, M.A., *Economic Doctrines of Islām*, vol. II, p.16.

luxuries life. He used to like simple food, simple dress and simple ride. He asked his followers to follow his virtue. He said:

> "Successful is the man who has acted on the principles of Islām and lived on simple necessaries of life".[34]

He has also said:

> " A thing which is scarce but sufficient (to meet the necessaries of life) is better than that which is abundant (but makes man forget himself) and leads him astray (from the right path of moderation)".[35]

He also said:

> "The rocky land of Mecca could be turned in to gold for me if I had wished, but I said, O Lord! I wish I had enough to fill my stomach one day and remain hungry and be thankful to you when my stomach was full".[36]

He has also said:

> "O Lord! Bestow livelihood on my family according to their needs".[37]

Holy Prophet (pbuh) is a perfect example of living a balanced and moderate life. He has condemned both extravagance and miserliness and asked people to be moderate in their expenditure. Extravagance means spending wealth on unlawful things, such as gambling, drinking wine etc., even if the amount involved is insignificant; excessive expenditure on lawful things, whether within or beyond one's means and expenditure for good and charitable purposes merely for show. Qur'ān condemns this sort of expenditure in the following words:

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[34] Hākim, *Mustadrak, (Saḥīḥ ala shart Muslim),* tradition no. 98, vol.1, p.90.
[35] Ahmad b. ḥanbal, *Musnad,* tradition no.21769, Mu'assisāt al-Qurṭubah, Cairo, vol.5, p.197.
[36] Al-Tirmidhī, *Sunan, Bab Ma Jā'a fi al-Kafāf wal-ebar 'alayhi,* tradition no. 3980.
[37] Al-Bukhārī, *Saḥiḥ, Bab Ma Jā'a Kayfa Kana Aysh al-Nabi,* tradition no.5979.

> "And render to the kindred their due rights, as (also) to those in want, and to the wayfarer: But squander not (your wealth) in the manner of a spendthrift. Verily spendthrifts are brothers of the Evil Ones; and the Evil One is to his Lord (himself) ungrateful."[38]

> "O Children of Adam! wear your beautiful apparel at every time and place of prayer: eat and drink: But waste not by excess, for God loveth not the wasters."[39]

Islamic law has condemned wasting of wealth in extravagant manner such as gambling and drinking, ostentations dress (mostly silken wears by men), paintings and portraits, rearing of dogs, and precious metal utensils. Leading such a luxurious life that violates norms of *Sharī'ah* is strictly prohibited. Thus, the concept of luxuries would be defined from time to time. The luxurious life is discouraged in Islam both by educating people and by public action if necessary. For example, the state may discourage or even ban the production and import of such articles, which by a social consensus lead to a life of luxury. In still another case, the state may apply the classical instrument of *Hajr* to forestall a luxurious behaviour.

Islam has also condemned miserliness which applies where one does not spend wealth on one's self and his family according to one's means; and when one does not spend anything on good and charitable purposes.

Qur'ān says:

> "And let not those who covetously withhold of the gifts which Allāh Hath given them of His Grace, think that it is good for them: Nay, it will be the worse for them: soon shall the things which they covetously withheld be tied to their necks Like a twisted collar,

[38] Qur'ān: 17:26-27.
[39] Qur'ān: 7: 31.

on the Day of Judgment. To Allāh belongs the heritage of the heavens and the earth; and Allāh is well-acquainted with all that ye do."[40]

Qur'ān also says:

"Serve God, and join not any partners with Him; and do good- to parents, kinsfolk, orphans, those in need, neighbours who are near, neighbours who are strangers, the companion by your side, the wayfarer (ye meet), and what your right hands possess: For God loveth not the arrogant, the vainglorious; (Nor) those who are niggardly or enjoin niggardliness on others, or hide the bounties which God hath bestowed on them; for We have prepared, for those who resist Faith, a punishment that steeps them in contempt."[41]

Qur'ān also says:

"The mutual rivalry for piling up (the good things of this world) diverts you (from the more serious things), until ye visit the graves."[42]

Qur'ān also says:

"Woe to every (kind of) scandal-monger and-backbiter, Who pileth up wealth and layeth it by, Thinking that his wealth would make him last forever!"[43]

Qur'ān also says:

"O ye who believe! Intoxicants and gambling, (dedication of) stones, and (divination by) arrows, are an abomination,- of Satan's handwork: eschew such (abomination), that ye may prosper."[44]

Muslims have been directed to be humble in their conduct towards life. They must not lead a life of extravagance, and must exhibit good-will in any transactions

[40] Qur'ān: 3:180.
[41] Qur'ān: 4: 36-37.
[42] Qur'ān: 102:1-2.
[43] Qur'ān: 104:1-3.
[44] Qur'ān: 5 :90.

among themselves. They are also required to adopt a moderate attitude in the acquisition and utilization of resources.[45] Both the extremes of consumer behaviour, *Isrāf* (extravagance) and *bukhal* (niggardliness) have been condemned both in the Qur'ān as well as by the Prophet (pbuh).[46]

3.2.4. Islamic Concept of a Just Market System and Consumer Protection

Sharī'ah has strictly prohibited all unfair trade practices that may cause harm either to the businesses or consumers. The ideals of Islamic *Sharī'ah* are the establishment of free and fair market where government intervention is less. For the smooth running of economy *Sharī'ah* has banned malpractices and unlawful business activities. *Sharī'ah* disapproves all business activities which involve firstly explicit or implicit harm and injustice to the contracting parties or to the public at large; secondly, which restrict the freedom of trade, or stand in violation of the *Qur'ānic* injunctions and the approved business conduct. Islamic state may use force to organise transactions on sound Islamic principles. Other things remaining the same price are determined by free operation of market forces. The Holy Prophet (pbuh) discouraged any interference in the process of price determination by the state or individuals. Besides refusing to take any direct action, he prohibited those business practices which could lead to market imperfections. Consequently, stockholding, speculation, oligarchic collusions, adulteration concealment of vital information

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[45] khan, Muhammad Akram, *Economic teaching of Prophet Muhammad* (pbuh), pp.75-76.

[46] Qur'ān: 3:180; "And let not those who covetously withhold of the gifts which Allāh Hath given them of His Grace, think that it is good for them: Nay, it will be the worse for them: soon shall the things which they covetously withheld be tied to their necks Like a twisted collar, on the Day of Judgment. To Allāh belongs the heritage of the heavens and the earth; and Allāh is well-acquainted with all that ye do." Other related verses are: 4: 36-37; 102:1; 104:1-3; 5 :90.

about the product quality and selling by false vows (which could be compared to misleading advertisements of the present day) were prohibited by the Holy Prophet (pbuh). Thus, the market policy in an Islamic economy is to nullify the influence of economic power on price mechanism. Simultaneously, he discounted exploitation of the ignorant by the informed. In the contemporary society these instructions could be made a basis for a voluntary code of conduct for the business community.[47]

Islamic *Sharī'ah* has encouraged all lawful transactions and disapproved the unlawful transactions. *Sharī'ah* requires a specific type of attitude from the economic agents-the consumers and the producer. In order to ensure socio-economic justice in the society, Islamic *Sharī'ah* has mentioned a number of guidelines. Islamic law has given great importance to legitimate (*ḥalāl*) earnings, trade through mutual consent, truthfulness, trustworthiness, generosity and leniency, honouring and fulfilling business obligations, fair treatment of workers, and transparency in dealings etc.

Protection and preservation of '*Māl*' is one of the five objectives of *Sharī'ah*. To ensure this goal Islamic law has legalized and promoted all the legal ways of earning while it has discouraged the unethical and unlawful means of earning wealth. Islamic *Sharī'ah* has shown great keenness to earn (*Ḥalāl*) legitimate. It has determined the code of lawful and unlawful and ordered Muslims to earn *Ḥalāl*. The ways that lead to pure earnings such as farming, labouring, inheritance, gifts and presents etc. are highly encouraged. On the other hand it has strictly prohibited *ḥarām* earnings and all the ways that lead to impure earnings

[47] Khan, Muḥammad Akram, *Economic Doctrines of Islām*, pp.125-126.

such as bribery, robbery, gambling, usury, cheating, theft, business of *ḥarām* things, shoplifting, etc. have been highly discouraged.[48] It has also attached great importance to the consent (*tarādhi*) between the parties in a commercial transaction. The transaction is considered legally valid only if it is made through the mutual consent of the parties. Thus, a seller cannot charge extra amount for any product or service without the consent of the consumers. The basic principles of contract theory in Islamic law are mutual consent and gainful exchange.[49]

Another virtue that Islamic law demands from the traders is honesty and truthfulness in business dealings. It has zero tolerance for cheating, fraud and exploitation of others in the course of any business.[50]

Trustworthiness is another moral virtue required by *Sharī'ah* from the traders. A true Muslim trader will avoid fraud, deception, and other dubious means in selling his

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[48] Qur'ān says: *'Ye People! Eat of what is on earth; lawful and good'* (Qur'ān 2:168); *'Eat good things Allāh has provided for you'*(Qur'ān 7:160); Also see E. Clay, 'Kosher and halal meal', Meals in science and practice, 2009. Qur'ān has disapproved the wrongful taking of property. Qur'ān said: *"Do not devour one another's property wrongfully, nor throw it before the judges in order to devour a portion of other's property sinfully and knowingly."* (Qur'ān: 2:188); *"Do not eat up one another's property wrongfully - unless it be by trade based on mutual consent* (Qur'ān: 4:29).

[49] Qur'ān has explicitly mentioned in this regard: *"O you who believe! Eat not up your property among yourselves in vanities: but let there be amongst you traffic and trade by mutual goodwill: nor kill [or destroy] yourselves: for verily Allāh has been to you Most Merciful"* (Qur'ān,4:29). The Prophet (pbuh) is reported to have said: *A sale is a sale only if it is made through mutual consent* (Ibn e Majah, *Sunan*, *Bab Bay' ul-Khiyār*, tradition no: 2176).

[50] There are many verses of the Holy Qur'ān and traditions of Holy Prophet (pbuh) such as: The Prophet (pbuh) is reported to have said: The truthful merchant [is rewarded by being ranked] on the Day of Resurrection with prophets, veracious souls, martyrs and pious people. (Tirmidhī, *Sunan, Bāb Ma Jā'a fi al-Tijarah*, tradition no: 1130). The Prophet (pbuh) has also exhorted the believers to strictly adhere to truthfulness in business transactions. He says: The seller and the buyer have the right to keep or return the goods as long as they have not parted or till they part; and if both the parties spoke the truth and described the defects and qualities [of the goods], then they would be blessed in their transaction, and if they told lies or hid something, then the blessings of their transaction would be lost (Bukhārī, *Saḥīḥ*, *Bāb Idhā Bayyana al-Bā'i'ān*, tradition no: 1937). The tradition implies that Allāh blesses business dealings if both the buyer and the seller are true to each other. Telling lies and hiding facts will result in the loss of divine blessing. A tradition reads. The Holy Prophet said: *'Traders are wicked people'. The Companions asked: 'O Messenger, has Allāh not permitted business?' The Messenger replied: 'Of course He has declared trading lawful. But they (i.e. the traders) will swear by Allāh and do evil; they will not speak but tell lies'* (Aḥmad b. Ḥanbal, *Musnad*, tradition no: 15569, vol.3, p.248).

merchandise. The sense of mutual trust demands that the pros and cons of commodity be revealed to the buyer so that he purchases the commodity in full satisfaction. Says the Holy *Qur'ān*:

> "O ye that believe! betray not the trust of Allāh and the Messenger, nor misappropriate knowingly things entrusted to you."[51]

Islamic *Sharī'ah* has also put great stress on the fulfilment of contracts and promises. It requires from a Muslim trader to be honest, truthful and keep his integrity and fulfil all his promises and contracts. Qur'ān has explicitly mentioned this:

> "O ye who believe! fulfil (all) obligations. Lawful unto you (for food) are all fourfooted animals, with the exceptions named: But animals of the chase are forbidden while ye are in the sacred precincts or in pilgrim garb: for God doth command according to His will and plan."[52]

The tradition of the Holy Prophet states:

> "The Muslims are bound by their stipulations".[53]

Another tradition condemns promise-breaking as the hallmark or trait of a hypocrite: *If he makes a promise, he breaks it, and if he makes a compact, he acts treacherously.*[54] In order to avoid any dispute and safeguard rights of both the seller and consumer all the attributes of the transaction such as quality, quantity, the price of the commodity and the time and mode of delivery and payment etc. should be clarified among the parties. *Sharī'ah* encourages transparency in all business dealings. The Holy Qur'ān in loan transactions *(Ayāt ul-Dayn)* has stressed that all agreements and contracts should be as transparent and

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[51]Qur'ān: 8:27.
[52] Qur'ān: 5:1.
[53] Abu Da'ūd, *Sunan*, *Bāb fi- Sulh*, tradition no: 3120.
[54] Bukhārī, *Sahih*, *Bāb Alāmāt al Munāfiq*, tradition no: 32.

clear as possible.[55] *Sharī'ah* has considered it as the religious and moral responsibility of the employer to take care of the overall welfare and betterment of his employees. In this regard workers should be provided with fair wages, good working conditions, suitable work and excellent brotherly treatment.[56] All these tenets of Islamic law play a vital role in protection of consumer rights by establishing a healthy business environment.

On the other hand, Islamic *Sharī'ah* has discouraged various business practices due to their unfair and unethical nature. The behavior of a Muslim business person has been tied to the principles of justice, fairness, permissibility, equitability, cooperation and mutual help. Islamic Law has strictly prohibited dealing in *Ḥarām*[57] goods and services. Therefore, it is prohibited in Islamic law to deal in *Ḥarām* products and services. Acquiring or transferring

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[55] Qur'ān says: "O ye who believe, when ye deal with each other in transactions involving future obligations in a fixed period of time, reduce them to writing. Let a scribe write down faithfully as between the parties: let not the scribe refuse to write as God has taught him, so let him write. Let him who incurs the liability dictate, but let him fear His Lord God, and not diminish aught of what he owes. If the party liable is mentally deficient or weak, or is unable himself to dictate, let his guardian dictate faithfully. And get two witnesses, out of your own men . . The witness should not refuse when they are called on (for evidence). Disdain not to reduce to writing (your contract) for a future period, whether it be small or big: it is just in the sight of God, more suitable as evidence, and more convenient to prevent double dealing among yourselves. But if it be a transaction which ye carry out on the spot among yourselves, there is no blame on you if ye reduce it not to writing. But take witnesses whenever ye make a commercial contract; and let neither scribe nor witness suffer harm. If ye do (such harm) it would be wickedness of you: so fear God, for it is God that teaches you. And God is well acquainted with all things. If ye are on a journey and cannot find a scribe, a pledge with possession (may serve the purpose). And if one of you deposits a thing on trust with another let the trustee (faithfully) discharge his trust, and let him fear his Lord. Conceal not evidence; for whoever conceals it, his heart is tainted with sin. And God knoweth all that ye do (Qur'ān 2:282).

[56] There are number of traditions of the Holy Prophet in this context such as: "Those are your brothers [workers under you] who are around you, Allāh has placed them under you. So, if anyone of you has someone under him, he should feed him out of what he himself eats, clothe him like what he himself puts on, and let him not put so much burden on him that he is not able to bear, [and if that be the case], then lend your help to him." (Bukhārī, *Saḥiḥ, Bāb al- Mu'āsi min amr al-Jahiliyyah,* tradition no: 29). The Prophet (pbuh) also said: "I will be foe to three persons on the Last Day: one of them being the one who, when he employs a person that has accomplished his duty, does not give him his due. (Bukhārī, *Saḥiḥ, Kitāb al-Ijārah, Bāb Ism Man Mana'a Ajr al- Ajiri,* tradition no: 2109). The Prophet (pbuh) is also reported to have said: The wages of the labourers must be paid to him before the sweat dries upon his body (Ibn e Majah, *Sunan, Bāb ajr al ujarah,* tradition no: 2434).

[57] Muslims are not allowed to engage in businesses that are not in conformity with the injunctions of Islām.

anything that *Sharī'ah* has declared *Ḥarām* or trading in that is unlawful. Dealing in unlawful goods such as carrion (dead meat), pigs and idols is strongly prohibited in Islam. Thus dealing in *Ḥarām* products and services such as prostitution, bribery, selling *Ḥarām* food, selling adulterated foods etc. are strictly condemned by *Sharī'ah* and their income is also unlawful. The manufacturer producing such things and the supplier of such products are strictly liable under the penal laws of Islam. *Ta'zīr* or *Siyāsah* can be invoked in such matters in order to protect public interest i.e. *Maṣlaḥa Mursalah.*[58]

Islamic *Sharī'ah* has also condemned dealings based on *Ribā* (Usury).[59] *Ribā* (Usury), by definition, is the extra sum the moneylender charges from the borrower for deferred payment. *Ribā* is defined as "An increase that has no corresponding consideration in an exchange of property for property."[60]

Islām has forbidden all forms of *ribā* since it involves both oppression and exploitation. Islam strictly forbids this form of tyrannical dealings and condemns it in severe terms. In the context of consumer protection *ribā* largely affects the consumers' interests by causing inflation and opening ways to exploitation. There is an explicit distinction between genuine business profits and usury; while the

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[58] See chapter 4 for a detailed discourse on the criteria for *ḥalāl* and *ḥarām*.

[59] Many verses of the Holy Qur'ān and traditions of the Holy Prophet (pbuh) indicate the illegitimacy of dealing in usurious transactions. Some of these are: The words of the Qur'ān are: *"Those who devour usury will not stand except as stands one whom The Evil One by his touch has driven to madness. That is because they say: "Trade is like usury," but Allāh has permitted trade and forbidden usury.* (Qur'ān 2:275) *"Allāh has permitted trading and forbidden Ribā (usury)".* (Qur'ān, 2:275) *"Devour not Ribā doubled and re-doubled".* (Qur'ān, 3:130) It further states: *"O you who believe! fear Allāh and give up what remains of your demand for usury if you are indeed believers. If you do it not, take notice of war from Allāh and his Apostle: but if you turn back you shall have your capital sums; deal not unjustly and you shall not be dealt with unjustly".*(Qur`an, 2:278). The *Sunnah* is equally emphatic in denouncing *Ribā.* The Prophet (pbuh) is reported to have said: *May Allāh send down His curse on the one who devours Ribā and the one who pays it and on the two witnesses and on the person writing it* (Muslim, *Saḥīḥ, Bāb La'an Akil e Ribā wa mukalihi*). *"Allāh's Messenger (peace be upon him) cursed the acceptor of interest and its payer, and one who records it, and the two witnesses; and he said, "They are all equal."*[59] (Muslim, *Saḥīḥ*, tradition no: 3881).

[60] Ibn 'Ābidīn, *Rad al-Muhtār*, vol.5. p.21; Al-Sarakhsī, *Al-mabsūt*, vol.8, p.5.

former is recommended and desirable, the later is discouraged. Another thing that *Sharī'ah* has discouraged is *gharar.*[61] It applies to an occurrence about which the parties are unaware whether such an event will take place or not; a thing that is not within the knowledge of the parties; a thing about which is not known whether it exists or not; a thing whose acquisition is in doubt; and a thing whose quantum is unknown. Muslim jurists have given various examples of transactions based on *gharar* such as sale of fish in water, birds in the air, a foetus in the womb, and fruit of trees at the beginning of season when their quality cannot be established. Thus, Islamic law has strictly prohibited uncertainty *(gharar)* because the quality, whether good or bad, is not known to the buyer at the time of the deal and there is every possibility that the contract may give rise to disputes and disagreements between the concerned parties. In other words such transactions may harm the consumers' interest that's why these are rejected by *Sharī'ah* .

[61] Ibn Qudāmah, *Al-Mughnī,* vol.4, p.151. *Gharar* means risk, uncertainty and speculation. There are many evidences on the illegality of such transactions such as Abū Hurayrah (R.A.) narrated that the Holy Prophet (pbuh) forbade sale by pebbles and the *gharar* sale i.e. indeterminate and speculative transactions. It is narrated by Anas b. Malik that Gods Messengers forbade the sale of fruits till they were ripe Allāh Messenger further said: *"If Allāh spoiled the fruits what right would one party have to take the money of his brother."* Ali (R.A.) reported that the messenger of Allāh forbade forced purchases from a needy person and *gharar* purchase and the purchase of fruit before it reached maturity. The Prophet (pbuh), therefore, prohibited the sale of what is still in the loins of the male; or sale of whatever is in the womb of a she-camel; or sale of birds in the air; or the sale of fish in the water, and any transaction which involves *Gharar* (i.e. anything that involves deception). He also forbade the sale of fruits before they look healthy and also the sale of crops until the grain hardens. Nevertheless, such advance sales would be acceptable if the element of *Gharar* does not exist and the quality and the quantity of the goods are pretty well known and predictable.

Islamic law has prohibited *Qimār* [62](Gambling) and *Maysir* [63](Games of Chance). Qur'ān has expressly prohibited such practices. Islamic law has also prohibited hoarding (*Ihtiḳār*).[64] Prohibition of hoarding not only helps in eliminating the evil of black marketing but also ensures the establishment of a free market so that a reasonable and just price could emerge as result of open competition.[65]*Iḳtināz* (hoarding of gold, silver and cash) and *Ihtiḳār* (hoarding of food grains and other supplies) both are declared against Islamic *Sharī'ah*. Traders hoard foodstuffs in expectation of rise in their prices. Consumer are largely affected by this practice as they are left with no choice but to purchase the article concerned from the one who hoards, as he is the only one in the market who holds it. Sometimes, a trader hobnobs with the suppliers who will only sell their merchandise to him. As a result, he holds the entire stock of the essential items that other traders do not possess. He is, therefore, in a position to dictate his terms in the market and sell them at an exorbitantly high price to the needy people. This is an unjust practice

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[62] *Qimār* includes every form of gain or money the acquisition of which depends purely on luck and chance. As opposed to others eligible, one may acquire income as a result of lottery or lucky draws. It also includes any receipt of money, benefit or usufruct that is at the cost of the other party or parties having equal entitlement to that money or benefit (Maḥmūd Aḥmad Ghāzī, "*Muḍārabah Financing: an Appraisal*", paper presented in the conference on Islamic Corporate Finance: *Sharī'ah* based Solutions, Nov.21-22, 1998 at Karachi).

[63] Maysir literally means getting something too easily or getting a profit without working for it. The form most familiar to the Arabs was gambling by casting lots by means of arrows on the principle of lottery. The arrows were marked and served the same purpose as a modern lottery ticket. Dicing and wagering are rightly held to be within the definition of gambling and *Maysir* (Muḥammad Ṭahir Mansūrī, *Islamic Law of Contracts and Business Transactions*, pp.7-8).

[64] There are many evidences on illegality of this practice such as: The Prophet (pbuh) is reported to have condemned the hoarders when he said: *No one hoards but the traitors (i.e. the sinners). (Abū Dā'ūd*, Bāb fi Nahi al-Hukrah, tradition no. 2990) He (pbuh) also said: *The importer [of an essential commodity] into the town will be fed [by Allāh], and the hoarder will have [Allāh's] curse upon him* (Ibn e Mājah, *Bāb al Hukrah wal Jalb*, tradition no: 2144). He (pbuh) also said: "*He who hoards is a sinner.*"(Muslim, Bāb Taḥrīm al-Iḥtiḳār fil aqwāt, tradition no: 3910).

[65] Mawdūdī, Sayyid Abū al-a'lā. *Mu'āshiyāt-al Islam*, p.144.

and a clear case of exploitation and deservedly condemned by Islām. 'Umar b. al-Khattāb, during his Caliphate, had issued a stern warning against hoarding of any marketable commodities. Nobody was allowed to spend his wealth on purchasing food grains with the intention of hoarding.[66] If a commodity is being sold without any hoarding, and its price rises because of natural shortages or scarcity or an increase in demand, then this circumstance is due to Allāh. Businessmen cannot then be compelled to sell at a fix price. In cases where businessmen are engaging in hoarding and other forms of price manipulation, Islam allows price control in order to meet the needs of society and to provide protection to the consumers against greed.[67] However, *Sharī'ah* has not encouraged the practice of price-fixing and leaves the traders to earn the profits from each other within the lawful limits.[68]

As a matter of principle public authorities are not allowed to fix the prices of commodities by force. This is because rise and fall in the prices are linked to various factors other than the greediness of the traders and fixing the prices may endanger both public and private interests.

But the authorities can intervene if a trader adopts unfair means, charges unjust prices and indulges in undercutting with a view to doing harm to the consumers. In such cases they should take steps to fix or control the prices so as to eliminate injustice from the market and allow the trader to earn reasonable profit and the

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[66] Aḥmad, Mushtāq, *Business Ethics in Islām*, p.121.

[67] Beekun, Rafik Essa, *Islamic Business Ethics*, p.44.

[68] It is reported that once the prices shot up during the period of the Prophet (pbuh). The people said: *"O Messenger of Allāh! Prices have shot up, so fix them for us. Thereupon the Messenger of Allāh said: 'Allāh is the One Who fixes prices, withholds, gives lavishly, and provides, and I hope that when I meet Allāh, none of you will have any claim on me for an injustice regarding blood or property" (Tirmidhī,* Sunan, tradition no: 1235).

buyer to pay a just and equitable price. Therefore, Islamic *Sharī'ah* has also discouraged all those measures that may cause price-hike. In this regard it has prohibited *Makth*[69], *Najash*,[70] *Talàqqī al Rukbān*[71], *and Bay' al Ḥadir li Ba'd*[72] *etc.* The Prophet (pbuh) forbade this practice. Imām Ibn Taymiyyah says that there is harm for the consumers in this practice.[73]

Islamic law has prohibited exploiting one's ignorance of market conditions. The local trader is not allowed to persuade the new-comer to transfer all of the goods to him so that he will sell them on his behalf in the market. He obtains the commodities on a price that is lower than market price and then sells them at a high or exorbitant price. The Prophet (pbuh) has prohibited this practice through a number of instructions. A tradition reads: A town dweller should not sell the goods of a desert dweller.[74] If a consumer is such exploited, he may claim back the

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[69] The term Maks is used for sales-tax. The Prophet (pbuh) had reportedly said: *"He who levies maks shall not enter paradise."*[69] (Al-royānī (d.307 A.H.), Musnad, Mu'assisah Qurṭubah, cairo, tradition no.197, vol.1, p.164). Since the imposition of sales-tax (or excise duties) results in raising the prices unjustly, therefore, Islam does not approve of it. The Caliph 'Umar b. 'Abd al-'Azīz had abolished *makth*, interpreting it as *bakhs* (diminution in what is due to others) which is expressly prohibited by the Qur'ān.

[70] *Najash* is the practice of offering a higher price just to induce others to raise their offers, with no intention of buying of commodity. Besides being a form of fraud (which itself is forbidden) the practice of *Al-Najash* raises the prices for the needy consumers. The Prophet (pbuh) is reported to have said: *"Do not harbour envy against one another; do not outbid one another [with a view to raising the price]; do not bear aversion against one another; do not bear enmity against one another; one of you should not enter into a transaction when the other has already entered into it; and be fellow brothers and true servants of Allāh"*(Muslim, Ṣaḥīḥ, *Bāb Taḥrīm Ẓulam al-Muslim wa Hazlihi wa Ihtiqārihi wa Damihi*, tradition no: 4650).

[71] This is the practice of meeting the villagers at the outskirts of the town in order to purchase their merchandise before they reach the market place. The Prophet (pbuh) forbade it. Obviously, the prohibition is aimed at curbing artificial price-hike.

[72] This is the practice in which the clever town broker assumes the role of a middleman between the unsophisticated villagers and the consumers of the town. He sells the merchandise brought by these villagers to the local consumers and in the process makes huge profits for himself while raising the prices for the general consumers (Aḥmad, *Mushtāq, 'Business Ethics in Islām'*, p.124).

[73] Ibn e Taymiyyah, *Al-'Ubudiyyah fi al-Islām*, p.17.

[74] Bukhārī, *Ṣaḥīḥ, Bāb hal yabi'u ḥazir lilbādī bidūn al ajr*, tradition no: 2013.

extra amount he paid if it is a case of exorbitant profiteering (*Ghaban al Fāḥish).*[75] In this context protectionism is equally condemned by Islamic law.[76] According to Imām Abū Yusuf, it is prohibited because it provides affluence to the favoured ones at the expense of the general public. Moreover, it is the root cause of inflation and leads to such evils as smuggling, black-marketing, adulteration and profiteering.[77]

Sharī'ah has prohibited all such transactions that may cause harm to the consumers. A Muslim businessman is required to be very careful lest he should harm someone else or even himself through his heedless conduct in business. Therefore, Qur'ān has also said:

> ".....But take witness whenever ye make a commercial contract; and let neither scribe nor witness suffer harm. If ye do (such harm), it would be wickedness in you. So fear Allāh. For it is good that teaches you. And Allāh is well acquainted with all things...."[78]

All business practices based on fraud and cheating *(Al-Ghash)* are strongly condemned by Islamic *Sharī'ah.*[79] Islam prohibits any kind of fraudulent transaction whether during a purchase or a sale. The Muslim businessmen must be honest all times.[80]

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[75] *Mawahib al-jalil fi Sharh Mukhtaṣar Khalil, vol.4, p.468.* Ghaban al Fāḥish means selling of the subject matter for more price than it's worth.
[76] It consists in taxing the general consumers directly or indirectly by the state.
[77] Yusuf, S.M. *Economic Justice in Islām*, pp.43-44.
[78] Qur'ān 2:282.
[79] The term *Ghish* is used which in trade means concealing the defects of and adulteration in merchandise. (Aḥmad Mushtāq, *Business Ethics in Islām* p.113).
[80] Beekun, Rafik Essa, *Islamic Business Ethics*, p.45.

The Prophet (pbuh) has strongly condemned all such practices in a number of traditions and asked the believers to abstain from them.[81] Holy Prophet (pbuh) has said:

> "He who defrauds does not belong to us."[82]

In this context dishonesty is also strongly condemned by Qur'ān in the following words:

> "O ye who believe! Betray not the trust of God and the Apostle, nor misappropriate knowingly things entrusted to you."[83]

The condemnation and prohibition of dishonesty, fraud, and betrayal of trust occur in more than nineteen verses of the Qur'ān. Falsehood and breach of promise or contract with any valid reason is disapproved by *Sharī'ah*.[84] It is also prohibited for the traders to take recourse to swearing to emphasise that there items are of good quality and having such and such attributes. Some businessmen persuade the consumers to purchase their product. The Prophet (pbuh) is reported to have said: Swearing [by the seller] may persuade the customer to purchase the goods but the deal will be deprived of Allāh's blessing.[85] One of the major frauds is giving short measures. Islamic law has strongly condemned giving of short measures while the believers are commanded to weigh and measure in full. Qur'ān states:

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[81] The Prophet (pbuh) is reported to have said: "*The seller and the buyer have the right to keep the goods or return them as long as they have not parted. He also said that if both the parties have spoken the truth and described the defects as well as the merits thereof (the goods), they would be blessed in their deal. If they have told lies or concealed something, then blessings of their transaction would be lost*" (*Bukhārī*, Ṣaḥīḥ, Bāb Idhā Bayyana al Bā'i'āni wa 'am yaktumma wa naṣaḥa, tradition no: 1937).

[82] Muslim Ibn al-Hajjāj, *Ṣaḥīḥ*, Dār Ihyā' ul-turāth al-'arabi, Beirut, vol.1, p.99; Al-tirmidhī, Sunan, tradition no. 1315, vol.3, p.598.

[83] Qur'ān 8:27.

[84] Qur'ān, 51:10-11; 6:140.

[85] Al-Bukhārī, *Ṣaḥīḥ*, Bāb Yamhaqullāhu al-Ribā wa Yurbi al-Ṣadaqat, tradition no: 1945.

> "Fill the measure then ye measure, and weigh with a right balance; that is meet, and better in the end."[86]

Qur'ān narrates the story of the community of the Prophet *Shu'ayb* (pbuh) was known for practising it with impunity. Consequently, they were destroyed for their persistence in deceit and disbelief in Allāh and His Messenger. Allāh the Almighty has repeatedly commanded exactitude in weights and measures. Qur'ān says:

> "And unto Midian (We sent) their brother Shu'ayb. He said: O my people! Serve Allāh. Ye have no other God save Him! And give not short measure and short weight. Lo! I see you well to do, and lo! I fear for you the doom of a besetting Day." [87]

The *Madyan* people were ultimately destroyed by Allāh for using improper weights and measures. Those who give short weight and short measure to others and receive from them in full are condemned and promised a severe punishment. Such people are called *"al-Muṭaffifīn"*. Qur'ān says:

> "Woe unto the defrauders: Those who when they take the measure from mankind demand it full, But if they measure unto them or weigh for them, they cause them loss. Do such (men) not consider that they will be again unto an awful Day." [88]

According to some scholars the meaning of *Taṭfif* extends to include the worker who receives his wages in full but does not perform his duties honestly and

[86] Qur'ān 17:35.
[87] Qur'ān 11:84.
[88] Qur'ān 83:1-5.

efficiently.[89] Similarly, Islamic law has discouraged the practice of adulteration in any form. In a famous *ḥadīth*, it is narrated:

> "The Messenger of Allāh (peace be upon him) happened to pass by a heap of eatables (corn). He thrust his hand in that (heap) and his fingers were moistened. He said to the owner of the heap of eatables (corn), "What is this?" "Messenger of Allāh, these have been drenched by rainfall." He (the Prophet) remarked, "why did you not place this (the drenched part of the heap) over other eatables so that the people could see it? He who deceives is not of me (is not my follower)."[90]

In order to avoid uncertainty particularly on the part of consumers, Islamic law has made it compulsory to own the subject matter e.g. currencies, instruments and commodities before selling them and prohibited the sale of what is not owned by the seller.[91] As we know that Islamic law has prohibited theft and prescribed severe punishment of cutting hand for it. It has also declared it a violation of the right of Allāh. According to Islamic law, the stolen items are neither to be bought nor sold by those who know the reality. The Prophet (pbuh) made the person knowingly buying a stolen commodity a partner to the crime. He said:

> "The one, who knowingly purchases a stolen good, is a partner to the act of sin and the shame".[92]

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[89] Mufti shafi', *Islām ka Niẓām-i-Taqsīm-e-Dawlat*, p.42.

[90] Muslim b. al-Hajjāj, *Ṣaḥīḥ*, Dār Ihyā' ul-turāth al-'arabī, Beirut, vol.1, p.99.

[91] This is prohibited in *Sharīah*. It is narrated from Ḥakim b. Ḥazam (ra) who said: *"I said: O Messengerof Allāh, there comes to me a man asking me to sell what I do not have to sell then I buy if from the market. He said:Do not sell what you do not have"* (Abū Dawūd, *Al-sunan*, Al-maktabah al-asariyah, Beirut, vol.3, p.283).

[92] Ḥakim, *Mustadrak*, tradition no: 2253, vol.2, p.41.

3.2.5. Enforcement of Islamic Law on Consumer Protection

3.2.5.1. Islamic State and Consumer Protection

The basic purpose of Islamic law is to ensure social justice that can be achieved by promoting the right and forbidding the wrong.[93] In this regard, Imām Ibn Taymiyyah (d. AH 728/AD 1328) pointed out: "to govern the affairs of men is one of the most important requirements of the religion that is Islām, nay, without it religion cannot endure. The duty of commanding well and forbidding the evil cannot be completely discharged without power and authority.[94] Without the coercive power of the Islamic state, it is not possible to realize the ideals of Islamic socio-political and economic justice. It is the duty of the Islamic state to implement Islamic law; establish the Islamic system of education; and defend Islamic civilization against domestic perversions and foreign aggression. Islam's promises as the guide for man's happiness in this world and the Hereafter would not be true. The Islamic state is, therefore, 'an effort to realize the spirituality in human organization."[95] It was applied during the administration of the first four successors of the Prophet Muḥammad, appropriately called the rightly guided Caliphs. For example, Caliph 'Umar (AH 13-23/AD 634-644) inaugurated a universal social insurance scheme and a special department was created to take regular population census.[96]

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[93] Qur'ān, 3:103; 9:71,112; 22:41; 31:17.

[94] S.Waqar Aḥmad Ḥusaynī, *Islamic Enviromental Systems Engineering*, p.92; E.I.J. Rosenthal, *Political Thought in Medieval Islām* (Cambridge: Cambridge Univ.Press, 1958), p.53.

[95] Husaynī, Waqqār Aḥmad, *Islamic Environmental Systems Engineering*, The Macmilan Press Ltd; London and Basingstoke associated companies throughout the world, First Published; 1980, p.92.

[96] Quṭb, Sayyid, *Social Justice in Islām*, (trans.) John B. Hardie, New York, Islamic Publications International, 2000, pp.175-97, 87-99.

Muslim leaders from the very beginning used to take great care of the merchants and dealers and regulate proper weights and measures. In this regard, Ḥaḍrat 'Alī (R.A.) was most prominent as he used to inspect the markets of al-Ḳūfah- with a whip in hand, to check that proper weights and measures were used and no one is doing unfair trade practices. During the era of Umayyads police officers were made in charge of the supervision of weights and measures.[97]

Islamic state was also bound to dispense justice free of cost; hence, there was no stamp duty or court fee on those who sought to redress the injustice done to them through the process of adjudication.[98] It has to be added here that the Islamic state is subject to the same rules as the individuals. Thus, it must not do anything, which is repugnant to the spirit of Islam, including. It should also bring the barren land under cultivation and invest the idle state funds in trade. 'Umar b. al Khaṭṭāb (R.A.) has done a great job in this context.[99]

Everything that helps promoting the objectives of *Sharī'ah* is desirable. Hence, Islamic state is bound to adopt policies that realize the protection of these rights. In this context an Islamic state has to ensure the establishment, protection and propagation of faith (*Ḥifẓ ul-Dīn*) in accordance with the first purpose. Similarly, the Islamic state is bound to ensure protection and preservation of life *(Ḥifẓ ul-Nafs)* and take adequate steps to prevent practices that may harm life and health of the people.

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[97] S. Abdul Qādir Hussaynī, *'Arab Administration*, Sh. Muḥammad Ashraf, Lahore, 1966, p.101.
[98] Abu Yusuf (d.182 A.H.), *Al-Kharāj*, Al-Maktabah al-Aẓhariyyah Li al-turāth, Cairo, vol.1, p.77.
[99] Abū 'Ubayd al-Qasim, Al-baghdādī (d.224 A.H.), *Kitāb al-amwāl*, Dār al-fikr, Beirut, vol.1, p.363.

Islamic state has to provide an adequate environment of safety and welfare to the citizens by promulgating and enforcing policies and laws to ensure supply of necessities of life. Islamic state should also create a healthy environment for a good family system in accordance with the third objective (*Ḥifẓ ul -Nasal*). It must also establish conditions for the growth of healthy minds by prohibiting all those means that affect its function and ensuring the ways that promote (*Ḥifẓ ul -'Aqal*) such as education etc. Moreover, the Islamic state is bound to ensure the economic well being of the Muslim community as a whole. In this context, the wealth of the Muslim community is to be safeguarded and developed to achieve the high purposes of *Sharī'ah* . This should be done in accordance with the fifth objective (*Ḥifẓ ul -Mal*). These responsibilities of the Islamic state should be discharged in the listed order of priority, as required by the structure of high purposes of Islamic law.[100]

In order to establish socio-economic justice in the society, the Islamic state should also protect the individual's right to equal opportunity of work by providing employment to every able bodied and willing person; establish and enforce the system of *Zakāt* as it was prevailing during the period of the Prophet (pbuh) and the *Rashidūn* Caliphs;[101] establish a fair system of governance that enjoin good and prohibit evils; establish a proper check and balance system for the works of its

[100] Niyazee, *Outlines of Islamic Jurisprudence,* pp. 232-33.

[101] Shihāb, Rafī ullāh, *Islāmi Riyasat ka Maliyatī Niẓām*, Karachi, Qamar Ḳitāb Gahr, 1971, pp. 78-80, See also Ahmad, Mushtaq, *Business Ethics in Islam*, International Institute of Islamic Thought, Islamabad, 1995, p.131.

officials;[102] establish an elaborate and effective system of *Ḥisbah*; take serious actions against those who insist on retaining the system based on *Ribā* in order to establish the economic justice in the society;[103] stop hoardings, break monopolies, corner markets, and all other unfair trade practices; ensure the supply of large quantity of goods with cheap prices in the market during a crisis like famine as was the position during the era of Caliphs. 'Umar b. al Khaṭṭāb who arranged for the supplies to be imported from Egypt during the period of famine in Madīnah[104]and there was a serious shortage of food; and also to ensure essential supplies.[105] Islamic state should make good business relationship with other nations to import products and skilled labour etc in order to fulfil necessities of the consumers.

It may also be noted that people are in need of the industry of certain individuals: e.g. the public need farming, weaving and building, for people cannot go without food to eat, clothes to wear, and dwellings to live in. If these professions are suspended most of the people will not survive.[106] Unless sufficient clothing is imported-as it used to be imported in to the *Ḥijāz* in the days of Messenger of God, on him be peace, when clothing was imported from *al-Yaman*, Egypt and Sayriyah-unless the citizens import sufficient for their needs they will require someone to

[102] Al-Tirmidhī, *Bāb Naha 'anil-ihtiḳār*, Maktaba Raḥmaniyyah, Urdu Bazar, Lahore, Vol.1, p.371.
[103] For a detailed discussion on *Ribā*; see Niyazee's *The Concept of Ribā and Islamic Banking*, Niyāzī Publishing house, Islamabad.
[104] Not only *Madīnah* but the whole *Ḥijāz* was affected by it. This happened in the period of famine known as *'Ām al-Ramadah*, in 18 A.H. The rains completely failed. The people in the hope came to Madīnah. The Caliph ordered governors of 'Irāq, Sayriyah and Egypt to send continuous supplies. When the rains returned the people were sent back. For this crisis taxes were remitted. With all the gigantic efforts nearly two third of the population died. For detail see Ibn Sa'd, *Tabaqāt al-Kabīr*, 1957, Beirut, Vol.III, pp. 310-320-Ed.
[105] Al-Bayhaqī (d.458 A.H.), *Al-Sunan al-Ḳubrā*, Dār al-Kutub al-'ilmiyyah, Beirut, Labnān, 2003 Vol.6, p.577; Bukhārī (d.256 A.H.), *Al-adāb al-Mufrad bi al-ta'liqāt*, Maktabat al-Ma'ārif Li al-nashr wa al-taazī' Riyaḍ, 1998, vol.1, p.289.
[106] Al-Ghazālī, *Ihyā' ul 'ulūm al-dīn*, vol.2, p.83.

weave their clothes for them. They will require food whether it to be imported from outside or obtained from local agriculture, which is more usual. Likewise, their need for houses to live in will create demand for builders. Therefore several scholars have held that these industries are a collective obligation, since the public welfare is incomplete when they are not practiced, in the same way as the Holy War is a collective obligation unless it becomes a personal duty, binding on individuals, as when the enemy threatens a town or the ruler (*Imām*) summon someone to enlist.[107]

Islamic State is duty bound to cultivate barren lands of the state and to invest the state funds in trade and commerce.[108] It will make consumer goods easily available at low cost, and their demand will be fulfilled. The Islamic state is required to dispense justice free of cost.[109]

3.2.5.2. Whether or not an Islamic State is authorized to interfere in markets?

In order to ensure socio-economic justice in the society and preserve and protect consumers' interests, the Islamic state is fully authorised to interfere or even have

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[107] Ibn Taymiyyah, Aḥmad b. 'Abd al-Ḥalīm, *'Public Duties in Islām'*, translated by M. Holland, Leicester, the Islamic Foundation. U.K, 1982, pp.37-38.

[108] To bring the barren lands under the cultivation was never a responsibility of the Islamic state. However, it is agreed that anyone who developed a barren land into a cultivated one, he could become its owner for a period he maintains it properly, of course with the permission of the state/ruler. See Abu Yusuf, *Kitāb al-khirāj*, Ur. Tr., Karachi, n.d., ch. *Ihyā' e Mawāt*, pp. 136-144. A typical example is the allocation of the land known as *Farangi Mahal* to the *Sihalwi* family in Lucknow in the reign of Awrangzaib. See Raḥman 'Alī, Tadhkirah Umarā' Hind, Urdu, 2003, p. 337-Ed.

[109] The FSC (Federal *Sharīat* Court) of Pakistan has also declared court fees repugnant to the injunctions of *Sharīah*.

recourse to use force.[110] In this context, Imam Ibn Taymiyyah hold that if the public is in need of commodity and some members among the public are in possession of surplus stock of the same, the ruler can force these individuals to sell their surplus stock for an equivalent price *(qimat al mithl)* and they will not be permitted to exploit the situation by charging inflated prices.[111] Imām Ibn Taymiyyah further says:

> "Now, if people refuse to sell what they are under an obligation to sell, in this case, they are ordered to perform and punished for non-compliance. Likewise, when someone is under obligation to sell at the fair price and refuses to sell except for a higher sum, in such cases he is ordered to perform and punished for non-compliance. Of this there is no doubt."[112]

Hence, Islamic state has the power to restrict the economic freedom of traders, provided that the right of interference with the individual's personal property will be limited to the extent required by the general welfare of the community, in order to protect the society from harm.[113]

An Islamic state, in case of necessity, has the power to impose taxes in addition to *zakat* provided that such taxation is permissible within limits especially for the discharge of the state obligations. Hence, if the state is in need of financial support for carrying out essential projects, it can ask the general masses to contribute and render funds for the purpose. This help would be designated as taxes, if realized by

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[110] Al-Mubarak, *'Niẓām al-Islam al-Iqtiṣadī Mabādi wa Quwā'id 'Ammah'*, Dār al-Fikr, Beirut, 1972, p.106.

[111] Aḥmad, Mushtāq, *Business Ethics in Islam*, IIIT (International Institute of Islamic Thought), Islāmabād, 1995, p.134.

[112] Ibn Taymiyyah, Aḥmad b. 'Abd al-Halīm, *Al-Ḥisbah fi al-Islām, [Public Duties in Islām]* translated by M. Holland, Leicester, the Islamic Foundation. U.K, 1982, p.50.

[113] Al-Ghazālī, Muḥammad, *Al-Islam wal-Awdā' al-Iqtiṣādī*, Dār al Kitāb al-Arabi, Cairo, 1952, p.137.

force; and as donations or loans, if given voluntarily.[114] Moreover, if rich people refuse to fulfil needs of the poor, the Islamic state must interfere and extract from the wealth of such persons whatever is necessary to fulfil the need of that poor. In case these needs of the poor are not realized it would not only be a violation of Allāh's injunction on the part of the state but also deprivation of the poor of their rights granted to them by *Sharī'ah*. The criteria to be considered eligible for such help is that if a person does not have enough to meet his basic necessities is enough to qualify him as needy; and the state must secure his right. [115]

The state is authorised to control the price list of the commodities when it ensures just and fair dealing between the people. Hence, it is clear that a fixation of price may amount to a wrong, especially when it results in harm to public at large and force the sellers without justification to sell at a price not affordable to them, then it becomes unlawful. However, if it promotes just dealing among people and prevents them from doing injustice in taking more than a fair consideration, then it is not merely permissible but indeed compulsory.[116] In order to realize the protection of social and collective interests of the community these powers are vested in the state.[117]

Moreover, if a group who purchases or sells a specific type of product conspires to depreciate what they purchase and so purchase for less than the fair price while

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[114] Maudūdī, Sayyid Abul A'lā, *Ma'āshiyat-e Islām* [*Economic System of Islam*], Lahore: Islamic Publications, 1969, p.371.

[115] Aḥmad, Mushtāq, *Business Ethics in Islām*, p.134.

[116] Abu Lail, Maḥmūd Aḥmad, "*The Status of Price Fixation in Islamic Sharī'ah*", paper presented in the International Conference on the topic of "Consumer Protection in Sharī'ah and Law"conducted by the Faculty of *Sharī'ah* & Law of United Arab Emirates University, 6-7, December, 1998.

[117] Ibn Taymiyyah, Aḥmad b. 'Abd al-Ḥalīm, *Public Duties in Islām*, translated by M. Holland, Leicester, the Islamic Foundation. U.K, 1982, pp.35-37.

increasing what they sell above the customary price, and to malign what they purchase, and then the device of having an accomplice bid up the price (*najash*). They in this way purchase from the suppliers at less than fair price but sell in the market on enhanced rates to the buyers.[118] This is what results in artificial price hike. The Islamic state can inflict punishment on those who violate the rules and commit wrongs.

3.2.5.3. Scope of an Islamic State interference in Business Matters

However, this interference by an Islamic state in business matters in not absolute but limited to the establishment of justice. The state must interfere only in situation when the socio-economic norms of the *Sharī'ah* are being violated. An Islamic state is bound to enforce the rules of *Sharī'ah* through the system of judiciary (*Qaḍā*) and execution of the court's verdict (*Ijrā'*). Under the rules of *Sharī'ah* an Islamic State is not authorised to use its power to make monopolistic gains or to tax the general masses indirectly for replenishing the exchequer thereby.[119] It must not resort to custom barriers, restrictive tariffs or exchange control.[120]

It must not impose taxes directly or indirectly on the potential consumers in order to protect the interests of producers in the name of any scheme such as industrialization.[121]There must not be any "income" tax as such. Besides curbing the initiative it assumes illegitimacy of the income of the rich. The state should levy, if

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[118] Qur'ān, 7: 85; 11:84.
[119] Yusuf, S.M., *Economic justice in Islām*, Sh. Muḥammad Ashraf Publisher, Lahore, 1971, p.96.
[120] Ibid. pp.68-101.
[121] Ibid. pp.9-10.

need be, a proportional tax on the pattern of *zakāh* on the accumulated wealth of the capable taxpayers. Hence, an Islamic state is highly required to play a vital role in order to ensure the socio-economic justice for consumers within the ambit of *Sharī'ah*.[122]

3.2.6. The Institution of Ḥisbah and Consumer Protection

The institution of *ḥisbah* is a system that "ensures the righteousness of the individuals in their conducts". Most Muslims scholars have agreed on a similar definition of *ḥisbah*. Imām Al-mawardī has defined Ḥisbah in the following words: "*Ḥisbah:* It is to command individuals to act in good manner and prohibit sins".[123] There is a lot of evidence, both textual and historical, for the institution of *ḥisbah*. The Holy Qur'ān has described it in the following words:

> "And there may spring from you a nation who invite to goodness, and enjoin right conduct and forbid indecency. Such are they who are successful."[124]
>
> "Ye are the best community that hath been raised up for mankind. Ye enjoin right conduct and forbid indecency; and ye believe in Allāh. And if the People of the Scripture had believed it had been better for them. Some of them are believers; but most of them are evil livers."[125]

It was in compliance with such *Qur'ānic* injunctions that the Prophet (pbuh) as well as Caliphs instituted *hisbah* and appointed reliable persons as market

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[122] Aḥmad, Mushtāq, *Business Ethics in Islām*, International Institute of Islamic Thought, Islamabad, 1995, p.136.

[123] Al-Mawardī (d.450), *Al-aḥkām al-sulṭaniyah*, Dār al-ḥadīth, Cairo, vol.1, p.349.

[124] Qur'ān, 3:104 "Let there 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." Other related verses are Qur'ān: 110:114; 9:71, 112; 31:17.

[125] Qur'ān, 3:110 "Ye are the best of peoples, evolved for mankind, enjoining what is right, forbidding what is wrong, and believing in Allāh. If only the People of the Book had faith, it were best for them: among them are some who have faith, but most of them are perverted transgressors."

inspectors. *Al-Muḥtasib* is responsible for carrying out the job of enjoining good and forbidding evil, which, generally speaking is beyond the purview of official duties assigned to the judges and governors.[126]

Imam Abu Yusuf describes the function of *ḥisbah* in regard to commerce and industry as follows: On the spot checking of weights and measures , qualities of the commodities offered for sale, honesty in dealings and the observance of modesty and courtesy in salesmanship and in general behaviour of the people.

Islamic law has described special procedure and qualification for the appointment of a *Muḥtasib*.[127] Al *Muḥtasib* is supposed to supervise the whole economic enterprise.[128] *Sharī'ah* has assigned various duties to *Muḥtasib*; some of these are to command the fulfilment of trusts; prohibit all evils and misdemeanour, particularly lying and dishonesty; make sure that there is no dishonesty with regard to weights and measures, manufactured goods, credit transactions and trade in general;[129] keep a check on the practice of hoarding as t is prohibited in Sharī'ah ;[130]prevent the instances of fraud in all sorts of transactions by laying down specific and detailed

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[126] Al-mawardī (d.450 A.H.), *Al-aḥkām al-sulṭaniyyah*, Dār al-ḥadīth, Cairo, vol.1, p.349

[127] The *Muḥtasib* is to be a free Muslim male with a high degree of integrity, insight, reverence and social status. He is supposed to be a scholar of the *Sharī'ah* (most often competent for *Ijtihād*) with a high degree of in- depth knowledge in the social customs and moors. Of qualities of *Muḥtasib* knowledge, kindness and patience are considered to be of prime importance. *Ḥisbah* is an important institution. It can investigate matters, which affect the morality of the public. *Ḥisbah* is an independent and impartial institution. It performs quasi-judicial functions but does not form part of the judiciary. As we know that the institution of *ḥisbah* embraces all aspects of life, whether worldly or religious. It covers individual moral, social values and commercial dealings.

[128] Aḥmad, Mushtāq, *Business Ethics in Islām*, p.138.

[129] Ibid.

[130] Ministry of Auqaf (Endowment) and Islamic affairs, *Al-mu'asasah al-fiqhiyyah al-kuwaitiyyah*, vol.2, p.90. It is his duty to stop hoarding especially of such commodities that people are usually in need of. Since the practice of hoarding is condemned by the Prophet (pbuh) the hoarder will be forced by the *Muḥtasib* to sell stock for an equivalent price (Al tirmidhī, *Sunan*, Maktabah Rahmāniyyah Urdu bazar Lahore, p. 301).

rules for different traders; check all evils, which include all such practices, and tendencies as are condemned and prohibited by Allāh and His Messenger; keep an eye on all trades, and he must make sure that those who work in a trade are well qualified for the job and know the rules of the *Sharī'ah* regarding their respective trades; and ensure that all the needs of people are taken care of especially when the people are in need of the skills and services of the certain group, he can force this group to make their services and skills available for an equivalent compensation and must not allow them to charge more than the just wages. He must also see that people do pay their due without diminution. It is the duty of the *Muḥtasib* to check business frauds and adopt policy for its eradication. In the *Saḥīḥ* of Muslim, we learn from *Abu Hurayrah that the Messenger of Allāh, (pbuh) came upon a stack of food. He inserted his hand and his fingers reached something moist. "What is this, food-Merchant?" said he "It has been affected by the weather, Messenger of Allāh." "Then why not put it on top of the stack so that people can see it? He who defrauds us is not of us."*[131] Thus, the Prophet, (pbuh) made it known that the fraudulent is excluded from the meaning of the expression" People of religion and faith, just as he said:

> "The thief cannot thieve and be a believer. The wine drinker cannot drink wine and be a believer."[132]

He thereby denied him that true faith which entitles to the attainment of reward and salvation from punishment, even though he has the essence of faith, which distinguishes him from the infidel and rescues him from the fire. Fraud enters to

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[131] Muslim b. al-Ḥajjaj, *Ṣaḥīḥ Muslim*, *Bāb qawl ul-nabiyyi man gashahanā falaiysa minnā*, Ihyā' ul-Turāth al-'Arabī, Beirut, no. 102, vol.1, p.99.

[132] Muslim, *Kitāb al-Imān, Bāb Nuqṣān Imān bil-Maāṣī*, Maktaba Dār al-Ihsān, Peshawar, Vol.1, pp.55-56.

the sale with the concealment of defect and the misrepresentation of goods, as when the exterior of the article is better than the inside, like the case, which the Prophet (pbuh) encountered and disapproved. It may also occur in industries, e.g. among those concerned with the preparation of food such as bread, cooked stuff, lentils, grilled meat, etc., or among those who follow some other craft. All must be restrained from fraud, deceit and unlawful concealment.[133] It is the duty of the *Muḥtasib*, in order to protect interest of the consumers and public at large, to take notice of other market imperfections such as: The practice of intercepting of goods before they reach the market. This is proscribed by the Prophet (pbuh) because of the risk to the seller, as he might not know the regular price his goods may be purchased for the less than their value. For this reason the Prophet (pbuh) established his right of option on reaching the market. The doctrine of Malik, Aḥmad and others accords the right of option in the case of deception to the *mustarsil*, i.e. the easy- going customer who does not bargain, or to those who are ignorant of the regular price. The new comer being ignorant of the regular price in the market. For this very reason the Prophet (pbuh) forbade the townsman to sell for the nomad, and said:

> "Leave people alone and God will see that they provide for one another."[134]

The institution of *Ḥisbah* is fully authorized to take cognizance in any type of commercial activity when it violates basic rights of the consumers and public at

[133] Ibn Taymiyyah, Aḥmad b. 'Abd al-Ḥalīm, *Al-Ḥisbah fi al-Islām, (Public Duties in Islām)*, translated by M. Holland, Leicester, the Islamic Foundation. U.K, 1982, pp.29-30.
[134] Muslim, Ṣaḥīḥ, *Kitāb al Buyū', Bāb ul Taḥrīm bai' al Ḥafi Lilbāri*, tradition no. 1522.

large. The institution of *Ḥisbah* is responsible for the regulation of business and economic life of the people according to the injunctions of Islām. In order to stop violation of the basic rights of the consumers and ensure quality of the products, the institution of *Ḥisbah* is authorized to prevent hoarding, control official mint and adopt preventive mechanism to close the way of all types of malpractices in trade. However, the powers of the *Muḥtasib* are not absolute but limited with the establishment of socio-economic justice. He is not authorised to prescribe unjust prices. To force the merchants without any justification to sell their merchandise for a price to which they do not agree or to stop them from doing what Allāh has made permissible.

If the prices have risen because of either a scarcity of commodity or an increase in the number of buyers. Then the *Muḥtasib* is not allowed to force the traders to sell the commodity for a prescribed price. He can force them to sell it for an equivalent price only in case they sell a needed commodity for more than the known market value. Moreover, it is incumbent upon the *Muḥtasib* to keep an eye on the conduct and honesty of those merchants who deal with lady customers. If he sees any indecency in their conduct he may warn them or stop them from dealing with women. Furthermore the *Muḥtasib* must ensure that the slaves, if there be any, are given their rights and they are treated justly by their masters and are not burdened with a task beyond their capacity.[135]

[135] Aḥmad, Mushtāq, *Business Ethics in Islām*, International Institute of Islamic Thought, Islamabad, 1995, pp.138-139.

3.3. CONSUMER PROTECTION IN ENGLISH LAW

The common law system of jurisprudence has been a late developer when compared with Islamic law. Although there are elements in it which antedated the Norman Conquest in 1066, it is distinctly discernible as an emerging legal system only from around the thirteenth century. Even then it was for some centuries a haphazard collection of individual decisions, not unified by any significant strands of basic principle. It was only in later centuries that the work of scholars assembled what Tenneyson described as "a wilderness of single instances" into an ordered body of legal knowledge.[136] The expression, "common law" first came to be applied to this legal system, in consequence of the step taken by Henry II by the Assizes of Clarendon (1166) and Northampton (1176) [13] in reorganising the legal system by requiring judges of the realm to go out regularly on circuit and bring the King's justice to every man.[137]

This had the effect of evolving a law common to the whole realm as opposed to local custom which might vary from one district to another. It was thus that England began to acquire common law. The basic source of the common law apart from parliamentary enactments is the great wealth of judicial decisions commencing with the Year Books in 1289 and reaching down to modern times

[136] Gamal Moursi Badr, "*Islamic Law: Its Relation to Other Legal Systems*", The American Journal of Comparative Law, Vol. 26, No. 2, [Proceedings of an International Conference on Comparative Law, Salt Lake City, Utah. February 24-25, 1977](Spring, 1978), pp. 187-198.

[137] Weeramantry, GC, *An Invitation to the Law*, Lawman Private Limited, New Delhi, India, 1998, p. 44.

through a vast number of law reports. One of the most important sources of common law is precedent.[138]

Thus, the English common law began in the 11th century as the municipal law of Norman England. Historically, common law provides us with the latest example of this interesting phenomenon of expansion of the domain of certain legal systems beyond their original homes. Beginning from the 16th century, the influence and even the direct application of common law extended to North America and to Australia along with the offshoots of its parent society which took root on those continents. Later, British colonial rule extended the influence of common law to many parts of Asia and Africa where the present laws of the newly independent countries still reflect the strong impact of common law. According to the same yardstick, common law no doubt emerges as one of the major world legal systems.[139]

3.3.1. Evolution of Consumer Protection Law in England

The roots of consumer protection laws are found in the religious books. In the Bible, various quotes are found that commands for the consumer protection indirectly such as: *"You shall not put a stumbling block in the path of the blind"*.[140] It has also stated: *"Just weights and measures shall you have"*.[141] It has further stated: *"If you lend money to any of my people with you who is poor, you shall not be to him as a*

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[138] Ibid.

[139] Gamal Moursi Badr, *"Islamic Law: Its Relation to Other Legal Systems"*, The American Journal of Comparative Law, Vol. 26, No. 2, [Proceedings of an International Conference on Comparative Law, Salt Lake City, Utah. February 24-25, 1977](Spring, 1978), pp. 187-198.

[140] Leviticus 19:14. Similarly, the Bible warns against stealing another's mind. Ancient sages saw this too as an injunction against deception.

[141] Lev. 19:36.

creditor, and you shall not exact interest from him".[142] The historical evolution of English law on consumer protection can be examined in the following periods of history:

3.3.1.1. Pre-Industrial Period:

In the period before industrial boost in eighteenth century, people consumed fewer products as they do today and there were not very many products as it is case today. The social set up was very much simple. This situation was dealt by the English law principle of "*caveat emptor*"[143] i.e. let the buyer beware. The philosophy of course in those days was one of individualism so that consumers were expected to look after themselves. There were few laws to protect consumers. Only some laws exist related to weights and measures of bread and ale. The consumers used to know personally the producers and they would go out of business if they offered poor service or products. Thus, in this era protection was largely through self help. In seventeenth century, manorial courts known as '*courts leet*' had a persistent role in safeguarding the trading standards and suppression of local nuisance, and in supervision of all other functions that we would associate with consumer protection and public health. Court of *leet* appointed an officer styled an '*aleconner*', more like a modern weight and measure inspector, to examine pricing, weight and quality of bread, ale and beer for sale. Same system was also prevalent until sixteenth century in England (1664) to control coal price and weight.144

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[142] Exodus 22:25.

[143] For a detailed discourse on the role of *caveat emptor* see chapter 4 of this thesis.

[144] Brian W Harvey and Deborah L Parry, '*The Law of Consumer Protection and Fair Trading*", Fifth ed, London, Dublin & Edinburgh; Butterworth 1996, 1-4

3.3.1.2. The Period of Industrial Revolution (18th Century):

In this period people have started moving to cities and begun working in the factories and industries. The culture of manufacturing products was started with the development of heavy machinery and many opportunities for work and labour was created. People have started consuming products of companies they didn't know. A large scale of new products became easily available in the markets. The large scale production of products after the industrial revolution effected changes in the approach of the judges. Sellers and consumers were no longer contracting in a single place rather they used to bargain from a distance. Moreover, sellers started to realize the importance of marinating good quality of the products in order to be competitive in a big market where the same product was sold by different producers.[145]

These changes were not rapid and still in 1802, in *Parkinson v. Lee*[8], the King's Bench Court denied the existence of an implied warranty. In this particular case the consumer decided to purchase from the seller five pockets of hops that were supposed to be warranted by a sample that the buyer had had the possibility to examine. The rest of the products later delivered compatible with the sample but had been treated with water in order to increase their weight. Despite the fact that it was not possible for the customer to find out that the products had become worthless the court passed verdict in favor of the customer. Le Blanc J., who directed the jury, expressly asserted that the *ratio decidendi* did not involve the

[145] Karl L. Llewellin, *Cases and Materials on the Law of Sales*, London, Callaghan & Co. 1930, p.204.

implication any non-written warranty. Hence, *caveat emptor* was still followed as a basic principle but many courts deviated from it. The concept of consumer protection throughout the 18th century involved protection from excessive prices levied on primary commodities and protection from short measures. The statutes of these times, encompassing different jurisdictions, were related to certain price related items such as bread, beer, meat and fuel. These laws were not as such covering all aspects of consumer protection but were designed to keep the states regulatory role over some areas while neglecting important aspects of consumer protection. The motivation behind these laws was to protect the honest traders from unfair competitors. For instance, laws related to enforce uniformity in weight and measures as, the assize of bread and ale of 1226 laid down a scheme to control the amount of bread and ale.[146] Similarly, the weight of bread was controlled by Bread Act 1836 which required bread to be unadulterated and sold by weight. The reference to the uniformity in weight can be traced back to *Magna Carta* in 1225.[147]

3.3.1.3. The Period of Industrial Society (19th Century):

As it has been discussed earlier that due to the industrial revolution the methods of production of products had developed however not much case law can be found about the harms caused by complex products and machines in the first part of the nineteenth century. In this period the case law concentrated on the sale of raw material that was used in the process of production.

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[146] V Balakrishna Eradi "*Consumer protection jurisprudence*" India; Lexis nexus and Butterworth publishers, 1999.
[147] Ibid.

Karl Llewellyn, however, has pinpointed that since the first part of the nineteenth century some changes took place such as the sellers started to make good will to gain future benefits. The law of seller and buyer' relationship *had to* change, to adapt to these new developments.[148]

In this period individual craftsman was replaced by large manufacturers. On the other hand society was also evolved and population converted from subsistence to a mass consumption society. In such situations it was easy for consumers to be deceived, misled and to be sold products of low quality. In this period the legal principle of '*caveat emptor*' was still applicable which was not adequate. The government had almost no interference in transactions between a seller and a consumer.[149] The traders also disapproved government intervention and they extracted full benefits out of the new markets that mass production had created. They have relied on the free market economy that is based on free demand and supply rule. It was presumed that the market forces would balance between the powers of the manufacturer and that of consumer and it would help in regulating the quality of goods and their prices fairly. But this did not happen. The consumers started realizing that the application of *caveat emptor* put the consumer at a great disadvantage. The law of tort or negligence hadn't developed at that stage as it was in its infancy.

During the 19th century a considerable body of case law developed around the buyer/seller relationship in England. Sir Mackenzie Chalmers was given the task of

[148] See http://www.gccni.org.uk/online_documents/buying.pdf, last accessed on 12.09.2013.

[149] The philosophy that governments should not interfere in private negotiations between people is termed *laissez faire.*

drafting Sale of Goods legislation which codified the common law position and the Sale of Goods Act appeared on the statute book in 1893 in Britain.[150] This is the Sale of Goods Act, 1893.[151] In this context Prof. Howells writes:

> "The first Sale of Goods Act, codifying the common law position, appeared in statute books in 1893. At that time, any implied terms as to the quality of the goods in question were default rules that could be excluded from the contract if the parties agreed. This position changed in 1973 with the introduction of the Supply of Goods (Implied Terms) Act which made implied terms non-excludable Excluding minimum guarantees of quality would have been viewed as grossly unfair, attracting concern about consumer inequality of bargaining power and potential exploitation by traders."[152]

However, there was no recognized legal right of the consumer to a safe product or service. The product suppliers controlled the marketplace to a great extent while consumers of these products were very much at the risk. The position of the courts was very weak to develop public policy in this regard. Common law had no exact rules to protect the consumers and most cases used to be decided in favor of the seller. The law of Equity later on recognized the unfavorable situation of the consumer. The famous case Carlill vs. Carbolic Smoke Ball Co.[153] was a step towards the realization of consumer protection.

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[150] Geraint Howells & Stephen Weatherill, *Consumer Protection Law*, p.150

[151] The Act was amended by the Supply of Goods (Implied Terms) Act 1973, and these and other changes were consolidated in the Sale of Goods Act 1979. This in turn has been amended by the Sale and Supply of Goods Act 1994 and most recently the Sale and Supply of Goods to Consumers Regulations 2002 (Geraint Howells & Stephen Weatherill, *Consumer Protection Law*, p.150). The Law Reform (Enforcement of Contracts) Act 1954 removed the rule which rendered unenforceable contracts for the sale of goods valued at more than ten pounds which had not been evidenced in writing.

[152] Howells, G & Weatherill, S, *Consumer Protection Law* (2nd Edition), Ashgate Publishing, Aldershot, England, p.148.

[153] Carlill vs. Carbolic Smoke Ball Co. [1893] QB 256

3.3.1.4. The Period of Mass Consumption Society (20th Century)

In this period great growth in retail chains, advertisements and use of credit has begin that led to a consumer revolution in a sense that large range of products and services were now available to consumers. It was not easy to bring a change in the legal structure of England at that time to the conservative nature of the judges. However in Donoghue v Stevenson there was a change to great extent. It was the famous case of Donoghue vs. Stevenson.[154]

It can be classified as a classical case of a consumer against a larger producer. It appears from a thorough analysis of the case that a legal debate was generated on the issue among the then best legal minds in England. One of the strong arguments against Mrs. Donoghue' position was that if she was to recover damages, then the door for such claims will open up and everybody who ever had any slight harm would be able to seek remedy. No doubt that there was a great resistance against it. Moreover, it was unknown to English law to imply duty so widely and sacrifice the classical rules of common law.

After 1945, consumer law, litigation and the law of negligence developed to a large scale.[155] Due to Ralph Nadar who challenged the safety of cars against the General Motors in 1960, people became more aware of their rights. In the 1960s, consumer protection became a matter of concern to a small consumer. A consumer

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[154] Donoghue vs. Stevenson [1932] AC 562. This is the leading case which recognized that manufacturers have a *duty to consumers* to provide goods of a certain quality. For a detailed discussion on *Donoghue v. Stevenson* see chapter 5 of this thesis.

[155] From the 1940s, America was leaping ahead in consumer protection and by the 1960s it was really a rights-based approach. That resulted in high levels of claims and awards in the United States.

movement developed at grass-roots level because many western consumers became dissatisfied with unsafe and inferior products.

In USA and UK, the call for the protection of consumer rights from ordinary consumers was strong enough. Ralph Nader's book *Unsafe at Any Speed* 1964, USA, and the effects of the drug *thalidomide* sparked similar calls from Australians. About 1962, John F. Kennedy set out a series of fundamental rights for consumers, for example, the right to safety, the right to information.[156]

In this period there was a great increase in choice of goods and services, transactions became more remote, technology advanced at high level, credit became available and advertising[157] became essential factor for marketing of products. Despite all these developments this period has also created many problems for the consumers such as difficulty in assessing the quality of similar goods, consumers will not always deal directly with the manufacturers of products that may cause difficulties in seeking remedies if problems arise, difficulty in assessing quality and value for money, increased capacity to incur debts consumers ought to consider the added cost of using credit, increasingly goods and services represent status and image that increases the temptation to spend and incur debts. In this period many consumer groups, government and non-government organization started their activities for the promotion and protection consumers' interest. In this period the

[156] Kennedy, John, F., *Special Message to the Congress on Protecting the Consumer Interests*, 15, March, 1962 available at: http://www.presidency.ucsb.edu/ws/?pid=9108, last accessed on 29.05.2015.

[157] As technology advanced, advertising grew, because of the new methods available to sell products; such as cinema, radio and telephone. These changes led to increased use of credit, and consumers were exposed to new hazards involving harsh credit arrangements; http://stage6.pbworks.com/f/Consumer+Law.pdf, last accessed on 12.08.2013.

states are required to make laws in this particular area that ensures the protection of consumers against unfair trade and commercial practices and defective products and services. Consumers are required to be vigilant and make rational decisions before making large contracts. The state has established various governmental organizations that help consumers if a problem occurs.

3.3.2. Current Status of Consumer Protection in England

Consumer Protection has become unavoidable due to the advance technology and rapid increase in number of goods and services. The Common law has offered protection to the consumers in the areas of contracts, torts and criminal law for hundreds of years. There are number of laws, in addition to those laws whose basic concern is consumer protection such as prosecution of fraud, protecting property, or facilitating litigation etc. Therefore, consumer protection cannot be conceived in a single document. In this context Peter Cartwright writes:

> "In this age of advance technology, consumer protection has become increasingly necessary as the number of goods and services available has grown dramatically. The common law, which has operated in the area of contracts, torts and criminal law for hundreds of years, offers some protection to consumers. In addition to those laws that specify consumer protection as their primary concern, numerous other provisions have the effect of protecting the consumer, for example by streamlining the prosecution of fraud, protecting property, or facilitating litigation. As a result, the boundaries of consumer protection law are not easily drawn."[158]

[158] Peter Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK*, Cambridge University Press, p.1.

The United Kingdom has actively responded to the developments in the area of consumer protection through the introduction of a number of statutes, regulations and administrative authorities to respond to the new challenges in the field.[159]

In this regard, the UK government introduced a wide range of legislation covering various aspects of the basic needs of consumer interests such as The Consumer Protection from Unfair Trading Regulations 2008 (CPRs)[160], The Fair Trading Act, 1973, The Supply of Goods (Implied Terms) Act 1973, Unfair Contract Terms Act, 1977, The Sale of Goods Act, 1979, Supply of Goods and services Act, 1982, Consumer Protection Act, 1987, The Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, The Sale and Supply of Goods Act 1994, The Unfair Terms in Consumer Contracts Regulations 1999, The Consumer Protection (Distance Selling) Regulations 2000, The Sale and Supply of Goods to Consumers Regulations 2002, the Enterprise Act of 2002 and many others.[161] As a member of the EU, the UK must also implement legislation passed by the EU.[162] Recently the Consumer Bill of Rights (2013) is

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[159] Black, J. (1996), *Constitutionalising Self-Regulation*, The Modern Law Review, Vol. 59, No. 1, pp 24-55, pp 24-26.

[160] The regulations repealed the Trade Descriptions Act 1968.

[161] Hence, so far no single consumer protection code exists in United Kingdom. It is also reflected in the fact that there is no single common law definition of a consumer.

[162] As a member of the EU, the UK has to conform to standards set out in EU directives. This brought about the Consumer Protection Act 1987. These directives, which aim to ensure that all EU members operate to the same standards, are likely to increase in the future. Regulations regarding the safety of various appliances have already been upgraded in accordance with EU directives. For customers, UK membership of the EU means that they can now have redress to the EU judicial system if they are not satisfied with the outcome in the British courts. In practice, however, this is a complicated and costly procedure and is unlikely to be used often. http://www.ngfl-cymru.org.uk/vtc/ngfl/bus_studies/13/ao1b/ao1b_legislation_extended_teacher_notes.DOC, last accessed on 15.08.2013.

proposed to consolidate and amend some of the consumer protection laws of United Kingdom in a single piece of legislation and provide adequate protection in some new areas such as digital content etc.[163] The new bill of rights of consumer protection is proposed to provide legal protection to the consumers of digital contents in United Kingdom.[164] The Consumer Protection Act of 1987 is of prime importance for the research in hand that seeks remedy to the consumers affected by defective products. These statutes have given various definitions of the term 'consumer'. So far, there is no universally agreed definition of the term 'consumer', although a number of statutes, both criminal and civil, attempt to define it for their own purposes.[165]

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[163] Consumer Rights Bill, 2013, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/206367/bis-19-925-draft-consumer-rights-bill.pdf, last accessed on 8-7-2013.

[164] Ibid.

[165] Generally speaking, a consumer is a person who purchases a product or service for private (non-commercial) use. There is no universal definition of consumer in English law for example the earlier Molony Committee on Consumer Protection defined the 'consumer" as the one who purchases (or hire-purchases) goods for private use or consumption (Final Report of the Committee on Consumer Protection (Cmnd.1781) 1962, para.2)." The definition in the report is analyzed by J. A. *Jolowicz, in his essay titled 'The Protection of the Consumer and Purchaser of Goods Under English Law'*, in words that the definition is obviously unacceptable for it excludes the law's best known consumer, *Mrs. M'Alister (or Donoghue)*. Indeed, for the tort lawyer "consumer" extends even so far as a passer-by in the street who is injured by a wheel which comes off a passing lorry (*J. A. Jolowicz, The Protection of the Consumer and Purchaser of Goods Under English Law'* Modern Law Review, Vol.32, No.1, January 1969; http://bilder.buecher.de/zusatz/23/23331/23331195_inha_1.pdf). Another definition of consumer is given in the S.12 of the Unfair Contract Terms Act, 1977. This states that a party to a contract deals as a consumer if '(a) he neither makes the contract in the course of a business nor holds himself out as doing so; and (b) the other party does make the contract in the course of a business'. Another definition is contained in the Consumer Protection Act, 1987 (*J. A. Jolowicz, The Protection of the Consumer and Purchaser of Goods Under English Law'* Modern Law Review, Vol.32, No.1, January 1969; http://bilder.buecher.de/zusatz/23/23331/23331195_inha_1.pdf). This states that the consumer in relation to any goods, means any person who might wish to be supplied with the goods for his own private use or consumption; in relation to any services or facilities, means any person who might wish to be provided with the services or facilities otherwise than for the purposes of any business of his; and in relation to any accommodation, means any person who might wish to occupy the accommodation otherwise than for the purposes of any business of his (S.20(6), Consumer Protection Act 1987). Regulation 2 of the Unfair Terms in Consumer Contracts Regulations 1999

Similarly, the UK government has established many departments under one central government on local and national levels with an adequate homogeneousness and uniformity between both levels. The role of the central government in relation to consumer protection can be described as the initiation and furtherance of legislative policy and supervising the enforcement of consumer protection measures designed to protect the economy and safety interests of consumers within the general constraints of the market.[166] The UK central government involvement on consumer protection is divided between the Department of Trade and Industry (DTI) and the Office of Fair Trading (OFT).[167] There are also independent consumer organizations working for the protection and promotion of consumer rights in United Kingdom such as Citizen's Advice Bureau (Cab), Consumer Association, National Consumer Council, Ombudsmen, Trading Standards and Utility Regulators etc. These bodies have specific policy roles in specialized areas of consumers' economic interests, health and safety.[168]

Consequently, consumers are protected from unsafe products, fraud, deceptive advertising, and unfair business practices through a mixture of national and local governmental laws and the existence of many private bodies with legal right to take

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provides a further approach, describing a consumer as 'a natural person who, in making a contract to which these Regulations apply, is acting for purposes which are outside his business'. The new bill on consumer rights defines 'consumer' as an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession' (S.2 (3) Draft Consumer Rights Bill, June 2013). The definitions of ' a consumer' given in various statutes suggest that the consumer is a private individual acting in a private capacity and that the defendant must act in the course of a trade or business.

[166] Oughton D. and Lowry J., *Text book on Connsumer Law*, Blackstone Press, 2nd Ed., 2000, p.21.

[167] G. Howells and Stephen Weatherill, *Consumer Protection Law*, p.182.

[168] See Lugt, M., *Opportunities for, and Limits to, Harmonizing Criminal Law on Food Processing and Distribution, and Administrative Sanctions in the European Community*, European Journal of Crime, Criminal and Criminal Justice, Vol. 2 No. 3, 1994, pp 307-316.

action. These public and private bodies both protect consumers and, at a formal level, equip them with the knowledge they need to protect themselves, while also putting pressure on businesses to be more efficient and innovative.[169]

3.3.3. Enforcement of Consumer Law in United Kingdom

The role of central government in the area of consumer protection is to promote legislative policy, oversee the implementation of legislation and supervise the work of various government agencies.[170] In the United Kingdom, trade practice law has historically been characterized by decentralised enforcement. Local trading standards offices had exclusive jurisdiction over the enforcement of the Trade Descriptions Act 1968, whereas the Office of Fair Trading had limited enforcement powers.[171]

Governmental bodies had followed traditional approaches of dealing with problems by using a reactive rather than proactive approach in seeking out new problems.[172]

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[169] Waller, S., Brady, J., Jillian, G. and Acosta, R. (2011), *Consumer Protection in the United States: An Overview*, European Journal of Consumer Law, available at; SSRN: http://ssrn.com/abstract=1000226, last accessed on 17/05/2014.

[170] Harvey, B. and Parry, D. *Consumer Protection and Fair Trading*, 6th edition, Butterworths, 2000, p. 49.

[171] Ramsay I., Consumer Law, p. 454; Abdulla M. A. AlGhafri, '*The Inadequacy of Consumer Protection in the UAE: The Need for Reform*, a thesis submitted to the department of law, Brunal University, UK for the degree of doctor of philosophy in law in 2013, p.280. Available at: http://bura.brunel.ac.uk/bitstream/2438/7691/1/FulltexThesis.pdf, last accessed on 10.04.2015, p.175.

[172] Cappelletti, M. and Jolowicz, J., *Public interest parties and the active role of the judge in civil litigation*, A. Giuffrè, 1975. The UK has tackled this challenge when it found within the White Paper 'the safety of goods' (1984) that 'many consumer goods found to contravene safety requirements are imports', Cmnd 9302 para 27; therefore, some degree of co-operation between the Trading Standards Service and the Commissioners of Customs and Excise was necessary to tackle such offences. This has been solved under Consumer Protection Act 1987 s 37(1)(2), which provides Customs with the sufficient authority to seize suspicious goods for examining before releasing or holding for infringement. For more, see; Cardwell, K. (1987), *The Consumer Protection Act 1987: Enforcement of Provisions Governing the Safety of Consumer Goods*, The Modern Law Review, Vol.

To tackle those difficulties, and to alleviate the huge concern about inconsistency and the need for coordination in enforcement, the model was changed as increasing enforcement responsibilities were transferred to the new independent official body.[173]

Two major steps were introduced by UK government to enhance consumer protection through administrative bodies. The first was the establishment of the Office of Fair Trading (OFT), which has become the United Kingdom's competition and consumer protection authority and which works in partnership with Trading Standard Services (TSS) across the United Kingdom to promote and protect the interests of consumers and businesses. The model was adopted to simulate the US Federal Trade Commission model.[174]Therefore, a variety of powers and functions were conferred upon this new independent and nonpolitical office by the Fair Trading Act 1973.[175] The official rationale for the creation of the OFT was to remove the regulation of competition and consumer policy from the political arena, encouraging continuity and expertise in the development of policy on a long-term basis. Administrative regulation was also justified in terms of its being a

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50, No. 5, pp. 622-638, pp 628-632; Jaffe, L. (1973), *The Illusion of the Ideal Administration*, Harvard Law Review, Vol. 86, No. 7, pp. 1183-1191, pp 1183-1184.

[173] See Cartwright, P., *Crime, Punishment, and Consumer Protection*, Journal of Consumer Policy, Vol. 30, No. 1, 2007, pp. 1-20.

[174] Ramsay I., Consumer Law, 2007, p. 454; Abdulla M. A. AlGhafri, *'The Inadequacy of Consumer Protection in the UAE: The Need for Reform,* a thesis submitted to the department of law, Brunal University, UK for the degree of doctor of philosophy in law in 2013, p.280. Available at: http://bura.brunel.ac.uk/bitstream/2438/7691/1/FulltexThesis.pdf, last accessed on 10.04.2015, p.176-7.

[175] Sir *Geoffrey* Howe underlined these points in introducing the Second Reading of the Fair Trading Bill (Official Reports HC, 1972: 453-57) and concluded that given the specialist and detailed nature of the work and the need for continuity in its performance, it could be best done by an independent official body.

response to the limitation of judicial and legislative processes. A major objective of the newly created office was to maintain and promote an effective market mechanism by responding to market failures attributable to uncompetitive practices and information failure.[176]

Second, the government has also developed some degree of uniformity in enforcement through the creation in 1978 of the Local Authorities Coordinating Body on Trading Standards (LACOTS), which subsequently became known as 'LACROS'.[177] This body acts as a spokesperson to the central government on reform proposals, provides for the collection and exchange of technical information, negotiates voluntary standards of quality with trade associations; promote uniformity in interpretation and aids in the coordination of enforcement work.[178]

Now, a new approach is being taken to secure more consistency, through the establishment of the Local Better Regulation Office, which will play an important role in liaising between different local authorities. The new approach will make compliance easier for business, tackle the inconsistency problem, and prevent real damage to the public.[179]

Accordingly, the UK model has tackled the problem of inconsistency by designating the main OFT as a body to protect consumer rights and establishing

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[176] Ramsay I., *Consumer Law*, p. 454.

[177] See official website at: http://www.lacors.gov.uk/pages/trade/trading.html.

[178] G. Howells and S. Weatherill, *Consumer Protection Law*, 2005, pp. 576-577.

[179] See Local Better Regulation Office, *Better Local Regulation: Supporting Businesses Towards Recovery*, UK, 2009, pp 11-13.

LACROS, which acts as supporting department to enhance and promote uniformity in interpretation and aids in the coordination of enforcement work.[180] Additionally, the enactment of the Enterprise Act of 2002 has been essential in enhancing the role of the OFT. Firstly, it changed the structure of the OFT from that of a Director General Model to a board structure in 2003. The new model requires the board to be composed of a Chair and at least four other members who are appointed for terms no longer than five years.[181] This step was taken by the government to reduce the risks of capture, to secure stability and to limit idiosyncrasy.[182]

Secondly, it has given the OFT various functions to act effectively, monitoring unfair business practices that affect the interests of consumers, and the power to recommend reforms to the Secretary of State. The OFT was also given an important new role of taking rule-making initiatives to propose regulations for those practices which seemed to adversely affect consumers' economic interests. Another function was to seek assurances from individual traders that they would refrain from persisting in a course of conduct that was deemed detrimental and unfair to consumer interests.[183]

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[180] Abdulla M. A. AlGhafri, *'The Inadequacy of Consumer Protection in the UAE: The Need for Reform*, a thesis submitted to the department of law, Brunal University, UK for the degree of doctor of philosophy in law in 2013, p.280. Available at: http://bura.brunel.ac.uk/bitstream/2438/7691/1/FulltextThesis.pdf, last accessed on 10.04.2015, pp.176-7.

[181] See Schedule 1 of the Enterprise Act,2002.

[182] OECD, *Regulatory Reform in the United Kingdom: Government Capacity to Assure High Quality Regulation* 2002, Op. Cit., p 38.

[183] Ramsay I., *Consumer Law*, pp.460-461.

The new centralised enforcement model has more advantages in regard to enforcement through national agencies. There are arguments for central enforcement; indeed, one test case, or a communication directed to a head office, may secure countrywide compliance, avoiding a multiplicity of local actions.[184] In addition, the national agencies will enjoy reduced compliance costs. A further supporting argument is that national agencies may have more bargaining power vis-à-vis national firms, although this must be balanced against the potential danger of agency capture. National agencies may also take advantage of economies of scale in producing and collecting certain information, for example, as in testing the safety of products, developing standards and collecting information for licensing purposes.[185]

Moreover, to practically impose the consumer protection laws in England there are various organisations such as Citizen's Advice Bureau (Cab), Consumer Association, National Consumer Council, Ombudsmen, etc. that help consumers understand their rights and responsibilities. These organisations also play a vital role in protection of consumers' interests. The legal system is also meant to regulate the behaviour of suppliers of products and services and try to reduce the number of consumer disputes.

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[184] Abdulla M. A. AlGhafri, '*The Inadequacy of Consumer Protection in the UAE: The Need for Reform*, a thesis submitted to the department of law, Brunal University, UK for the degree of doctor of philosophy in law in 2013, p.280. Available at: http://bura.brunel.ac.uk/bitstream/2438/7691/1/FulltexThesis.pdf, last accessed on 10.04.2015, p.177.

[185] Ramsay, Op. Cit. p.349.

CHAPTER 4

PRODUCT LIABILITY IN SHARĪ'AH AND ENGLISH LAW

CHAPTER 4

PRODUCT LIABILITY IN SHARĪ'AH AND ENGLISH LAW

4.1. INTRODUCTION

The previous chapter has given an overview of consumer protection in Islamic and English legal systems. It has been thoroughly analysed that both the legal systems cover the important aspects of consumer protection law. This chapter undertakes the discussions on the protection of consumers in the context of product liability from the perspective of English as well as Islamic law. In this regard, the concept of the product liability, its significance, scope, and most importantly the theoretical foundations of the modern product liability regime have been discussed.

The chapter traces the roots of the notion of product liability in classical Islamic legal tradition. The theoretical foundations of the product liability under Islamic law and jurisprudence have been explored and analysed. The chapter attempts to contextualize the same in the modern era of science and technology. It also embarks on defining the important notions such as producer, product, liability etc. from an Islamic legal perspective in order to provide basis for an Islamic theory on product liability. The instances for holding the sellers liable for defective products and providers of faulty services have been quoted and analysed from the traditional sources of *fiqh*. Moreover, the chapter has highlighted the need for substantive law developments and reforms in the area of consumer protection in general and in product liability in particular under Islamic law.

Similarly, the English regime of product liability has been thoroughly analysed in the chapter. In this regard, the meaning and scope of product liability and its various regimes in English legal tradition such as contract regime, tort of negligence regime and strict liability regime, have been explored and thoroughly analyzed. Moreover, the substantive law developments on product liability in England have been discussed with special reference to the EU Directive on product liability and Part-1 of the Consumer Protection Act, 1987. It has discussed theoretical foundations of modern product liability law. It has also described the legislative history of the EU Directive on product liability. The Advantages and disadvantages of EU Directive on product liability are discussed from the perspective of UK's consumer. Moreover, the future of product liability in England is also discussed. At the end the chapter is concluded with the most important results found.

4.2. THE CONCEPT OF PRODUCT LIABILITY

4.2.1. Meaning of 'Product Liability'

The term '*product*' indicates an item which has been manufactured and then sold, perhaps through an intermediary, to the consumer. In market transactions the term "product' is referred to anything that can be offered to market that might satisfy a want or need. It is also called merchandise. According to manufacturing, products are purchased as raw materials and sold as finished goods; supplies are usually raw materials such as metals and agricultural products, but a product can also be anything widely available in the open market. In project management, products are the formal definition of the project deliverables that make up or contribute to

delivering the objectives of the project".[1] There is no definition of product in the general English law of negligence. Under the new rules, however, 'product' is a central concept-if no 'product' is involved then the new regime of strict liability will not be attracted. In the United Kingdom it is usually taken to mean that class of liabilities to which commercial manufacturers and commercial suppliers of goods are subject because a good has caused some form of actionable loss to either a business, a consumer (someone who intends to use the product for private use) or a bystander.[2]

As far as the meaning of liability is concerned Sir Jhon Salmond has stated that it means responsibility that results from wrong or breach of duty. It is something which one must do or suffer on account of his failure to do what he ought to have done. Liability is *vinculum juris* the bond of legal necessity existing between the wrong-doer and the remedy of the wrong.[3] Liability is of two kinds - civil and criminal. Civil liability is the enforcement of the plaintiff's right against the defendant in civil proceedings; criminal liability is the liability to be punished in a criminal proceeding.[4]

The term "*Product liability*" is used to identify the body of law that seeks to hold manufacturers and sellers financially responsible for their products not meeting

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[1] Michael G. Faure, "*Product Liability and Product Safety in Europe: Harmonization or Differentiation?*" (2000) 53 Kyklos: International Review for Social Sciences 470; also quoted by M. Fayyad's in his article on the *Transposition of the European Directive 85/374/EEC on Product Liability into Palestine and Jordan: Is it Adaptable to Islamic law?* Global Law Journal, 2012; Thomas Kadner Graziano. "《EC Tort Law》 and the German legal family", Tort and Insurance Law, 2008 available at: http://link.springer.com/chapter/10.1007%2F978-3-211-77586-8_18, LAST ACCESSED ON 13.08.2013.

[2] Alistair Clark, *Product Liability*, p.25.

[3] John Salmond, *Jurisprudence*, P.L.D. Publishers, Lahore, p.141.

[4] Ibid.

safety standards. It is the area of juridical studies in which producers, distributors, suppliers, retailers, and others who make products available to the public are held responsible for the injuries those products cause. Although the word 'product' has broad connotations, product liability as an area of law is traditionally limited to products in the form of tangible personal property.[5] Developments in science and technology constantly exert new pressures on existing legal concepts. The speed and accuracy with which those concepts are able to adapt to such challenges have important social and economic consequences.[6] One of these important aspects of law in modern times is '*product liability*'. Thus, product liability in other words is the liability of the manufacturers for defective products. The advancement of technology and change in trading methods has made product liability a very important legal issue of modern times.

This phenomenon is due first to the higher standards of living which have led to an increase in the amount of consumer products and a corresponding increase in the possibility of damage caused by defective products. The quality and quantity of damage and injuries which these new manufactured products may cause has increased. This is due to the increase in number of dangerous products that are used by relatively ignorant customers. Damage caused by a defective wagon in the tenth century was not as serious as injuries caused because of a car with a defective brake

[5] Restatement (Third) of Torts: Products Liability, § 19; http://www.primidi.com/product_liability accessed on 13.12.2013.

[6] Jane Stapleton, *Software, Information and the Concept of Product,* Tel Aviv University Studies in Law, Vol.9, 1989.

or a drug with dangerous side effects. Therefore, someone must be held liable for products that prove to be unsatisfactory or that cause damage.[7]

The jurisprudence of consumer protection is expanding day by day, and it has covered many aspects of human life. There are many aspects of the consumer law such as quality of goods and services, consumer credit finance, holiday laws, and consumer remedies etc. The area product liability law is a hybrid collection of inter-connected aspects of law. Consumer Protection against defective products has become unavoidable due to the advance technology and rapid increase in number of products and services. Products form an integral aspect of all our lives. Our dependency on products to survive has been amusingly sketched by one US commentator who describes the multitude of product a consumer might use even before leaving for work:

> "A stereotypical "consumer" awakens in his pyjamas to an alarm clock in his house, the air temperature of which is adjusted by a thermostatically controlled heater or air conditioner, and continues as he rolls off his spring mattress and foam pillows (covered of sheets, blankets and pillowcases), to stand upon the polyester carpet covering a synthetic pad and woollen floor. The consumer may then don his glasses, bathrobe and slippers, and proceed to his bathroom where he may put to use such products as an area rug, a light bulb, a toothbrush, toothpaste, water, a sink, mouthwash, a washcloth, a towel, a toilet, toilet paper, a water heater, soap, shampoo, powder, a razor, pre-shave lotion, shaving crème, after-shave lotion, a styptic pencil, a Band-Aid, facial tissue, a cotton swab, a brush, and a radio".[8]

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[7] Sjostorm and Nilson, *Thalidmoide and the Power of the Drug Companies*, Penguin, 1972; Nagela Naseer, *Manufacturer's Liability under Islamic law*, LLM (unpublished) thesis submitted to the Law School, Harvard University, U.S.A. 1985, p.2.

[8] Owen '*Products Liability: Principles of Justice for the 21st century*' (1990) 11 Pace Law Review 63, p.64-65, available at: http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1445&context=plr accessed on 10-11.2013; Prof. Geraint G. Howells, *The Law of Product Liability*, 2nd Edition, p.1.

The sketch continues in similar vein, but this is sufficient to appreciate how many products we each, almost unwittingly, use on a daily basis. To this, one should add the products used in the provision of services and those which are used to manufacture and distribute them to us.[9] The great majority of products are safe to use; however a small proportion of them will have been produced with undetected, perhaps undetectable, defects in their design or construction. These defects may threaten not only our health and our property but also that of third parties. Thus, it is essential for the legal systems and/or the legislators to regulate the subject by attempting to find a balance between the competing interests of the consumers of a product (who naturally expect the greatest possible protection against such damage), the producer or manufacturer (who is looking to keep the costs of production to a minimum) and the general public interest (in raising technical standards and increasing productivity whilst maintaining a reasonable degree of safety).[10]

4.2.2. Juridical Bases of Modern Product Liability

Product Liability has been one of the fastest developing areas of law in both US and in Europe in the second half of the twentieth century. The American Law Institute recently issued its Restatement (Third) of Tort: Product Liability (hereinafter Third

[9] Geraint G. Howells, *The Law of Product Liability*, 2nd Edition, p.1.

[10] Taschner, 'Product liability-Actual Legislation and Law Reform in Europe' (ch. 8, p. 113,) in Woodroffe (ed.), *Consumer Law in the EEC* (Sweet and Maxwell, 1984); Duncan G. Smith, *The European Community Directiv on Product Liability: A Comparative Study Of Its Implementation in the UK, France And West Germany*, Kluwer Law International, 2007.

Restatement), which limits strict liability to manufacturing defects.[11] The impact of this approach on state law is unclear. Meanwhile in Europe, following the enactment of the French product liability law in May 1998, all member states of the European Community (EC) have implemented the EC Product Liability Directive of 1985 (hereinafter EC Directive), which requires member states to introduce strict product liability legislation.[12] While discussing the legal basis for modern product liability law, Jane Stapleton explaining the views of Tony Honore regarding '*strict moral enterprise liability*' writes that there is a coherent theme which does not link most existing pockets of tortuous strict liability, including those aspects of the product rules in the US and EC which are stick. It is the taking of risks in pursuit of financial profit.[13] A non-consequential basis of these liabilities might be expressed in terms of a moral argument that if, in seeking to secure financial profit, an enterprise causes certain types of loss, it should be legally obliged to pay compensation to the victim. This is termed by them as the '*strict moral enterprise liability*' argument to distinguish it from the diffuse concept of enterprise liability, which has been used in many different and loose ways. The author argues that the moral enterprise liability provides a considerably better fit with those rules than

[11] Restatement (Third) of Product Liability: Products Liability S.2 (1998). For a detailed discourse about the American Restatement and product liability, see Jane Stapleton's An outsider's view of the restatement of torts, Australian Product Liability Reporter, Vol. 16, No.4, LexisNexis, Butterworths.

[12] Geraint Howells & Mark Mildred, *Is European Products Liability More Protective than the Restatement Third of Torts: Products Liability?* Tennessee Law Review, Vol.65, Summer 1998, Number 4; available at: GONZÁLEZ CASTILLO, JOEL. "PRODUCTS LIABILITY IN EUROPE AND THE UNITED STATES", Revista Chilena de Derecho, 2012., last accessed on 12.03.2014.

[13] Jane Staplton, *Product Liability*, Butterworth and Co. Publishers, UK, 1994, p.186.

economic theories, although still not a completely satisfactory fit. It is considered as the basis for the modern US and EC product liability laws.[14]

4.2.3. Scope of Modern Product Liability Law

The scope of product liability law is increasing day by day. After the industrial revolution and mass production of products, the necessity of protecting consumers' rights by approving some rules regulating the relationship between producers and consumers is greatly felt. Product liability law is the outcome of such an effort. It is a body of law which solves this problem and provides compensation for harms caused to a person or property due to defective or unreasonably dangerous products, and from the failure of a manufacturer or seller to warn the consumer of potential threats in a product. There are many reasons of the harms caused by the products. The major reasons relate to behaviour and knowledge of product users, environment of use, design or construction of the product using safety analysis. Changing the product or process design and improving quality management is easier than changing the human culture or behaviour and environments. It is for this reason that we observe an increase in manufacturer's responsibility resulting in major changes in product/ process design. Consequently, manufacturing innovation is found to be one major vehicle for reducing the risk of injury. Product safety and liability laws (where they exist) are continuously being strengthened in order to protect the consumer.[15] The basic purpose of the product liability is to

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[14] Ibid.

[15] Khalid Akhtar & Nubla Iftikhar, Product Liability and Safety in the post WTO era, paper presented at the Pakistan's Eighth International Convention on Quality Improvement at PCSIR Auditorium, Lahore on August 21-22,2004 available at:

insure the consumers right to safety; emphasized in the United Nations Guidelines for Consumer Protection.[16]

Product liability is a new concept, and so it is easy and interesting to track how legal systems have, within a relatively short space of time, reacted to this new topic.[17] Solutions have sometimes been developed by the courts out of existing legal principles, and at other times, solutions have been created by legislatures. Because pre-existing legal principles were similar in most countries, it is interesting to see the extent to which systems were prepared to amend their traditional concepts without having resort to legislation. As the new regimes claim to adopt strict liability, there is plenty of scope for comparison as to the actual extent to which they deviate from traditional forms of liability.[18]

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

> _the victim, as the price for his participation in the advantages of the industrial development, but to be borne as an inevitable Act of God,
>
> _to the state, this means to all taxpayers in solidarity, or

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http://www.piqc.edu.pk/casestudies/Dr_Khalid_Akhtar_Product_Liability_and_Safety_in_WTO_Case_Study_PIQC.pdf, last accessed on 12.11.2013.

[16] See http://www.un.org/esa/sustdev/publications/consumption_en.pdf, accessed on 23-07-2013.

[17] He who commits a wrong is said to be liable or responsible for it. Liability or responsibility is the bond of necessity that exists between the wrongdoer and the remedy of the wrong (*John Salmond*, Jurisprudence, Chapter on *Liability*).

[18] Geraint G. Howells, *The Relationship between Product Liability And Product Safety-Understanding A Necessary Element In European Product Liability Through A Comparison With The U.S. Position*, Washburn Law Journal, Vol.39, Number 3, 2000; available at: http://washburnlaw.edu/wlj/39-3/articles/howe.pdf, accessed on 15.09.2013.

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

The answer to this question seems to be one of perspective: the traditionalist prefers the first choice, a citizen believing in state-organized solidarity the second, and the person devoted to state-free liberal convictions the last one. There are no other solutions than these three. Good arguments exist for each of these solutions.[19] In the developed parts of the world almost all countries have adequate legislation to deal with product liability issues. On the other hand, the situation in Muslim countries is entirely different and in this part of the world it is believed that the harm caused by a defective product is due to the will of God and the manufacturer is not considered to be liable for any of his fault or negligence, hence, there are no product liability laws in most of the Muslim countries. This is the reason that this area of law seems to be a new one for Muslim jurists and that's why very little amount of literature can be found on it from the perspective of Islamic law. Whether or not such a belief has been endorsed by *Shariah* is the focal point of this research.

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[19] Hans Claudius Taschner, *Product Liability: Basic Problems in a comparative law perspective*, book chapter in *Product Liability in Comparative Perspective*, edited by Duncan Fairgrieve, Cambridge, p. 155; available at: "Product liability in comparative perspective.(Brief Article)(Book Review)", Reference & Research Book News, Feb 2006 Issue, accessed on 13.09.2013.

4.3. PRODUCT LIABILITY AND ISLAMIC LAW

4.3.1. The Concept of Product Liability in Islamic Law

The concept of modern product liability law actually denotes to the liability of the manufacturer for defective products.[20] In Islamic law, the term "product liability" specifically does not appear in these exact terms in the classical literature of *fiqh*. Also, the *fuqahā'* did not mention this term in their writings and manuals. However, this is not a strange rule in Islamic law as it has provided concrete principles to deal with such issues. The liability for manufacturing, marketing, importing and selling of defective products can be established under Islamic *Sharī'ah* through contract, tort and even on the basis of statutory law i.e. any law on any subject can be enacted provided it is based on the sources of Islamic law or at least it does not violate any injunctions of the *Sharī'ah*.[21]

4.3.2. *Some Examples from the Traditional Islamic Law*

The main concern of this research is with the principles of Islamic law; however it is of great significance to quote some examples that there had been many proofs of liability for a defective product in the classical Islamic legal tradition. In this regard, it is pertinent to quote here the famous *Hadith* of the Holy Prophet (pbuh). It is narrated that the Messenger of Allāh (pbuh) happened to pass by a heap of eatables (corn). He thrust his hand in that (heap) and his fingers were moistened. He said to

[20] Coglienese, Finkel and Zaring, Consumer Protection in an Era of Globalization, This paper can be downloaded without charge from the Social Science Research Network Electronic Paper Collection:http://ssrn.com/abstract=1788921, last accessed on 15.05.2013.

[21] The Islamic contract regime of product liability has been thoroughly expounded in chapter 5, the Islamic tort regime in chapter 6 and the Islamic strict product liability regime in chapter 7 of the thesis.

the owner of the heap of eatables (corn), "What is this?" "Messenger of Allāh, these have been drenched by rainfall." He (the Prophet) remarked, "why did you not place this (the drenched part of the heap) over other eatables so that the people could see it? He who deceives is not of me (is not my follower).[22]

In another case, the Muslim scholars Ibn il-Asqā said: 'I bought a camel from a seller and when leaving the place of contract 'Uqba b. Nāfi' followed me and said: The camel seems fat and healthy; did you buy it for meat or travel? I said: For travel (ḥajj). He said: Its toe has a hole, and it is not appropriate for your travel. Are you looking to rescind the agreement? The seller asked 'Uqbā. 'Uqbā responded: I heard Prophet Muhammad (pbuh) say that the contracting parties have the choice.[23]There are many instances in which a subject matter has been found defective and returned to the seller.

A relevant case is the action of the *'Umar b. Khaṭṭāb (R.A.)* who on seeing that a man had diluted milk with water punished him by spilling it away. One group of the jurists who uphold this principle have given this ruling, for it is reported of the Prophet (pbuh) that he prescribed the watering down of milk for sale–though not for drinking purposes – because if the milk is diluted the buyer does not know the relative quantities of milk and water, and for this reason *'Umar (R.A.)* destroyed it.[24] Moreover, the attitude of Islamic law is to prevent the occurrence of any harm to

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[22] Al-tirmidhī, *Sunan,* tradition no. 1315, vol.2, p.597; Muslim Ibn al-Ḥajjaj, *Saḥīḥ,* Dār Iḥyā' ul-turāth al-'arabi, Beirut, vol.1, p.99.

[23] Aḥmad b. Ḥanbal (d.241 A.H.), *Musnad,* tradition no. 16013Mu'assisah Al-Risālah, 2001, vol.25, p.394.

[24] Ibn Taymiyyah, Aḥmad b. Abd al-Ḥalīm, *'Public Duties in Islam'*, translated by M. Holland, Leicester, the Islamic Foundation. U.K, 1982, p. 50.

the consumers; hence, it has encouraged taking initiatives to block the ways that may lead to violation of consumer rights. This is materialized through the Islamic principle of *sadd ul-dharā'i'* (blocking the ways leading to unlawful results).[25]

Therefore, it has always been considered a duty of the Islamic state to look after the production processes of consumer products and a specific institution called *ḥisbah* has been assigned the task to take care of business practices.[26] The person who acquires profit from their production is held liable, and moreover any person who has caused harm to the other in one way or the other is bound to make good whatever the loss he has caused to the other. The institution of *ḥisbah* as a representative organ of Islamic state is bound to provide adequate protection to consumers. The institution of *ḥisbah* must take notice of different trades in order to guarantee maximum protection of consumers' interests and maintain just weights[27] and measures.[28] Some of these are such as fodder merchants and millers, bakers, bread makers, cook-shops, butchers, pharmacists, milk sellers, criers (brokers), weavers, tailors, repairers, ship-men, astrologers, letter writers, and rice merchants etc.[29] The *muḥtasib* must stop unfair trade practices. It must also take serious actions against unfair contract terms in order to block all the ways of exploitation.

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[25] Ibn al-Qaiyyam, *I'lām ul-muwāqi'īn,* Dār al-kutub al-'ilmiyyah', Beirut, vol.3, p.108.

[26] For a detailed discourse on the topic of *Ḥisbah* see chapter 3 of the thesis.

[27] Qur'ān says: "Woe to those that deal in fraud" (83:1). Other related verses are: 11:84; 26:182; 4:107.

[28] It is duty of a *Muḥtasib* to see that the traders and shopkeepers do not indulge in short measuring. He must order possessors of scales to keep them free of oil and dirt. Scales must be brought to rest before being used for weighing and the pans must not be touched by the thumb with fraudulent intent. Scales must not be suspended from the hand. A trick used in weighing gold is to blow into the pan containing it or to fasten a fine strand of hair to one side. The *Muḥtasib* must not forgive fraud in the use of measures and weights. (Al-mawardī, *Al-aḥkām al-sulṭaniyah,* vol.3, p.168; Ibn Taymiyyah, *Al-ḥisbah,* vol.1, p.55;).

[29] Ibn al-Ukhuwwah (d.729 A.H.), Dār al-funūn, Cambridge vol.1, p.238.

People must be allowed to provision themselves from each other without intermediary.

The *muḥtasib* must examine that the fodder merchants and millers may not mix bad wheat with good or old with new. They may not hoard grain. He must check that scales and weights used for the flour and those for money.[30] He must inspect that the flour is fit for consumption. *Muḥtasib* should maintain a proper system for bakers and bread makers. They should be ordered to make high roofs for the bake-houses and wide vents for smoke. He must order that ovens shall be kept swept kneading-troughs washed and covered with straw mats.[31] The *muḥtasib* must control cook-shops them by weighing carcasses before they are placed in the oven and after the removal; if the cooking has been completed there will be a diminution of a third.[32] Under Islamic *Sharī'ah* an animal must be ritually slaughtered to make it edible.[33] Qur'ān says:

> "Prohibited to you are dead animals, blood, the flesh of swine, and that which has been dedicated to other than Allāh , and [those animals] killed by strangling or by a violent blow or by a head-long fall or by the goring of horns, and those from which a wild animal has eaten, except what you [are able to] slaughter [before its death], and those which are sacrificed on stone altars, and [prohibited is] that you seek decision through divining arrows. That is grave disobedience. This day those who

[30] Ibid. vol.1, p.90.
[31] Ibid.
[32] Ibid. vol.1, p.107.
[33] See Adāb ul-dhibha' in *Al-mawsūa' al-fiqhiyyah al-kuwaitiyyah*, vol.21, p.197; Shah Waliullāh al-dihlawī, *Hujjat ullāh-i-albāligbah'* Dār-al-jīl, Beirut, Lebanon, vo.2, p.281. It is preferable that the slaughterer should be a Muslim of full age and understanding who shall utter the name of God over the animal. Slaughter by minors, blind or intoxicated persons is disapproved for the reason that they may err in making the sacrificial cut. Any instrument which has a sharp cutting edge, even a reed or sharpened stone, is lawful for the sacrifice. Camel should be slaughtered standing, oxen and sheep lying down.

> disbelieve have despaired of [defeating] your religion; so fear them not, but fear Me. This day I have perfected for you your religion and completed My favour upon you and have approved for you Islam as religion. But whoever is forced by severe hunger with no inclination to sin - then indeed, Allāh is Forgiving and Merciful."[34]

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

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

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[34] Qur'ān 5:3.
[35] Al-bukhārī, *Sahḥīḥ*, tradition no.2086, vol.3, p.59.
[36] Al-jiziri, *Al-fiqh 'alā madhhab al 'arba'h*, Dār al-kutub al-'elmiyyah, vol.1, p.10.
[37] Ibn al-Ukhwah, *Ma'ālim al-Qurbah fi aḥkām al-ḥisbah*, vol.1, p.99.
[38] Ibn Taymiyyah (d.728 A.H.), Al-ḥisbah fi al-Islām, Dār al-kutub al-'Elmiyyah, vol.1, p.52.

[39] This principle of destruction of defective work in the crafts is quite similar to the modern day notion of 'product recall' once its defects are proved. The defect is anything that reduces the actual value of the product and is recognised by the commercial custom (*'urf tijārī*) in a particular age and place.[40]

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

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

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[39] Ibid.
[40] Al-marghināni, *Al-Hidāyah,* vol.3, p.36.
[41] Ibn al-Ukhuwwah, *Ma'ālim al-qurbat fi Ṭalab al ḥisbah,* vol.1, p.129.
[42] Ibn al-Ukhuwwa, vol.1, p.222.
[43] Ibid. vol.1, p.183.

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

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

4.3.3. The Basic Notions of Product Liability and Islamic Law

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

4.3.3.1. The Notion of Producer and Islamic Law

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

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[44] Al Baihaqi, *Al Sunan Al Kubrā, Kitābul Qasāmah, Bāb al Takfīr*, tradition no. 16496, vol.8, p.233.
[45] Khalīfah, Babakar al-Ḥasan, *Himyah al-Mustahlik fi al-Sharī'ah*, paper presented in the International conference on "*Consumer Protection in Sharī'ah & Law*" conducted by the Faculty of *Sharī'ah* & Law of United Arab Emirates University, 6-7, December, 1998.

> "He knoweth that there may be (some) among you in ill-health; others travelling through the land, seeking of Allāh.s bounty; yet others fighting in Allāh.s Cause, read ye, therefore, as much of the Qur'ān as may be easy (for you); and establish regular Prayer and give regular Charity; and loan to Allāh a Beautiful Loan. And whatever good ye send forth for your souls ye shall find it in Allāh.s Presence,- yea, better and greater, in Reward and seek ye the Grace of Allāh. for Allāh is Oft-Forgiving, Most Merciful."[46]

Islam has emphasized on more and more production so human needs be fulfilled but it gives a comprehensive code for consumption. The Prophet (pbuh) endorsed the importance of legitimate ways of earning in the following words: *"Asked 'what form of gain is the best? [The Prophet] said, 'A man's work with his hands, and every legitimate sale".*[47] Islamic commercial law stress a lot on the fulfilment of human needs along with achieving a great spiritual satisfaction therefore it gives a balance system for earning and consumption of goods and services to stabilize the worldly life and life here after. *Sharī'ah* has encouraged the production of all beneficial things and condemned the production of harmful things to humanity. Hence, many Muslim scholars are of the view that production of tobacco is not allowed and smoking is prohibited. Similarly the cultivation of opium is not allowed as it harms the society. For Muslims consumption of alcohol is not allowed either. The point here is that in *Sharī'ah* the term producer has not been defined in any specific words by earlier jurists.

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[46] Qur'ān 73:20.

[47] Aḥmad b. Ḥanbal, *Musnad*, tradition no. 17265, vol.28, p. 502; Ibn Abī Shaibah, Muṣanaf, tradition no.23083, vol.4, p.554; Al-baihaqi, Al-sunan al-kubrā, tradition no.10397, vol.4, p.432.

Islamic *Sharī'ah* has not focused on the definition of producer rather it has focused on the product that is produced that whether it is good for consumption or not. All those things that are harmful to human life, intellect, family and wealth are declared prohibited both its production and consumption as mentioned earlier in discussion on *Maṣālih* (interest). This is one of the primary objectives of *Sharī'ah* to acquire *manfa'ah* (benefit) and the reject *maḍarrah* (injury, harm) because the acquisition of *manfa'ah* and the repulsion of *maḍarrah* represent human goals, that is, the welfare of humans through the attainment of these goals.[48] Hence, it is at first duty of Islamic state to ensure that the products and production process are safe and not going to cause harm to the general body of consumers. If any statutory duty is violated the producer will be responsible for that.

Here it is pertinent to raise the issue that does the producer etc owe any duty towards the consumer being harmed by a defect in the product under Islamic law? The principle of Islamic law that states: *"Every profit has a corresponding liability"*.[49] It covers all the stakeholders i.e. producer, manufacturer, retailers and suppliers etc. to be liable for any shortcoming on their part. Thus the notion of liability in Islamic law is wider and it covers all those who extract benefit from the product and it is in conformity with English product liability regime. Though there is a

[48] Al-Ghazālī (d.505 A.H.), *Al-mustaṣfā*, Dār al-kutub al-'elimiyyah, 1993, vol.1, p.174

[49] Ibn Qudāmah, Al-mughnī, vol.3, p.489; Shah Waliullāh Al-dihlawi, Ḥujjat-ullāh al-bālighah, Dār al-jīl, Beirut, Lebanon, vol.2, p.174; Al-maqdisi, Ziyā' ul dīn, Al-sunan wa al-aḥkām 'anil-muṣṭafa 'alaihi al-salām, Dār Majid A'siri, Sa'ūdi 'Arabiyyah, 2005, vol.4, p.389.This is based on the well known ḥadīth of the Prophet (pbuh), see Ibn Mājah, *Sunan*, tradition no.2243, vol.2, p.754; Abū Dawūd, *Sunan*, tradition no.3508, vol.3, p.284; Al-tirmidhī, *Sunan*, tradition no.1285, vol.2, p.572; Al-nasā'ī, *Sunan*, tradition no.4490, vol.7, p.254.

debate among the Muslim scholars about the acknowledgment of corporate personality.[50]

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

4.3.3.2. The Notion of 'Product' and Islamic Law

In classical Islamic law no specific definition of the term 'product' exist; instead the term '*mabi*' has been used by *fuqahā'* that means subject matter to indicate all sold 'valuable' things including 'product' in its contemporary meaning.[51] Islamic law has explicitly mentioned the criteria for *ḥalāl* and *ḥarām*. Besides, *ḥalāl* and *ḥarām* there

[50] Malik, Muḥammad Ḥafīẓ, An Analysis of Corporate Entity and Limited Liability in Islamic and Western Perspectives of Corporate Governance International Journal of Business, Economics and Law, Vol. 2, Issue 3 (June) ISSN 2289-1552, available at: http://ijbel.com/wp-content/uploads/2014/07/An-Analysis-of-Corporate-Entity-and-Limited-Liability-in-Islamic-and-Western-Perspectives-of-Corporate-Governance-Dr.-Malik-M.-Hafeez.pdf, last accessed on 12.05.2015.

[51] M.Fayyāḍ, *'Misleading Advertising Practices in Consumer Transactions:* Can Arab Lawmakers Gain Advantage from European Insight? (2012) 26(3) Arab Law Quarterly Journal 287.

are certain things on which the Islamic law is silent. The Muslims are required to abstain from such doubtful things.[52]

The general principle of Islamic law regarding the 'products' is permissibility. All the beneficial and harmless things are permissible, unless explicitly prohibited by *Sharī'ah*. This is based on the well known principle of Islamic law: "...the original rule for all things is permissibility unless the prohibition is proved."[53] This principle explains the scheme of *Sharī'ah,* regarding *ḥalāl* and *ḥarām.* Allāh (S.W.T.) out of His infinite and boundless mercy, has permitted certain things, and prohibited certain others. While doing this, He has secured human beings' interests, and averted harm from them. There is another rule of *Sharī'ah* that: "*Al-aṣl fi al-Manāfi' al-Ibāḥah wa fi al maḍār al-taḥrīm*" i.e. the original rule about beneficial things is permissibility, and for harmful things is prohibition".[54] Anything that is beneficial for the people is lawful, and a thing which is proved harmful, for them is unlawful.[55]

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[52] Aḥmad, Musnad, tradition no.18368, vol.30, p.320; Al-Dārimī, Sunan, tradition no.171, vol.1, p.269; Ibn Mājah, Sunan, tradition no.3329, vol.3, p.243; Al-nasā'ī, Sunan, tradition no.4453, vol.7, p.241; Ibn Abī Shībah, Al-muṣṣanaf, tradition no.22003, vol.4, p.448.

[53] Ibn Nujaim, (d.970 A.H.), Al-Ashbāh wa al-Naẓā'ir, Dār al-Kutub al-'Elmiyyah, Beirut, Lebonan, 1999, p.56. The principle {الأَصْلُ فِي الأَشْيَاءِ الإِبَاحَةُ حَتَّى يَدُلَّ الدَّلِيلُ عَلَى عَدَمِ الإِبَاحَةِ} is based on a number of verses of the Holy Qur'ān such as "It is He Who hath created for you all things that are on earth; Moreover His design comprehended the heavens, for He gave order and perfection to the seven firmaments; and of all things He hath perfect knowledge *(2:29);* "And He has subjected to you, as from Him, all that is in the heavens and on earth: Behold, in that are Signs indeed for those who reflect (45:13); and traditions of the Holy Prophet (pbuh) such as the Prophet said: "*God has enjoined certain enjoinments, so do not abandon them. He has imposed certain limits, so do not transgress them. He has prohibited certain things, so do not fall into them. He has remained silent about many things, out of mercy, so do not ask about them*" Al-Bayhaqi, vol.10, p.23, Hadith No.20283.

[54] Al-Qarāfī (d.684 A.H.), *Al-furūq,* 'Alām al-Kutub, n.d. vol.1, p.220; Jamāl ud-Dīn, *Al-tamhīd fī al-Takhrīj al-furū' 'alā usūl,* Mu'assisah al-Risālah, Beirut, p.487.

[55] Smoking etc. is impermissible on the basis of this maxim because its harm has been proven, even though, no clear text prohibits it.

Islamic law has given specific criteria to consider something to be a product as it follows.

a) Valuable (Mutaqawwam)

In Islamic law, the *'mabi'* must have legal value. In this regard, Islamic law is distinct from its English counterpart in terms of having its own theory of property (*māl*) and ownership. It has been considered as a yardstick to weigh that whether or not a particular object is legitimate in Islamic law. The term legal value (*mutaqawwam*) in Islamic law means that it should be permissible and lawful in the eyes of *Sharī'ah*. Things forbidden in *Sharī'ah* are considered invaluable (*ghair mutaqawwam*), e.g. pork, wine and dead animal etc.[56]

Dead meat would mean the flesh of any bird or animal dead from natural causes, without being properly slaughtered in an Islamic way. A Muslim, therefore, will not eat the flesh of such an animal or bird. Flesh of an electrocuted animal, or of an animal killed by the blow of a blunt weapon, and of the strangled one is also proscribed in Islam. Also proscribed is the flesh of the animal that has been killed or slaughtered in ways other than Islamic. It is, therefore, not permissible for a Muslim to trade in dead meat. Likewise, trading in pork or intoxicants and sale of idols and statues is not permitted in Islam. Adultery, obscenity and immorality are expressly prohibited by the Qur'ān therefore any business hinges upon them is expressly forbidden. There are number of verses and traditions on this topic such as: Qur'ān says: *"Forbidden to you [for food] are: dead meat, the blood, the flesh of*

[56] Al-Kasāni, *Badā'i' al- Sanā'i*, vol.5, p.192.

swine and that on which name of other than Allāh has been mentioned."[57] Qur'ān also says: *"O you who believe! Intoxicants and gambling [dedication of] stones and [divination by] arrows are an abomination of Satan's handiwork: so avoid it in order that you may prosper."*[58] Qur'ān has also mentioned: *"Say: Not equal are things that are bad and things that are good even though the abundance of the bad may dazzle thee; so fear God, O ye that understand, that ye may prosper."*[59]

The Prophet (pbuh) is also reported to have said: *Allāh and His Messenger made illegal the trade of alcoholic liquors, dead animals, pigs and idols.*[60] The Prophet (pbuh) also said; If Allāh makes something unlawful, he makes its price also unlawful. [61]

In the Arabic dictionary, *māl* (plural - *amwāl)* means "whatever one may own from all matters."[62] There are various definitions of the Muslim jurists to define the term 'māl' in its technical sense. According to the famous ḥanafī jurist al-Sarakhsi, māl is that which is created, beneficial to humans, valuable and can be kept.[63] On the other hand, the other Ḥanafī jurist, al-Kasānī views it differently as he defines *'māl'* to include usufruct as an integral part of it. He indicates in his book, in the chapter

[57] Qur'ān, 5:1.
[58] Qur'ān 5:90.
[59] Qur'ān, 5:103.
[60] Ibn Ḥabbān, Saḥīḥ, tradition no.4937, vol.11, p.311; Aḥmad, Musnad, tradition no.14471, vol.22, p.360; Bukhārī, *Saḥīḥ, Bāb Bay' al-Mayyitah wal- aṣnām,* tradition no: 2236, vol.3, p.84; Ibn Mājah, Sunan, tradition no.2167, vol.2, p.732; Al-tirmidhī, Sunan, tradition no.1297, vol.2, p.582; Al-nasā'ī, Sunan, tradition no.4669, vol.7, p.309; Al-bayhaqi, Sunan, tradition no.11047, vol.6, p.20.
[61] Aḥmad, Musnad, tradition no.2678, vol.4, p.416.
[62] Ibn Manzūr, Jamāluddīn (d.711 H), Lisān al-'Arab, Dār al-Misriyyah li-talīf wa tarjumah, and Majd Fairūz abādī (1987).
[63] Al-Sarakhsi (d.483 A.H.), Al-mabsūṭ, Dār al-Ma'rifah', Beirut, 1993, vol.11, p.79.

of (Will and Testament), that will is an affirmation of ownership to the heir, and the place of the ownership is *'māl'* and *'māl'* is either corporeal or usufruct.[64]

According to the *Ḥanafi* School, property (*māl*) is that which is desired by the people and can be stored for use at a time of need.[65] It is stated in the Ottoman courts Hanafi Fiqh Manual, *al-Majallah al-Aḥkām al-'Adaliyyah*: "The thing sold must be property of some specific value (according to *Sharī'ah*)".[66]

According to the famous Māliki school jurist Imam al-Shatibi *'māl'* means everything that can be possessed, and the owner has an exclusive right of possession of the object when he owns it. Hence, in order for an object to become *'māl'*, it will depend on the relationship between the owner and the object, as the need to own and use the object is based on the fact that the object is beneficial to the owner.[67]

The famous jurist Imām Al-Suyūṭi referring to Imām Shafi'ī writes that an object cannot be classified as *māl* unless it is valuable and can be sold. In addition, someone has to be accountable for the object if it is damaged. He further clarified that the object can still be classified as *māl* even though it is a small amount, such as a coin or any equivalent for it, because people are still interested in owning it.[68]

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[64] Al-Kasani, (d.587 A.H.) *Badai wa al-Sanai,* Dār al-Kutub al-Elmiyah, 1986, vol.7, p.385.
[65] Ibn ` Abidin, *Radd-al-Muhtar* vol.4, p.502.
[66] Al-Majallah, Art. 199.
[67] Al-Shaṭibī (d.790 A.H.), *Al-Muwafaqāt*, Dār Ibn 'Affān, 1997, vol.2, p.32.
[68] Al-Suyūṭi, Jalal al-Din (d.911 A.H.), *Al-Ashbāh wa al-Naẓā'ir*, Dār al-Kutub al-'Elmiyyah, 1990, vol.1, p.327.

Al-Zarkashi defines māl as anything beneficial, that is, the object is ready to be used to gain its benefits. He explains further that the object can be in physical form (something immovable and moveable) or usufruct.[69]

According to the Ḥanbalī School-māl is anything beneficial and permissible according to the *Sharī'ah* and permissibility to use it should be under normal conditions. By normal conditions it means that it should not be in the situations of *ḍarūrah*, where *Sharī'ah* provides exceptional application as special treatment to ease hardship.[70]

In the view of Muṣṭafa Zarqā', a contemporary Muslim jurist, the word *māl* is applied to everything that has legal and material value among the people. This definition covers both abstract and unreal rights. The minimum value of *māl* is considered to be one *fals* by some that is one copper coin.[71] Anything that is explicitly prohibited by Qur'ān and Sunnah, such things are not considered *māl* (property) in *Sharī'ah*. Similarly, the contract, in which the subject-matter is something that is not considered *māl* by *Sharī'ah*, is void. Moreover, consumption of such products is not allowed. Hence, it is forbidden for the Muslim consumers to acquire or transfer through contract anything that *Sharī'ah* has declared *ḥarām* like wine, swine flesh, bristles of swine, *Najis* things, (that are considered filthy under the law and have no legal value), like carrion, blood; *Mutanajjas* things (that have

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[69] Al-Zarkashi, *Al-mansūr fi al-Qawā'id*, Ministry of Endowments and Religious Affairs, Kuwait, 1985, vol.3, p.222.

[70] Al-Suyūṭi, Muṣṭafa b. Sa'ad b. 'Abduhu (d.1243 A.H.), *Maṭālib Ulu al-Nūhā fi Sharḥ Ghayah al-Muntahā*, Al-Maktab al-Islāmī, 1994, vol.3, p.12.

[71] Al-Zarqā', *Al-madkhal al- fiqhi al-'āmm*, Dār al-Qalam, Damascus, p. 334 and p.763; Niyazī, *Outlines of Islamic Jurisprudence*, p.143.

been affected by filth), like something dirty falling into the milk; bone of dead animals and their hair and skin; pork (Pig), beasts, and some other animals whose meat is not permitted. Milk from an animal whose meat is in itself forbidden as, for example, the milk of lions and monkeys etc is *ḥarām*. Anything that contains part of the *ḥarām* animal is also *ḥarām* such as lard, gelatine, animal shortening, etc. are *ḥarām*, blood of any animal or bird, meat of dead animals or birds, meat of animals or birds that has been sacrificed in the name of other than Allāh, alcohol and (intoxicating) drugs. The sale and consumption of ḥarām foods is strictly prohibited by Allāh and if a Muslim eats them he commits a sin. It is pertinent to quote here Imām b. Nujaym who stated the same in al-Baḥar al-Rā'iq:

> "The sale of something that does not hold a value (according to *Sharī'ah*) will be void....such as the sale of a dead animal, blood, animal slaughtered by a fire-worshipper, etc..."[72]

Hence, it is forbidden for the Muslim consumers to acquire or transfer through contract anything that *Sharī'ah* has declared *ḥarām* like wine, swine flesh, bristles of swine etc.

The sale and purchase and mixing of these things in other lawful foods are also strictly prohibited. This is based on a well established rule of Islamic law that when the religiously lawful and unlawful coincide, the unlawful shall be dominant.[73] Hence, such products are considered *ḥarām* in the eyes of *Sharī'ah* that contain any unlawful object in its ingredients. The income acquired by selling unlawful

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[72] Ibn Nujaim (d.970 A.H.), *al-Baḥr al-Rā'iq Sharḥ Kanz ul-Daqā'iq*, Dār al-Kutub al-Islāmi, n.d. vol.5., p.279.

[73] Ibn Nujaim, *Al-ashbāh wa al-naẓā'ir*, vol.1, p.93; Al-Sarakhsi, *Al-mabsūṭ*, vol.1, p.77; Ibn Nujaim, *Al-baḥar al-Rā'iq*, vol.8, p.255; Al-kāsānī, Badā'i' al-Sanā'i', vol.5, p.58.

products would be filthy and must be disposed of in a lawful manner. It should be something that is clean (*ṭāhir*) and is not filthy or affected by filth. This condition is laid down by the majority of the jurists and not by the *Ḥanafis*. It can be easily merged with the first condition.[74]

Sale of human blood today for the purpose of transfusion and donation and the sale of human eye can be covered by the principle of necessity. Since adultery, obscenity and immorality are prohibited by the *Sharī'ah*, any contract or transactions that entails these evils or promotes them in any way is also forbidden. Similarly, the publications containing obscene content are not allowed and any profit out of it would be considered unlawful (*ḥarām).*

Similarly, according to Imam Abu Yusuf (R.A.) and Imam Muhammad (R.A.) musical instruments are unlawful subject matters in the eyes of Islamic law provided the contracting parties are Muslims as these are the means of distraction from the right path. According to Imam Abu Hanifa (R.A.) their sale will be valid if not used as instruments for playing music.[75] Hence, for a transaction to be valid under Islamic law it is established that the subject matter is something legally permissible. Contract for wine, swine and musical instruments are, however, allowed for non-Muslim consumers of an Islamic state.

b) Owned by Someone (Mamlūkun)

The legality of the subject-matter also requires that the commodity should be owned by someone. Hence, sale of things not owned by a determined owner is void

[74] Nyazee, *Outlines of Islamic Jurisprudence*, p.142.
[75] Al-Kāsānī, *Badāi' al-Sanā'i'*, vol.5, p.144.

such as the sale of grass and water etc.[76] There should be no encumbrance or right attached to the subject-matter such as the sale of mortgaged property to which the rights of the creditor/mortgagee are linked.

c) *Existence of the Subject Matter (Mawjūdun)*

Another condition for a product in Islamic law of contract is that it must be in existence at the time of the contract.[77] The contract is considered void, when the subject-matter is non-existent at the time of the contract of sale. The subject matter must be in actual existence and not in the fancy of the party for instance, the seller says to the buyer: "I sell you this diamond for so much," and the diamond turns out to be glass. As regards non-existent object, Muslim jurists, in general, hold the view that their sale is invalid. They base this opinion on the following tradition of the Holy Prophet (pbuh): *"Sell not that which you do not have".*[78]

The product should be well known to the parties. It is also required under Islamic law that the subject matter is capable to be delivered at the time of conclusion of a contract is an essential condition to make a valid contract. If such a capacity is lacking, the contract is void and this position is not altered by the fact that the seller was able to deliver the goods after the time of contract.[79] The same rule has also been incorporated in Majjallah that states: The thing sold must be in existence.[80]

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[76] Ibid., vol.5, p.146.
[77] Ibid., vol.5, p.138. The contract of *Salam* and *Istiṣnā'* are two exceptions from the general rule.
[78] Abū Dawūd, *Sunan*, Abwāb ul Ijārah, tradition no. 3503, vol.3 p.283.
[79] Mansūrī, *Islamic law of Contract and Business Transaction*, p.41.
[80] Majjalah, Art.197.

d) Ability to deliver the subject matter (Maqdūr ut-Taslīm)

Another condition is that the ability or capacity to deliver the subject matter of the contract at the time of conclusion of a contract is an essential condition to make a valid contract. If such a capacity is lacking, the contract is void and this position is not altered by the fact that the seller was able to deliver the goods after the time of contract.[81] In this context, the Holy Prophet (pbuh) said that it is not allowed to sell food items before they have been delivered. [82]

Inability to deliver may be actual and real or it may legal inability that is, declared so by the *Sharī'ah*. The jurists explain actual inability through examples such as the sale of fish in water or birds in the air.[83] Legal inability is illustrated by the sale of a beam in one's house, which is not demolished but in use.[84] The *ḥanafis*, however, maintain that in case of actual inability the contract is void (*Bāṭil*), but in the case of legal inability the contract is irregular (*fāsid*). Thus, if the seller were to demolish the house and deliver the beam to the buyer the latter would be forced to perform the contract as the cause of inability stands removed.[85] In the context of product liability all these conditions should exist in a product.

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[81] Al-Kāsānī, *Badā'i' al-Sanā'i'*, vol.5, p.147.

[82] Aḥmad b. Ḥanbal, *Musnad*, tradition no.396, vol.1, p.457; Al-bukhārī, *Saḥīḥ*, tradition no.2124, vol.3, p.66; Muslim, *Saḥīḥ*, tradition no.1525, vol.3, p.1159; Ibn Mājah, *Sunan*, tradition no.2226, vol.2, p.749; Abū Dawūd, *Sunan*, tradition no.3492, vol.3, p.281; Al-tirmidhī, *Sunan*, tradition no.1291, vol.2, p.577.

[83] Majma' ul-anhār, vol.2, p.55.

[84] Al-Marghīnānī, *Al-Hidāyah*, vol.3, p.44.

[85] Niyazee, *Outlines of Islamic Jurisprudence*, p.143.

4.3.3.3. The Notion of 'Liability' in Islamic Law

As far as the notion of liability is concerned, Islamic law termed it (*dhimmah*). In Islamic law, the general principle is freedom from liability which is incorporated in the well established principle of Islamic law: "*Al-asl Barā'ī ul-dhimmah*" i.e. freedom from liability is the fundamental principle.[86] According to this principle of Islamic law no one is liable to be penalized until his guilt is established by lawful evidence. Till that time, he is presumed to be innocent. The reason is that innocence is a state of certainty, and guilt is doubtful.[87] This presumption of innocence from liability is based on a *ḥadīth* of the Holy Prophet (pbuh) which places the burden of proof on the plaintiff. The Prophet (pbuh) said: "*The burden of proof is on plaintiff and the defendant must take an oath*".[88] The liability under Islamic law is classified into three kinds i.e. liability for worship, criminal liability and civil liability. This explains that how and when liability in Islamic law can be assigned to the perpetrators.

4.3.4. Juridical Bases for Developing an Islamic Theory of Product Liability

Modern Muslim writers have paid some attention to criminal liability in Islamic law, but not much attention has been paid to the civil liability in it.[89] This is a wide area and needs attention for purposes of compensations and damages. Many of the rights of citizens are guaranteed through this area".[90] This research attempts to provide juridical grounds in Islamic law for developing the theory of product liability.

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[86] Zarqā', *Al-Madkhal al-Fiqhi al-'Āmm*, vol.2., p.270.
[87] Mansūri, *Sharī'ah Maxims: Modern Application in Islamic Finance*, p.144.
[88] Al-tirmidhī (d.279 A.H.), *Sunan*, Dār al-Gharb al-Islāmi, Beirut, 1998, vol.3, p.19.
[89] Niyazee, *Islamic Legal Maxims*, Advanced Legal Studies Institute, Islāmabād, 2013, p.165-6.
[90] Ibid.

In Islamic law civil liability in the context of product liability can be established on the basis of *Maqāṣid al-Sharī'ah*. As it has been mentioned earlier that the objectives of *Shari'ah* in relation to people are to secure their interest and avert harm from them. This objective has been taken care of in various *aḥkām* that provide mechanism to protect the individual against the actual as well as expected harm.

However, under Islamic law the detailed rules about civil liability for defective products can be traced in the law of contract and that of torts. Hence, the bases of product liability under Islamic law are two-fold i.e. a general theory of redressing the harm and secondly harm caused in due course of a business. In case there is contract between the manufacturer and the ultimate consumer any liability arising from such a relationship will be dealt under Islamic law of contract. In case there is no contract then the issue can be covered in accordance with the rules of Islamic law of tort. Hence, Islamic law imposes the liability upon the producer/manufacturer for the harms caused to the consumer by their defective products. The basic purpose is to compensate the person being harmed and give him an adequate remedy. In Islamic law there are a number of principles and legal maxims on the basis of which the notion of product liability can be developed. However, two principles of Islamic law are of great significance in this regard. These are the: (*la ḍarar wa la ḍirār*), i.e. no harm and no counter harm and (*al-kharāj bil-Ḍamān*') i.e. every profit has a corresponding liability. These principles are further elaborated in the context of product liability as follows:

4.3.4.1. Every Profit has a Corresponding Liability: (Al-Kharāj bil-Ḍamān)

In order to establish the concept of 'Product Liability' under Islamic Law in the context of commercial transactions,[91] the well known principle of Islamic law *'Al-Kharāj bil-Ḍamān'*[92] *"Al Ghunum bil Ghurum"* i.e. every profit has a corresponding liability is quite relevant.[93] For example, the lessor bears all risks in respect of leased property. He takes liability of loss, or damage, to his property. So he is also entitled to reap benefit from it in the form of rentals.[94]

The basis of this principle is a tradition of the Holy Prophet (pbuh) that a person purchased a slave, who stayed with him for some time. After some period, the buyer discovered a defect in the slave. He complained to the Holy Prophet (pbuh), who ordered his return to the owner. The owner asked that the buyer has used his slave, so he should be held liable to pay for the use. The Prophet (pbuh) said: *"benefit accompanies liability and risk"* meaning thereby that this benefit is against the risk and liability that he has borne, with regard to property, while in his custody, since if he had died before being returned, it would have died as his property.[95] According to the principle, all types of profit in Islamic law are justified on the basis of liability (*ḍamān*). This may be translated as: Entitlement to profit (revenue) is based on a corresponding liability for bearing loss. This principle

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[91] Same principle would also apply in cases of liability for faulty services.

[92] Abū Dawūd, *Sunan*, tradition no. 3508, vol.3, p.284.

[93] The principle according to majority view point does not apply to a case where a person has usurped, or unlawfully appropriated, property of another person. As such the usurper cannot be held entitled to benefit from the property, on account of his liability towards its real owner.

[94] Mansoori, *Sharī'ah Maxims: Modern Applications in Islamic Finance*, Sharī'ah Academy, International Islamic University, Islamabad, p.181-182.

[95] Ibn Mājah, *Sunan*, tradition no.2243, vol.2, p.754; Abū Dawūd, *Sunan*, tradition no.3508, vol.3, p.284; Al-tirmidhī, *Sunan*, tradition no.1285, vol.2, p.572; Al-nasā'ī, *Sunan*, tradition no.4490, vol.7, p.254.

provides that a person is entitled to profit only when he bears the risk of loss. The principle operates in a number of contracts such as contract as sale, hire or partnership. A business man is entitled to profits and gain in his business because he is ready to bear loss. Similarly, owner of a house is entitled to rent of his house in the hiring contract because he subjects himself to the risk of its destruction and damages to it. This risk makes him the rightful owner of its rent. All profit that has occurred to the partners in a partnership contract is also attributable to this principle of liability. On the other hand, any access over and above the principle sum paid to the creditor by the debtor is prohibited because the creditor does not bear any risk with regard to the amount lent.[96]

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

[96] Al-Taḥāwī, *Sharḥ Ma'ānī al-athār*, tradition no.5734, vol.4, p.59; 'Abdul Razzāq, *Muṣannaf*, tradition no.14657, vol.8, p.145; Ibn Abi Shībah, *Muṣannaf*, tradition no. 20690, vol.4, p.327.

An explanation of this principle may be found in the words of Al-Kāsānī, the Ḥanafī jurist. He states:

> "The rule, in our view, is that entitlement to profit is either due to wealth (*māl*), or work (*'amal*) or by bearing a liability for loss (*ḍamān*). As for entitlement due to wealth, it is obvious, because profit is a growth in wealth and belongs to its owner. It is for this reason that the *rabb ul-māl* in a contract of *muḍārabah* is entitled to profit and likewise the partner (*sharīk*). In the cases of *ḍamān* (liability for bearing loss), if the *muḍārib* were made to bear the liability for loss, he would be entitled to the entire profit."[97]

In the context of product liability consumers should expect to receive products that are safe as well as in working conditions and priced fairly, they should also be notified of any deficiencies. The basic issue in order to ascertain liability for the defective product is that who should bear the responsibility i.e. the manufacturer, the retailer, the importer, the seller etc. This situation becomes very clear after consulting the well known principle of Islamic law which suggest that the perpetrator who has caused the wrong is bound to redress the victim. In this context, the basic principle that establishes the liability of manufacturers, retailers and sellers etc. for the damages caused by defectives products is *"Al-Kharāj bil-ḍamān"* i.e. every profit has a corresponding liability.[98] This is a well-established principle of Islamic law. The liability arising from defective products is covered under the notion of *ḍamān al 'uqūd (contractual liability)* under which if the seller sells anything defective that causes harm to any one, he can be held liable for that

[97] Al-Kāsānī, (d.587 A.H.), *Badā'i' wa al-Sanā'i'*, Dār al-Kutub al-'Elmiyyah, 1986, vol.6, p.62.
[98] Al-sarakhsi, *Al-mabsūṭ*, vol.5, p.72; Al-ghānim, *Majma' ul-damanah*, vol.1, p.224; Al-suyūṭī, *Al-ashbāh wa al-naẓā'ir*, vol.1, p.135; Ibn Nujaim, *Al-ashbāh wa al-naẓā'ir*, vol.1, p.127.

under the general principles of Islamic law. [99] This seems to be in compatibility with the theory of strict moral enterprise liability that is considered the basis of modern product liability law. This theory is advanced by Jane Stapleton according to which everyone who gains some sort of profit from an enterprise will be held liable in accordance with their proportionate in profit.[100]

4.3.4.2. No Harm and No Counter Harm (*La Ḍarar wa La Ḍirar*)

Islamic law prescribes certain rules which should be observed while redressing harm. These rules have been embodied in certain secondary maxims. These maxims serve as controllers for the above mentioned primary maxims. These are: a greater harm may be avoided enduring lesser harm; to avoid the public injury a private injury may be suffered; repelling an evil will be preferred to securing a benefit and harm is not removed through another of the same nature. *La Ḍarar wa La Ḍirar*, or *Al-Ḍararu Yuzāl*: there must be no incipient or retaliatory injury, or Harm must be eliminated is the basic rule in this context.[101] These principles of *Sharī'ah* provide the basis for product liability under the Islamic law of torts. The principle means that the harm and retaliation by another harm is not allowed. It has been interpreted in two ways: harm is not allowed whether as an initiative or in response and no harm should be caused and none should be suffered.[102]

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[99] See chapter 5 of the thesis for a detailed discourse on the product liability under Islamic law of contract.

[100] To learn more about the *strict moral enterprise liability* read Jane Stapleton's book on *Product Liability*, Butterworths, 1993.

[101] The counterpart of the above maxim in Western law is the maxim *'injuria non excusat injuriam'* meaning that one wrong does not justify another. See Bryan A. Garner, Chief ed. *Black's Law Dictionary*, 1645.

[102] Ibn Nujaim, *Al-ashbāh wa al-naẓā'ir*, vol.1, p.74.

The source and phraseology of this maxim, also cited as *al-Ḍararu Yuzāl* [103] is the *ḥadīth* reported by several compilers.[104] Causing initial harm to another in any way, shape or form is forbidden in Islam, and retaliatory harm is also forbidden. If someone were to harm another's fence or wall, it would likewise be forbidden for the victim of such action to respond by retaliatory destruction; rather, the solution would be to seek recourse through the judicial system. An example of the eradication of incipient harm is where the state/ municipality may order a person to redirect his gutter if it flows into the public thoroughfare in such a manner that it causes harm to the passersby, or to tear down an addition to his property if such addition protrudes beyond his property line. Article 345 of the *Majallah* cites a more intricate illustration:

> "If an ancient defect in the thing sold appears after a defect has come to it while with the purchaser, the right of the purchaser to return it to the seller no longer exists, but he has a right to demand a reduction of the price."[105]

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

Similarly, one of the sub maxims of the above mentioned maxim is *Al-ḍarar al-Ashad Yuzāl bil Ḍarar al-Akhaf:* i.e. the greater harm is removed by a lesser harm.

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[103] Ibn Nujaim, *Al-ashbāh wa al-naẓā'ir*, vol.1, p.72; Muḥammad Siddīq b. Aḥmad al-Burnu, *al-Wajīz fi 'Idah Qawā'id al-Fighiyyah al-Kuliyyah*, p.192.
[104] Ibn Mājah (d. 275/888), *Sunan*, tradition no.2340, vol.2, p.784; tradition no.2342, vol.2, p.785.
[105] The Majallah, Art.345.

Ibn Nujaym illustrates this maxim in the ruling regarding someone who takes illegal possession of a particular piece of lumber in his building. If the value of the building exceeds that of the lumber, then the owner of the building is given possession of the lumber after paying its due price. If, however, the lumber is more valuable than the building, then the ownership of the rightful possessor of the lumber is upheld.[106] This rule can be applied in cases where there is clash between the interests of a producer and the general body of consumers in favour of the later because their interest is greater than that of the producer.

It is also a well established notion of Islamic law that the private harm is borne in order to avert a more general harm *(Yutaḥammal al-Ḍarar al-Khāṣ li Daf'i al-Ḍarar al-'Āmm).*[107]This allows, for example, the proscription of a doctor from practice if it is determined that he is incompetent, and that permitting him to continue practice would endanger the lives of patients.[108]Another example is where the government could impose price restrictions on food suppliers, thereby causing them to profit less, but ensuring that their customers are not exploited.[109] Thus, the meaning of these maxims is that no injury be done to anybody in any circumstances and that injury should not be met with injury. It suggests that a person, who has suffered some grievance, should not inflict the grievance as he had suffered on another.

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[106] Ibn Nujaym, *Al-ashbāh wa al-naẓā'ir min Madhhab Abī Hanifa al-Nu'mān*, p.88.

[107] Ibid.

[108] Al-burnu, Muḥammad Siddīq b. Aḥmad, *al-Wajīz fi 'Idah Qawā'id al-Fiqhiyyah al-Kuliyyah*, p.207.

[109] Khalil Muḥammad, *The Islamic Law Maxims*, Islamic studies, Occasional Papers 62, p.25-27.This sub-maxim has its counterpart in western law as "*Lex citius tolerate vult privatum damnum quam publicum malum*"- The law would rather tolerate a private wrong than a public evil," and its corollary "*Privatum incommodum public bono peusatur*"-private inconvenience is made up for by public benefit (Bryan A. Garner, Chief ed. Black's Law Dictionary, 1653, 1676).

The maxim is applicable to a considerable number of rulings of Islamic law. The liability arising from a defective product is covered under the above discussed principles of Islamic law of tort i.e. *fiqh al-ḍamān*. If the seller sells anything defective that cause harm to any one, he can be held liable for it under the general principles of Islamic law. The principle of elimination of detriment has been especially observed in the sphere of contracts and business transactions. The perpetrator who has caused the wrong is bound to redress the victim in all the cases. The above mentioned principle of Islamic law has shown that under what rules of Islamic law of torts, anyone who causes harm to another directly or indirectly can be held liable for which the rule of *privity* was never a barrier under the Islamic law of tort.[110]

4.4. PRODUCT LIABILITY AND ENGLISH LAW

4.4.1. The Concept of Product Liability in English Law

Product liability in English law has been defined as 'the liability of a professional supplier of a product for damage caused by a defect in that product'. The concept of product liability performs the economic function of cost distribution by allocating the risks (and the liability for damages) either by legislative or judicial means.[111]

[110] For further comparison on the rule of *privity* in English law and Islamic law, see chapter 5 of the thesis.

[111] Duncan G. Smith, *The European Community Directive on Product Liability: A Comparative Study of its Implementation in the UK, France and West Germany*, Kluwer Law International, 2007; http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1001&context=faculty_publications&sei-, last accessed on 12.07.2013.

Traditionally the English common law has dealt with the protection of consumers in the context of product liability under the law of contract and law of torts. In earlier English common law there were no rules governing a seller's responsibility for defects in its products and no private law under which an aggrieved consumer might sue the seller for damages caused by faulty products. With the passage of time an elaborate system of localized criminal regulation of product quality was developed at the town level. But the focus of such local statutes was to protect the consumers against cheating in trade rather than protecting them from being injured. The main concern of these laws was on regulating business rather than safety of the products. The late Roman law's insistence on the fair quality of products sold was largely absent from the rustic local law of medieval England, but certain aspects of Justinian's Digest from late Roman law wended their way to a limited extent into early English law through the dominant role in society of the church, the scholars of which were trained in the civil law.

In the thirteenth century, Thomas Aquinas (1225-1274 A.D.) in his Summa Theological outlined the basic mercantile obligations consistent with those expressed by Justinian in his Digest. Thus, the seller was bound to disclose secret flaws: it was sin and fraud to sell a product containing a latent defect known to the seller and not the buyer, and the sale was void. If the seller was unaware of the defect, the sale was not a sin, but the seller was obligated to return to the buyer any excess in the price attributable to the defect. The buyer was responsible for obvious defects, according to Aquinas, so that the seller was not bound to disclose

such defects from "*any duty of justice*," but to do so would reflect "the more exuberant virtue."[112] The virtues of the ecclesiastical doctrine of seller responsibility for defective products did not hold much sway in early England, where the common law over time developed the notion of *caveat emptor*, "let the buyer beware."[113] This doctrine extended the law's early duty of a buyer to protect himself against obvious defects to embrace an obligation to protect himself against hidden defects as well, and any notion of an implied warranty of quality, lingering from the late Roman and ecclesiastical law, withered into oblivion. So, by 1600, the consumer rather than the seller bore the risk of product defects under English law. For the next two centuries, except for cases of fraud and breach of express warranty, the doctrine of *caveat emptor* ruled supreme.[114]

In 1810, the English courts finally replaced the *caveat emptor* rule-that the buyer takes the risks of hidden product defects-with precisely the opposite doctrine, the implied warranty of quality-that the seller impliedly warrants that its products contain no hidden defects. Five years later, Lord Ellenborough explained the fundamental notion of the implied warranty of merchantable quality:

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[112] See http://www.allbusiness.com/legal/torts-products-liability/8923297-1.html, last accessed on 12.08.2013.

[113] The caveat emptor principle, that literally means let the buyer beware, has been followed for many years by the Courts of England. These simple words were an easy focus for judicial thought, a principle to be invoked when the going is difficult, a guide to be followed amid the baffling uncertainties of litigation1. Emptor in Latin is the buyer and the verb *cavere* is a verb of caution: caveat emptor was the perfect principle for transactions involving not massive quantity of goods. The case that clearly illustrates the situation up to seventeenth century is *Chandelor* v. *Lopus* in which the plaintiff brought an action against the defendant for the selling of a *Bezoar* Stone. This particular stone, found in the stomach of some animals, was supposed to have medicinal properties. The majority of the court held that the evidence was insufficient to find the defendant liable because of the absence of any written warranty.

[114] See http://www.allbusiness.com/legal/torts-products-liability/8923297-1.html, last accessed on 12.08.2013.

> "The purchaser has a right to expect a saleable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of caveat emptor does not apply. He cannot without a warranty insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill".[115]

Subsequent cases established that this basic warranty of quality requires not only that the goods delivered must be genuine according to the name, kind or description specified, but that they must be of a quality to pass in the market under that description, and this in turn to mean that they must be reasonably fit for the ordinary uses to which such goods are put. In short, the implied warranty of merchantable quality reflected the view that sellers are accountable, as a matter of law rather than of their intent, for defects in products that they sell. During the 19th century a considerable body of case law developed around the buyer/seller relationship and the Sale of Goods Act appeared on the statute book in 1893. The Act was amended by the Supply of Goods (Implied Terms) Act 1973[116], and these and other changes were consolidated in the Sale of Goods Act 1979. This in turn has been amended by the Sale and Supply of Goods Act 1994 and most recently the Sale and Supply of Goods to Consumers Regulations 2002.[117]

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[115] Joseph Chitty, *A Practical Treatise on the Law of Contracts*, Law Bookseller and Publisher, London, 1834, p. 349.

[116] White, Fidelma, "Sale of Goods Law Reform: an Irish Perspective", Common Law World Review, 2013.

[117] Geraint G. Howells & Stephen Weatherill, *Consumer Protection Law*, p.150; The author mentioned in the footnote that the Law Reform (Enforcement of Contracts) Act 1954 removed the

The second most important product liability regime in England is the tort based liability of the manufacturers of defective products. The alternative to suing on the basis of contract (if there is one) is to sue in tort-the tort of negligence.[118] The tort of negligence entitles any party, commercial or private, to recover damages for any physical injury to his person or property where it was caused by the defendant's negligence in breach of a duty.[119]

The English consumer protection law in the context of product liability evolved as a dichotomy of the law of contract and law of torts achieved the statutory form due to the enactment of various consumer protection acts. In the United Kingdom product liability is usually taken to mean that class of liabilities to which commercial manufacturers and commercial suppliers of goods are subject because a product has caused some form of actionable loss to either a business, a consumer (someone who intends to use the product for private use) or a bystander.[120] The UK concept of products liability not only embraces users but since *Thalidomide*[121], also

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rule which rendered unenforceable contracts for the sale of goods valued at more than ten pounds which had not been evidenced in writing. http://www.pc.gov.au/ data/assets/pdf file/0014/10283/sub042.pdf; White, Fidelma. "Sale of Goods Law Reform: an Irish Perspective", Common Law World Review, 2013.

[118] As far as the sources of tortuous liability in the context of product liability is concerned the English internal statutes and statutory instruments and the common law are sources of tortuous liability[118] examples being the Civil Liability Act 1978, the Fishing Vessel (Safety Provisions) Rules 1975, etc. and cases like *Yachuk v Oliver Blais Co Ltd* (1949), *Evans v Souls Garage* (2000) about the age for contributory negligence causing injury.[118]

[119] Jane Stapleton, *Product Liability in United Kingdom: Myths of Reforms*, Texas International Law Journal, Vol. 34:45.

[120] Alister M. Clark, *Product Liability*, p.25.

[121] In the late 1950s and early 1960s, the drug *thalidomide* caused an estimated 10,000 birth defects and thousands of fatal deaths worldwide. The affected babies typically suffered from *phocomelia*, a failure of the limbs to develop. These unfortunate children were cruelly referred to as *"flipper babies"*. Thalidomide had been prescribed to pregnant women to help reduce morning sickness, but tragically, it turned out to be toxic to developing foetuses http://www.prijatelji-zivotinja.hr/index.en.php?id=582: For further detail on the topic read chapter 6 of this thesis.

places bystanders at the very centre of stage.[122] Hence, today in United Kingdom, the product liability law has three aspects: contract regime; tort regime (fault-based liability); and statutory strict product liability regime. All these regimes operate concurrently and, depending upon the situation in a particular case, one, two or all three may be applied by a plaintiff in an attempt to recover damages for loss.

4.4.2. Substantive Law Developments in United Kingdom on Product Liability

There have been extensive developments in the substantive law on product liability in United Kingdom. Developments in science and technology constantly exert new pressures on existing legal concepts. The speed and accuracy with which those concepts are able to adapt to such challenges have important social and economic consequences.[123] After becoming member of the European Union, England's sources of law are expanded in a manner that it includes EU legislation. As far as the sources of product liability law in England is concerned, the traditional principles of contract, torts and statutes, England being a member state of the European Union, also adopt the legislation of the European Community: treaties, conventions, declarations, protocols, regulations, directives, decisions; for instance, Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety. Besides this, decisions or judgements of

[122] Jane Stapleton, *Product Liability in United Kingdom: Myths of Reforms*, Texas International Law Journal, Vol. 34:45; http://dev.oldsquaredns.net/pdf_articles/3100126.pdf, accessed on 12.03.2014.
[123] Jane Stapleton, *Software, Information and the Concept of Product*, Tel Aviv University Studies in Law, Vol.9, 1989.

European Court of Justice (ECJ) are important sources of English law on tort under Article 234 of the EC Treaty 2002.[124]

One of the major development in English products liability law in the nineteenth century pertained to tort liability, rather than warranty (which by then had been absorbed largely by the law of contract), and concerned the applicability of the notion of *privity* of contract to actions brought in tort. Unlike the development of the implied warranty of quality, which served to broaden contractual protection for buyers of defective goods, the *privity* of contract rule went the other direction by restricting tort law's protection of persons injured by defective products. From the barriers of *privity* of contract and negligence in torts the English law has been developed to the position of strict product liability by promulgation of the Consumer Protection Act, 1987. The Consumer Protection Act, 1987 is based on the EU Directive on Product Liability (85/374/EEC).

4.4.3. The Legislative History of the EC Directive on Product Liability

In the early 1970s there were a number of children in Britain who had suffered a reaction to vaccination and who, it was claimed, were left with resultant brain damage. It was not easy to establish an action in tort of negligence in these cases. Therefore, an association (APVDC-Association of Parents of Vaccine Damaged Children) was formed in 1973 by parents of these children. Accusing the Department of Health of 'a conspiracy of silence', their action led eventually to a system of compensation, but not before the level of take-up of whooping cough

[124] Cf. Slapper, Garry & Kelly, David, *English Legal System 2003 – 2004* (5th edn, Cavendish, NSW 2003) pp. 2-3.

vaccine had declined from seventy-nine per cent in 1973 to thirty-one percent in 1978. This fall-off was attributed to the adverse publicity generated, particularly in relation to the pertussis element in the triple DTP Vaccine. In 1978, the number of notifications of whooping cough rose to its highest level since 1957-the date of national introduction of DTP Vaccine. The epidemic between 1977-79 was blamed on the decline in vaccine acceptance. The person Report recommended that the issue of vaccine injury pending would take too long to implement. Therefore an 'interim' scheme was adopted under the Vaccine Damage Payments Act 1979. Under this Act a tribunal consisting of a lawyer and two physicians (often a neurologist and a paediatrician) determine on the weight of medical evidence whether the brain damage from which the child suffers is caused, on the balance of probabilities, by the vaccination.[125]

Thus the touchstone for liability has become whether the product is defective rather than being based on the producer's behaviour. Defectiveness is defined in terms of whether the product lacks the standard of safety which the consumer is entitled to expect. Controversially, the development risks defence is permitted and primary agricultural produce and game are excluded. Although Member States have the option of derogating from these provisions the United Kingdom has chosen not to do so.[126]

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[125] Geraint Howells, *Product Liability, Insurance and the Pharmaceutical Industry: An Anglo-American Comparison*, pp.3-4.
[126] Ibid.

The Treaty of Rome,[127] which established the European Economic Community, makes provision for measures to be taken to harmonize the diverse rules of the Member States; in Article 3 (h) that the 'activities of the Community' shall include, in addition to the traditional direct means of establishing such a market (i.e. the elimination of custom duties between Member State and the establishment of a common customs tariff in respect of third countries), 'the approximation of laws of Member States to the extent required for the proper functioning of the common market'. This has been further elaborated in Article 100 and –since amendment of the EEC Treaty by the Single European Act (as from 1987) – Article 100a. it may be noted that such approximation of 'directive' is further explained in Article 189, of the EEC Treaty. A directive is an instrument instituted under the provisions of the Treaty (Article 189(3)). It is binding on Member States but, unlike a regulation, does not apply directly to Community citizens. It is binding as to the result to be achieved, but the means of implementation are left to the discretion of the Member States. Thus the directive provides the framework within which the Member States must operate.[128]

The decision to proceed with the development of a Community policy on product liability and Consumer protection was taken by the Heads of Government in 1972 and a preliminary draft of the Directive appeared in August 1974. The Commission adopted a proposal on 23 July 1976 which was submitted to the Council of

[127] Treaty dated 25 March 1957.
[128] Duncan G. Smith, *The European Community Directive on Product Liability: A Comparative Study of its Implementation in the UK, France and West Germany*, Kluwer Law International, 2007.

Ministers on 9 September 1976. The proposal was subsequently amended in accordance with recommendations of the Economic and social Committee and the European Parliament. The modified draft of the Directive was then submitted to the Council of Ministers by the Commission in September 1979. The revised draft was discussed by the Council in Januray 1980 with the sub-committee submitting four questions to the Committee of Permanent Representatives. Although answers were given, the Directive became bogged down in prolonged discussions on a number of issues on which a compromise was difficult to achieve. It was only the provision of optional elements which broke the deadlock and ultimately allowed the Council to adopt the Directive on 25 July 1985.[129] After many years of discussion, the EC Directive on product liability (85/374/EEC) was adopted on 25 July 1985 by the Council of the European Communities. The Directive is a response to the concern of governments of the Member States at the *Thalidomide (Softenon)* cases in the 1970s. In this context Jane Stapleton writes:

> "The Thalidomide disaster in Europe was clearly the catalyst for the reforms processes that culminated in the 1985 Council Directive "on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. It provides a telling benchmark by which to evaluate the impact of the latter."[130]

[129] O.J. 1985 L210/29; Council Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States concerning Liability for Defective Products (85/374/EEC).

[132] Jane Stapleton, *Product Liability in United Kingdom: Myths of Reforms,* Texas International Law Journal, Vol. 34:45 http://dev.oldsquaredns.net/pdf_articles/3100126.pdf, last accessed on 12.05.2014.

Moreover, the Directive has attempted to reduce distortions in competitive trade between Member States whilst providing a common level of protection to consumers throughout the Community against defective products.[131]

4.4.4. Transposition of the EU Directive in UK Laws

Before the European Directive on products liability was implemented in the United Kingdom's Part 1 of the Consumer Protection Act 1987 the principal pillars of products liability that in theory threatened manufacturers and suppliers in the United Kingdom as have been discussed earlier were the statutory warranties in the Sale of Goods Act 1979 and the common law action in the tort of negligence.[132]

The European Directive on product liability (85/374/EEC) imposes liability for defective products on certain parties involved in the commercial manufacture and the supply of products.[133] The victim must prove actionable damage, the defect and causal relation between the two.[134] The defendant is provided with certain defences: that there was no defect at the time of supply[135] (useful for defendant facing claims in relation to post-supply tampering); that the product has not been put into circulation[136] that the product had not been put into commercial circulation[137] or that the state of scientific and technical knowledge at the time when the product

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[131] Duncan G. Smith, *The European Community Directive on Product Liability: A Comparative Study Of Its Implementation in the UK, France And West Germany*, Kluwer Law International, 2007.
[132] Jane Stapleton, *Product Liability in United Kingdom: Myths of Reforms*, Texas International Law Journal, Vol. 34:45 http://dev.oldsquaredns.net/pdf_articles/3100126.pdf, last accessed on 10.05.2014.
[133] Art.4, EU Directive on Product Liability, 1985.
[134] Ibid.
[135] Ibid Art. 7 (b).
[136] Ibid Art. 7(a).
[137] Ibid Art. 7(c).

was put into circulation was not such that as to enable the existence of the defect to be discovered (the misleadingly termed "development risk defence").[138] There is contributory negligence defence, liability of multiple *tortfeasors* is joint and several and the liability is non excludable.[139] The inclusion of the development risks defence means that there has been little improvement in practice over the negligence standard, save that the burden of establishing the state of scientific and technical knowledge is now placed on the producer. However, David McIntosh in his paper argues that defendants will be in a very weak position if they solely on the development risks defence. The theme which came over very clearly from the practitioners' papers was that for all the discussion over the adoption of strict liability the major barrier to recovery remains the need to prove causation.[140]

In United Kingdom, after a lengthy and at times difficult gestation period, the debate on liability for defective products finally resulted in legislation on product liability in the form of Part I of the Consumer Protection Act 1987. Of the four major contributions to the debate made during the 1970s-the Strasbourg Convention (at European level, the movement towards a strict product liability began with the Council of Europe Convention on Products Liability in regard to Personal Injury and Death (the Strasbourg Convention) in 1977); the Report of the

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[138] The term development risk defence is misleading because the defence not only covers risks in newly developed innovative products but also covers established goods which have been on the market for a long time (Grant, L.J., "Product liability aspects of bioengineering", Journal of Biomedical Engineering, 199005).

[139] Jane Stapleton, *Product Liability in United Kingdom: Myths of Reforms,* Texas International Law Journal, Vol. 34:45 http://dev.oldsquaredns.net/pdf_articles/3100126.pdf, last accessed on 10.05.2014.

[140] Geraint Howells, *Product Liability, Insurance and the Pharmaceutical Industry: An Anglo-American Comparison*, p.5 available at: http://parki.co.uk/507phac.htm, last accessed on 12.03.2014.

Scottish and English Law Commission; the Report of the Pearson Commission; and the EEC Product Liability Directive-the last achieved primacy. Adopted in July 1985, it required Member States to implement its provisions within three years. The idea behind the Directive, and the resulting legislation, is straightforward enough: to provide a system of strict liability, rather than liability based on fault, for certain types of harm caused by defective products. The new measures came into force on March 1, 1988, and applied to products supplied from that date.[141]Hence, the EU Directive on product liability has been incorporated in the Consumer Protection Act, 1987.

4.4.5. The Advantages and Disadvantages of the Directive from the viewpoint of U.K. Consumers

4.4.5.1. Advantages:

The EU Directive on product liability has many advantages for the U.K. consumer.[142] The most prominent advantages are that the liability is in addition to other causes of action; the liability cannot be excluded or limited regardless of the type of damage or the reasonableness of the purported exclusion/limitation; the Directive imposes strict liability on mere suppliers; their reasonableness care is no answer to the claim- a particularly effective remedy for those non-purchasers injured by tainted food; the Directive imposes strict liability on importers into the European Community; the Directive imposes strict liability on own-brand

[141] Alister M. Clark, *Product Liability*, Sweet & Maxwell, p. 1.
[142] Jane Stapleton, *Product Liability in United Kingdom: Myths of Reforms*, Texas International Law Journal, Vol. 34:45 http://dev.oldsquaredns.net/pdf_articles/3100126.pdf, last accessed on 10.08.2014.

suppliers; the Directive imposes strict liability on manufacturers for defects due to the activities of a component part manufacturer or out of house designer (because even if the manufacturer used all reasonable care, and thereby escaped liability in negligence, this would be no answer to such a claim under the rule in the Directive); the Directive reverses the burden of proof on certain matters which appears in the form of defenses: whether the defect was present when the defendant supplied the product; whether the product was supplied; whether the product was supplied in course of business whether the development risk defense applies. An associated tactical advantage of this distribution of proof burdens is that it forces the defence to raise the issue in advance thereby allowing the plaintiff an opportunity which may not be available under the warranty or negligence claim, to explore evidence and arguments; by laying down a separate regime for products liability, the Directive may heighten awareness among potential claimants and their lawyers.[143]

4.4.5.2. Disadvantages:

Against these advantages there are certain drawbacks for consumers such as unlike the duty of care in negligence, no post supply obligations- e.g. to monitor for defects and to recall products if the post supply discovery of a defect makes this necessary- can arise on any party under the Directive since the defect must have been present when the product was supplied.[144] What this means is that if for example, the defect was only and could only have been discovered after supply- as

[143] Ibid.

[144] Art.7, EU Directive on Product Liability, 1985.

let us imagine was the case with Thalidomide- then the producer and supplier will not be liable under the Directive's rule for any injury caused by batches of the product already supplied when this discovery is made, even injuries occurring after the defect was discovered and by a batch that could easily have been recalled; unlike in negligence, the Directive only applies to products and makes no attempt to impose liability for services, even those directly responsible for creation of the defective state of a product such as the out-of-house designer, repairer or prescriber (whose dosage direction may be defective; unlike in negligence, the Directive provides no claim for a person injured by a defective product that has not been put into commercial circulation (victims of pollution or factory dumped faulty products, the manufacturer's work-force, etc); unlike in negligence, there is a ten year long stop which will bar claims by those suffering long latent injuries like those goods whose injury is caused by the malfunctioning of durables such as white goods and vehicles that are more than ten year old; unlike in negligence and sale of goods warranties there is a statutory threshold of 500 ECU (275 sterling) for claims of damage to property; unlike in negligence and sale of goods warranties, damage caused to commercial property is not actionable; unlike in negligence and sale of goods warranties in jurisdictions such as the United Kingdom, which have chosen to retain the exemption, no claims are possible under the Directive in relation to unprocessed game or agricultural produce; unlike in negligence and under sale of goods warranties, in cases of processed game or agricultural produce, the CPA does

not allow claims to be taken against the primary producer (the farmer). Instead the producer is deemed to be the processor.[145]

4.4.6. The Future of Product Liability in The United Kingdom

There are some important lessons that should be learnt about the product liability in order to speculate its future in U.K. In fact, the Directive has failed both doctrinally and in practice to advance significantly the position of the victim of defective products and could not deliver much as it was expected from the point of view of consumer advocates. Without realizing all such failures there is no future for product liability in Europe.[146]

The lesson for lawyers in general in the United Kingdom, European Community and further afield is not to be misled by the rhetoric of a law reform. Though the Directive's Recital speaks of imposing liability without fault on the producer, in practice only peripheral pockets of such liability were clearly created, leaving the core field of liability for in-house design and in-house warning defects as probably fault based as far as producer defendants are concerned. This is a lesson U.S.

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[145] Jane Stapleton, *Product Liability in United Kingdom: Myths of Reforms,* Texas International Law Journal, Vol. 34:45 http://dev.oldsquaredns.net/pdf_articles/3100126.pdf

[146] In this context Prof. Jane Stapleton writes: "As to the lessons to be learnt by consumer advocates, the most painful ones by far for them to accept are first, the failure of the Directive, both doctrinally and in practice, to advance significantly the position of the victim of defective products and second the inadequacy of the European Community law making machine to deliver much more than a diluted "lowest common denominator" in the field of consumer protection. Unless and until these failures are acknowledged and the causes for them understood, the future of consumer protection reforms in European countries is bleak. I am however not optimistic in this regard; products liability is no longer such a fashionable concern with consumer advocates, many of whom have gone on to other topics such as consumer guarantees. Whether this is because they take a mistakenly sanguine view of the Directive's efficacy, are embarrassed by its failure, or for other reasons, I fear the consumer lobby is losing a precious opportunity to learn from its mistakes" (Jane Stapleton's *Product Liability in United Kingdom: Myths and Realities* Texas International Law Journal, Vol. 34:45); http://dev.oldsquaredns.net/pdf_articles/3100126.pdf, last accessed on 12.05.2014.

lawyers have also taken some time to concede about their own special product liability rule.[147]

As to the doctrinal future within the United Kingdom, this jurisdiction has seen a boom recently in novel claims in both contract and the tort of negligence but none of these has directly involved in the context of products causing injury. Nor do the judicial responses to these challenges to orthodoxy suggest imminent developments which might in time influence the extent of products liability in the United Kingdom. *Privity* and consideration doctrines have been reaffirmed in the relevant areas while the recent history of negligence has seen a concern to restrain the ambit of liability rather than to recognize more extensive obligations. Conversely I have not found any hard evidence that the liability standard in the Directive has influenced how negligence or warranty law is developing. From this I would speculate that the doctrinal position of consumers and product suppliers (including manufacturers) in the United Kingdom will remain in its relatively stable state.[148]

As to the doctrinal future of EC products liability let me make two points. First at the behest of the European Parliament shocked by the scale of the Mad Cow disaster, the European Commission has recently proposed the withdrawal of the Option under the Directive which allows individual Member States to exclude unprocessed 'agricultural products' from the ambit of liability under the Directive. The inclusion of the Option to exempt was itself a monument to the political

[147] Ibid.
[148] Ibid.

power of the European agro-lobby and it remains to be seen whether the political pressure generated by the Mad Cow problem will be sufficient to outweigh it.

CHAPTER 5

PRODUCT LIABILITY UNDER THE LAW OF CONTRACT: A COMPARISON OF ISLAMIC AND ENGLISH LAWS

CHAPTER 5

PRODUCT LIABILITY UNDER THE LAW OF CONTRACT A COMPARISON OF ISLAMIC AND ENGLISH LAWS

5.1. INTRODUCTION

Contract law in any system ensures the parties to private agreements that any promises they make will be enforceable through the machinery of the legal system.[1] The contract regime of product liability is very much important as there are many ways to influence consumers' decision when buying goods. Some of the most influential methods are the implied warranties, express warranties, advertisements and guarantees made by the producer of the products. When there is any breach of these warranties or guarantees in a sense that they turn out to be false or misleading the contract regime would be applicable.[2] The liability of the seller of a good is either for misrepresentations or breaches of implied and express warranties in a contract of sale. The seller's liability is normally contractual but he can also be held liable for the widespread liability under the law of torts such as for deceit, for failing to disclose the known dangers, supplying the dangerous article into incompetent hands, omitting to inspect or to warn that an inspection has not been undertaken, failing to give adequate instructions or warnings of dangers, and for representing that a product is safe for intended use when it is not.[3]

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[1] Nyazee, *'Outlines of Islamic Jurisprudence'*, Advanced Legal Studies Institute 1998, p.105.
[2] Nassar, *'Manufacturer's Liability under Islamic law'*, LLM (unpublished) thesis submitted to the Law School, Harvard University, U.S.A. 1985, p.42.
[3] Goldberg, *Product Liability*, p.27.

This chapter attempts to explore, analyze and compare the contract regime of the product liability in English and Islamic legal systems. The chapter has highly celebrated the notions of *privity of contract*, *caveat emptor* and *strict liability* of English law of contract in the context of product liability. Moreover, the same doctrines have been analyzed in the light of *Shariah*. It has embarked on profound discussions about the scope and nature of contract regime of product liability in both the legal systems. Most common similarities and variations between the Islamic law of contract and that of English law are also underpinned. The prominent features of Islamic law of contract are deeply analyzed such as *Khiyarat*, *halal* and *haram*, and unethical and unfair contracts etc. Similarly, the meaning and scope of quality of products and the criteria for considering a product to be defective under English law of contract and that of Islamic law is elaborated in a concrete form. Moreover the notions of 'quality of goods', 'express terms', 'implied terms', 'damage', 'remedies', 'time limitation', etc. have been analyzed from the perspective of both the legal systems. The scope of manufacturer's guarantees is analyzed under English law as well as Islamic law. Moreover, the issues of third party rights, whether or not the loss caused to other property of the consumer can be recovered from the manufacturer of faulty products and what is the liability for advertisement etc. have been undertaken in this chapter.

5.2. PRODUCT LIABILITY AND THE ISLAMIC LAW OF CONTRACT

5.2.1. Islamic Law of Contract: Basic Concepts

Islamic law has highly stressed on fulfilment of contractual obligations.[4] The general principles of Islamic law of contract provide adequate protection to the consumers. Islamic law has rendered a number of transactions unlawful because they directly or indirectly violate rights of the consumers such as contracts based usury, uncertainty, adulteration, exploitation, concealment of the truth, cheating, fraud etc. Islamic law on the other hand opens the ways that lead to the promotion and preservation of consumer rights. The basic theme of this research is to assess the civil liability of harmful products therefore the chapter highlights the significance of the law of contract in cases product liability from the perspective of Islamic law of contract. The notions on which the modern product liability law is based have been traced in Islamic law in assessing the civil liability for the defective products.

Islamic law of contract is formed in such a way that protects rights of both i.e. the seller and the buyer.[5] The term *Bay"* is usually translated as sale; however, it has a

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[4] There are number of verses in Holy Qur'ān that prescribe this rule such as it says: O ye who believe! fulfil (all) obligations. Lawful unto you (for food) are all fourfooted animals, with the exceptions named: But animals of the chase are forbidden while ye are in the sacred precincts or in pilgrim garb: for God doth command according to His will and plan *(*Qur'ān 5:1*), "Those who keep their promises when they make them,"* (Qur'ān 2: 177), and *"I too promised, but I failed in my promise to you" (*Ibrahim: 22.This is the statement by Satan.*) etc.*

[5] Islamic law of contracts is based upon the following types of commercial transactions i.e. Contract of Sale, Contract of *Ijarah* (Leasing), Contract of *Mushārakah*, and Contract of *Muḍārabah*, Contract of *kafālah* (surety ship), Contract of *ḥawālah* (assignment of debt) and Contract of *Rahan* (Pledge) etc. All these contracts have great concern with consumers as to get some goods or services is the ultimate motive behind these contracts. The consumer cannot fulfil their needs and requirements without entering one of these contracts. However, the research in hand is focused on product

much wider meaning in Islamic law. The term Bay" has a more comprehensive meaning, being, defined to be an exchange of property for property with mutual consent. The eminent Ḥanafī jurist Imām Kāsānī has defined Bay' as it is an exchange of a useful and desirable thing for similar thing by mutual consent in a specific manner.[6] The *Majallāh* defines a sale as:

> *"The exchange of property for property", and in the language of the law, it signifies an exchange of property for property with mutual consent of the parties, which is completed by declaration and acceptance.*[7]

The term *Bay"* covers all commutative contracts, that is, contracts in which there is an exchange of two counter-values. Legitimacy of the contract of *Bay'* is established from the primary sources of Islamic Law.[8] Hiring (*Ijāra*) is often referred by jurists as the sale of benefits arising from property rented or service rendered.[9]

5.2.1.1. Legitimacy of Sale

The contract of sale is legalized by the basic sources of *Sharī'ah* i.e. the Holy Qur'ān and traditions of the Holy Prophet (pbuh). The Holy Qur'ān has permitted this in the words:

> *"Allāh hath allowed trading and prohibited Ribā.*[10]

The Holy Qur'ān says:

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liability therefore the main concern is to discuss provisions from those chapters of *Fiqh* where there is delivery of goods such as *Bay'* and *Ijāra*.

[6] Kāsānī, *Badā'i' al-Sanā'i'*, vol.5, p.133.

[7] Majallah, Art. 105.

[8] Qur'ān says: *"And Allāh has permitted sale"* (Qur'ān 2:278). It also says: "O you, who believe, devour not your property among yourselves by unlawful means except that it be trading by your mutual consent" (Qur'ān 4:29).

[9] Al-Kāsānī, *Badā'i' al-Sanā'i'*, vol.4, p.173; Al-Sarakhsī, *Al-mabsūṭ*, vol.15, p.74; Al-Marghīnānī, *Al-Hidāyah*, vol.3, p.230.

[10] Holy Qur'ān, 2: 275.

> *"O you who believe! Do not devour your property among yourselves falsely except that it be trading by your mutual consent".*[11]

This aspect is further strengthened by the fact that the Prophet (pbuh) himself, the Companions and the eminent jurists conducted business and entered into the contract of sale. The holy Prophet (pbuh) also gave it much importance by saying:

> *"That one of you takes his rope and then comes with a load of wood upon his back and sells, it is better than to beg of men whether they give or reject him".*[12]

While encouraging truthfulness in sale transactions, the Holy Prophet (pbuh) stated that the truthful merchant (will be rewarded by being ranked) on the day of resurrection together with the Prophets, the truthful ones, the martyrs and the pious people. The Prophet is also reported to have said: "Allāh will let the man enter the paradise who is an easy purchaser (in bargaining), and easy vendor (in selling), and easy debtor (in repaying the debts) and an easy creditor (in lending and demanding back the loans)."[13]

The holy Prophet also said:

> *"The best earnings are those of the businessman who does not tell a lie when he speaks; does not misappropriate the trust; does not break the word if he promises; does not cavil while making purchases; does not boast while selling his goods; does not prolong the period of repayment of loan; and does not cause difficulty to his debtors!" Further:*

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[11] Holy Qur'ān, 4: 29.

[12] Al-bukhārī, *Saḥīḥ*, tradition no. 2373, vol.3, p.113; Muslim, *Saḥīḥ*, tradition no. 1042, vol.2, p.271; Ibn Mājah, *Sunan*, tradition no.1836, vol.1, p.588; Al-nasā'i', *Sunan*, tradition no.2584, vol.5, p.93; Aḥmad, *Musnad*, tradition no. 1430, vol.3, p.43.

[13] Ibn Majah, *Sunan*, tradition no.2203, vol.2, p.742; Malik, *Muwaṭṭah*, tradition no.100, vol.2, p.685; Al-bayhaqi, *Al-sunan al-kubrā*, tradition no.10978, vol.5, p.585.

"The best type of earning is Bay' based on truth and earnings of one by his own hands".[14]

Abū Sa'īd khudrī reported: "The Messenger of Allāh (pbuh) said: *'The contract of sale becomes (lawful) with the consent (of both the parties)'.*"[15]

5.2.1.2. Elements of Contract in Islamic Law

There are various views regarding the elements of the contract in Islamic law. Majority is of the view that the essential elements of a contract are four: (a) *Sīghah* the form i.e. (offer and acceptance); (b) the seller; (c) the buyer and (d) the subject matter (*ma'qūd 'alayh*).[16] Ḥanafī jurists hold that there is only one element of a contract; namely, the *Sīghah* (form) i.e. *Ijāb* and *Qabūl.*[17] This, however, implies the existence of other elements. From the practical point of view, there is not much difference between the opinion of the *Ḥanafī* jurists and that of the majority.

Sīghah, consisting of *Ijāb* and *Qabūl,* is the basic element of contract. It is the instrument or the means by which a contract is made. *Ijāb* is the statement in an agreement that issues forth from one of the parties to the contract, and *Qabūl* is the statement that is made by the second party in response to the *Ijāb.*[18] Offer and acceptance are based on consent or *riḍā.*

According to the Maliki School, the first element of the contract is *sīghah (form)* on the basis of which a contract is formed. The demonstration of consent of the seller

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[14] Aḥmad, Musnad, tradition no.15835, vol.25, p.157.
[15] Ibn Mājah, *Sunan, Bab Bai' al-Khiyār,* tradition no: 2185, vol.2, p.737.
[16] Al-zuhaylī, *al-Fiqh al-Islami wa adillahtuhu,* Dār al-Fikr, Damascus, vol.5, p. 3309
[17] Al-Marghīnānī, *Al-Hidāyah,* vol.3, p.23.
[18] Majallah, Art.101-102; Al-Kāsānī, *Badāi' al-Sanā'i',* vol.5, p.133.

is known as *Ijāb (offer)* and that demonstrates the consent of buyer is known as *Qabūl (acceptance).*[19] In Shafi school the first element of sale contract is *sīghah* (form) i.e. offer from the side of the seller such as saying: I will sell you this thing for this much amount. This is known as *Ijāb.* Second the acceptance by the buyer that is known as *Qabūl.*[20] Similarly, according to the Ḥanbali School the *Ijāb* (offer) is made by the seller while the *Qabūl* (acceptance) is always made by buyer.[21]

Hence to sum up this discussion in the view of Ḥanafī school the *Ijāb* is that which is made first in point of time such as if one of the parties says: "I have sold this car to you for $ 10, 000," and the other party says, "I accept," then, what has been said by the seller is *Ijāb* (offer) and the acceptance of the buyer is *Qabūl* (acceptance). If the buyer had said, "Sell me this car for 10, 000," and the seller had said, "accepted," the statement of the buyer would have been *Ijāb* and that of the seller *Qabūl.* While in the view of majority of the schools, on the other hand, maintain that *Ijāb* is the statement of the owner of property, while *Qabūl* is always the statement of the buyer.[22]

Sharī'ah requires from the contracting parties that they should be (*mukallaf*) i.e. capable to understand the legal obligation.[23] Besides understanding, it is also essential that the subject (*mukallaf*) performs the act by his free will and choice. If an act is performed under coercion, it will not produce legal effects that are assigned

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[19] Shams-ul-dīn (d.954 A.H.), *Mawāhib al-jalīl fi Sharh Mukhtaṣar al-Khalīl,* Dār al-Fikr, Beirut, 1992, vol.4, p.228.

[20] Al-Nawwawi (d.676 A.H.), *Rawḍat ul-ṭālibīn wa umdat ul muftīn,* Al-Maktab al-Islāmi, Beirut, Damascus, 1991, vol.3, p.338.

[21] Ibn Qudāmah, *Al-Mughnī,* vol.3, p.480.

[22] Niyazee, *Outlines of Islamic Jurisprudence,* p.107.

[23] Al-jazirī, *Al-fiqh 'alā madhahib al-arba'ah,* vol.2, p.145.

to a valid act. Understanding of communication which is a basis of legal capacity is linked in Islamic law with adulthood. Thus, when a person attains puberty and adulthood, he is presumed to have developed ability to understand and perform the act required by the *Sharī'ah*. A minor or insane, are therefore, not under legal obligation (*taklīf*) because they are devoid of intellect and reason required for understanding the legal obligation. An intoxicated person during the state of intoxication is also unable to understand the legal obligation, so his contracts and transactions are considered void in all four schools of thoughts of Islamic law.[24]

There is an ongoing debate that whether or not the Islamic law recognise the artificial legal persons. The question is important in the context of ascertaining liability of producers or manufacturers for manufacturing defective and sub-standard products under Islamic law. These manufacturers and producers are often artificial/legal persons in contemporary age. For the purpose of this research the view that 'an artificial person' is recognised by Islamic law has been taken into consideration. This view is based on solid arguments from imminent jurists. In this context it is pertinent to quote Sir 'Abdur Rahīm who writes:

> "Corporations are treated as 'legal person'. It may be doubted whether the earlier jurists would recognise an artificial or juristic person. The state or community is regarded by them as holding and exercising the rights of God on His behalf through the Imām. But later jurists seem inclined to recognize an artificial person; for instance, they would allow a gift to be made directly to a

[24] Ibn Nujaim, *Al-bahar al-Rā'iq*, vol.5, p.278; Al-Khalīl Al-Māliki (d.776 A.H.), *Mukhtaṣar al-Khalīl*, Dār al-Ḥadīth, Cairo, 2005, vol.1, p.143; Al-ṭūsī (d.505 A.H.), Abū Ḥamid Muḥammad b Muḥammad al-Ghazāli, *Al-Wasīṭ fī al-Madhab*, vol.3, p.12; Muṣtafa b. Sa'ad (d.1243 A.H.), *Maṭālib uluww ul-nuhā fī sharh ghayat ul-muntahā, Al-maktab al-Islāmi*, 1994, vol.3, p.10.

> mosque, while the ancient doctors would require the intervention of a trustee".[25]

Hence, the research in hand is based on the view of Muslim jurists that recognize a distinct artificial personality for a corporation that produces products.

Subject-matter (*Mabi'*) is one of the most important elements of Islamic Law of contract especially in the context of product liability. It includes object of the contract, commodity, performance, and consideration and of the contract. In Islamic law the contractual obligation of one party is consideration for the contractual obligation of another party. In a contract of sale for instance, the commodity is the consideration for the purchaser and the price is the consideration for the seller. The subject matter *mabī* must be valuable, evaluated or able to be evaluated, exist at the time of concluding the agreement or be going to exist in the future and be legal in order to be recognized by Islamic law.[26] In the context of product liability all these conditions should exist in a product.[27] For example, the sale and trading of commodities such as wine or alcoholic products, pork and pork products is prohibited, and contracts involving such commodities are void on the grounds of their illegality. [28] The flesh and bones of animals that have died by other means than ritual slaughter (*ḥalāl*) cannot be sold. Idols are also forbidden commodities. [29]

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[25] 'Abdur Rahīm, *The Principles of Muhammadan Jurisprudence*, p.96.
[26] Al-zuhailī, *Al-fiqh al-Islami wa adillatuhu*, vol.5, p.3320.
[27] See Chapter 4 of the thesis for a detailed discussion about products in Sharī'ah.
[28] Al-mausūw'ah' *al-fiqhiyyah al-kuwaitiya*, vol.17, p.280; Al-zuhaili, *Al-fiqh al-Islami wa adillatuhu*, vol.6, p.4233.
[29] Muslim, *Saḥīḥ*, tradition no.1581, vol.3, p.1207; Aḥmad, *Musnad*, tradition no.2042, vol.3, p.480; Al-Dārimi, *Sunan*, tradition no. 2148, vol.2, p.1335; Al-bukhārī, *Saḥīḥ*, tradition no.459, vol.1, p.99.

5.2.1.3. *Types of sale contracts*

Bay" i.e. sale with respect to the counter-values is divided into four types, the sale of an ascertained commodity (*'ayn*) for an ascertained commodity (*'ayn*), which is the sale of goods for goods and is called barter; the sale of an ascertained commodity (*'ayn*) with a (*dayn),* and this is the sale of absolute goods for absolute prices (currencies), which are *dirhams* and dinars, or their sale for copper coins or with a described measured commodity as a liability (debt) or a described weighed commodity or described identical counted items; the sale of a *dayn* with an ascertained commodity (*'ayn*), which is *salam*; and the sale of a *dayn* with a *dayn*, which is the sale of an absolute price for an absolute price, and is called *ṣarf*.[30] Hence, there can be four types of sale according to the above description. These are 'ayn (goods) for 'ayn (goods)- barter ; 'ayn (goods) for `*dayn* (currency)- regular sale; *dayn* (delayed payment in goods) for 'ayn (goods)- advanced payment in goods and *dayn* (currency) for *dayn* (currency)- currency exchange and money loans.[31] The research in hand has focused on regular sale as most of the consumers sale fall in this category.

5.2.1.4. *The Legal Effects of a Sale*

The contract of sale once finalized is irreversible that results in the transfer of complete and instant ownership of the subject matter. It means that the seller excludes the commodity from his ownership and gives it to the buyer on a

[30] Al-kāsānī, *Badā'i' ul-Sanā'i'*, vol.5, p.134.
[31] Niyazee, *Outlines of Islamic Jurisprudence*, p.142.

permanent basis, while in loans, ownership is transferred for a specified period and exactly its similar has to be paid back.[32]

5.2.2. Express Terms and Islamic Law of Contract

Muslim jurists have various views regarding the extent of freedom enjoyed by the contracting parties to insert terms in the contract especially those which may change and modify the effects *Sharī'ah* accords to a contract. In the view of Ẓāhiri School the conditions are not allowed except those which are approved by *Sharī'ah.* According to this school the basic presumption of law is that all terms in a contract are prohibited except that which is established by the text or *'ijmā* (consensus of opinion).[33] They base their view on the tradition of the Holy Prophet (pbuh*): "He who performs an act we have not ordered him, his act is null and void".*[34]

The Ḥanbali view is a very much liberal on the topic as it acknowledges complete autonomy of will in contracts and transactions. This view is based on the presumption that the general rule is permissibility unless a text from the Qur'ān, Sunnah or 'Ijmā' makes them invalid. There are many arguments for this presumption from the Holy Qur'ān, Sunnah and 'Ijmā'. The Holy Qur'ān says: "O ye who believe! fulfil (all) obligations. Lawful unto you (for food) are all four-footed animals, with the exceptions named: But animals of the chase are forbidden

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[32] Al-zuhailī, *al-fiqh al-Islami wa adillatutu,* vol.5, p.3367; Al-Jazirī, Al-fiqh 'ala Madhāhib al-arba'ah, vol.2, pp.140-2.
[33] Ibn ḥazm, *Al-Muḥalla,* Dār al-Fikr, Beirut, vol.7, p.342.
[34] Muslim, ibn Hajjāj, *Saḥīḥ, Kitāb ul- aqḍiyā'*, tradition no. 1718, vol. 3, p.1343.

while ye are in the sacred precincts or in pilgrim garb: for God doth command according to His will and plan."[35]

The Holy Prophet (pbuh) said: "Muslims are bound by their stipulations unless it be a condition which turns *ḥarām* (forbidden) into *ḥalāl* (permissible) or *ḥalāl* (permissible) into *ḥarām* (forbidden)."[36] Hence, it is allowed to insert conditions in contract and the parties are bound to abide by it. However, the limitation is imposed on the parties that they should not insert such a term that is contrary to scheme of Islamic law.

The view of Ḥanafī, Mālikī and Mālikī schools on the topic is divided into three kinds i.e. valid, irregular and void terms.[37] These are further classified into four kinds. Terms or conditions which confirm the effects, attributed to juridical act by the *Sharī'ah.* Such conditions strengthen the purpose of contract e.g. to sell on the condition that the seller will not hand over good to buyer unless he pays the price is a valid condition because it ensures the effects of the contract. Terms or conditions which are admitted explicitly by the *Sharī'ah,* such as the *Khiyār al-Sharṭ* (option of stipulations) and *Khiyār ul-'ayb* (option of inspection) as these are explicitly admitted by *Sharī'ah.* Terms or conditions, which are intimately, connected with the contract such as pledge of security in a contract of surety.

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[35] Qur'ān 5:1.
[36] Abū Dawūd, *Sunan*, Al-Maktabah al-'Aṣriyah Seeda, Beirut, vol.3, p.304; Al-tirmidhī, *Sunan*, Dār al-Gharb al-Islāmī, Beirut, 1998, vol.3, p.28.
[37] Al-Sarakhsi, *al-Mabsūṭ*, vol.13, pp.13-28.

The Ḥanafī jurists also allow a term which has been established by custom such as for example in case of sale of a car by a specific manufacturer the condition that it will be responsible for its repair for a certain period.

The condition will be regarded as irregular if it is repugnant to requisites of the contract; it is irreconcilable with the purpose and effects of contract; it is not allowed by the *Sharī'ah*; it is not allowed by custom and usage; and it gives an undue advantage to one of the contracting parties such as if a person sells his house with a condition that he will reside in it for a month after the sale is concluded; if a person sells a piece of land with a condition that he will cultivate for a year on it; if a person sells an animal with a condition that he will keep and riding it for a certain period; and if a person sells a garment to a consumer with a condition that he will wear it for a certain period etc. such conditions are irregular as it amounts to usury.[38] Hence, the effect of such condition is that it renders the entire contract invalid especially in case of commutative contracts. It is a term or condition that directly infringes any rule of the *Sharī'ah* or inflicts harm on one of the two contracting parties or derogates from completion of contract, such as in the context of product liability the condition imposed by a seller that the consumer will not use the product he bought. The effect *(ḥukm)* of a contract with a void condition is that the condition is severable from the contract; it does not nullify the whole contract. The condition alone will be regarded null and void.[39]

[38] Al-Kāsānī, *Badā'i' al-Sanā'i'*, vol.5, p.169.
[39] Zaydān, *al-Madkhal li dirasah al-Sharī'ah al-Islamiyyah*, p.398.

Hence, in Islamic law unfair contract terms are considered void *ab initio*. It is one of the requirements of a valid sale that it should be free from any unlawful term and condition.[40] In Islamic law, terms of contract, properties of goods and consideration must be clear. A forbidden practice is for a man to purchase goods for a definite sum payable at a specified deferred term, then to bargain for a sum which will show him a profit if paid in cash immediately. This is not permissible because the (deferred) term is allowed for by a portion of the price. Another is for a man to purchase goods for a specified sum and then, if he should find a flaw in them, to return to the seller with a demand for a discount, bargaining about the original price when the question of a discount had not arisen. The terms of a contract that may lead to Ribā (Usury) is strictly forbidden under Islamic law. In this context, Imām Sarakhsī writes:

> *"Trade is of two kinds: permitted (Ḥalāl), which is called Bay" in the law; and prohibited (Ḥarām), which is called Ribā. Both are types of trade. Allāh Almighty informs us, through the denial of the disbelievers, about the rational difference between exchange (Bay") and Ribā, and says: 'That is because they said Bay' is like Riba'. Almighty, then, distinguishes between prohibition and permission by saying: 'And Allāh has permitted sale and prohibited Ribā'.*[41]

Similarly, any term in a transaction that is ambiguous is known as *Gharar* (uncertainty) and such contract are considered void in *Sharī'ah*. There are many instances such as:

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[40] *Al-mausu'a al-fiqhiya al-kuwatiya*, vol.9, p.101.
[41] Al-Sarakhsi, *Al-mabsut*, n.d., 12, p. 108.

1. Bay'` al- hasat

Bay'` al- ḥasat is also known as *ilqā' ul ḥajar.*[42] It is effected when the vendor says, "Of these pieces of cloth or these sheep I sell you the one upon which falls this pebble thrown in the air," and the consumer says, "Yes". The transaction is valid on the basis of the existence of an offer and acceptance; similarly the sale of a piece of land is valid to the distance of a stone's through; or by saying, "I want to buy as many goods as there are stones which I am grasping in my palms." Or a sale may become irrevocable by throwing a stone; or by stipulating, "I sell you such and such an object, and you will have a right of option until I have thrown this stone. Holly Prophet (pbuh) had forbidden a transaction determined by throwing stones, which involves uncertainty.[43] Hence, this kind of sale is forbidden in Islamic law.[44]

2. Bay'` al-Mulāmasah

A "touch" sale is an expression which implies:

a)The sale , i.e. of a piece of cloth already folded , that is bought by merely touching it, and renouncing in advance the right of option accorded by law after seeing it.

b) A sale by merely touching an article without any formal offer and acceptance and without mutual consent.

c)A sale concluded by saying, "Where you have touched this cloth I have sold it you."

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[42] Ibn Nujaim, *Al-bahr al-rā'iq Sharh Kanz al-daqā'iq*, vol.6, p.83.
[43] Muslim, Saḥīḥ, tradition no. 1513, vol.3, p.1153; Aḥmad, Musnad, tradition no.7411, vol. 12, p.373.
[44] Al-zuhailī, *Al-fiqh al-Islāmi wa adillatuhu*, vol.7, p.5040.

According to Ḥanafī school this kind of sale is voidable (fāsid).[45] According to Imām Mālik[46] and Imām Shafi'ī.[47] it is reported that the prophet (pbuh) had forbidden Bay' al-mulamasah, because the consumer is not given a chance to examine the good.

3. Bay'` al-Munābadhah

According to Imām Malik, *Bay' al-Munābadhah* is the practice whereby one man throws a garment to another , and the other also throws a garment without either of them making any inspection. Each of them says, "This is for this." It is reported that two types of transactions are forbidden by the Prophet (pbuh), i.e. *Bay' al-mulāmasah* and *Bay' al-munābadhah*.[48] This type of sale is prohibited in Islamic law.[49] The reason is that consumers are not allowed to proper or adequate inspection in order to know the goods thoroughly.

4. Bay' al-Muwāsafah: (Sale by Description)

It is the sale of goods which has not been possessed or a sale of goods by describing them without any inspection, the delivery being made later, after the vendor had bought them. According to Sa'īd b. al-Musayyab, the sale by description is a secret agreement made when a man describes to the consumer goods, which not with

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[45] Ibn Munzir, *Al-Iqnā'*, vol.1, p.244; *Al-mausū'a al-fiqhiya' al-kuwaitiyyah*, vol.9, p.140; Al-zuhaili, *Al-fiqh al-Islami w adillatuhu*, vol.5, p.3498.
[46] Mālik b. Anas, *al-Mudawannah*, vol.3 p.254.
[47] Al Muzānī, *Kitāb al-Mukhtaṣar*, in al-Shafi's *kitāb al umm*, Dār al-Ma'rifah, Beirut, vol.8, p.186.
[48] Mālik b. Anas, al-Mu'aṭṭā, tradition no.2460, vol.4, p.963.
[49] Al-Kāsāni, *Badā'i' al-Sanā'i'*, vol.5, p.176; Ibn Rushd, *Bidāyat ul-mujtahid wa nihāyat ul-muqtaṣid*, vol.3, p.167;

him, by deferment of an obligation.[50] It is prohibited because the transactions would have to be made before the goods were possessed by the vendor.[51]

5. Bay' al-Muzābanah

It is a contract of exchange of harvested dry dates by their calculated and definite measure for fresh dates or other fruit of the same species on the tree. It was reported that the Prophet had forbidden Bay' al-Muzābanah.[52] In cases where goods (i.e. fruits), whose weight, size and number are not known, are sold in bulk for a definite weight , measure or number of some other goods, i.e. green dates for a definite measure of ripe dates. The same applies to the selling of raisins by measure for grapes.[53] This type of sale is prohibited because it is buying of something that's number, weight and measure is not known.

6. Bay' al-Mukhadarah

Bay' al-Mukhadarah is selling fruit before it had started to ripen. The Holly Prophet is reported to have forbidden Bay' al-Mukhadarah. He forbade this transaction for both buyer and seller.[54] The Holly Prophet is reported to have stated further; *"Have you not seen if God prevents any fruit (from coming out) for what exchange shall one of you take the property of his brother."*[55] This type of contract gives rise to a lot of disputes, quarrels and feuds because of fluctuations in the quantity

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[50] 'Abd-ur-razzāq, *al-Mussaanaf*, tradition no. 14228, vol.8,.p.42.
[51] Ibid., pp.42-43.
[52] Mālik, *al-Mu'aṭṭā*, tradition no.2314, vol. 4, p.913.
[53] Al-Shafi'ī, *Kitāb al-umm*, vol.3, p.63.
[54] Al- Shafi'ī, *Musnad*, Dār al-kutub al-'elmiyyah', Beirut, Lebanon, vol.1, p.142; Mālik, *Mu'aṭṭa*, tradition no.11, vol.4, p.893.
[55] Mālik, *Mu'aṭṭa'*, tradition no.11, vol.2, p.618.

and quality; losses resulted on these commodities so that claims were made and disputes starts.

7. **Bay' al-Muhaqalah:**[56]

It is the exchange of seed-produce, still in the ear, for the grain of wheat .the prophet is reported to have forbidden Bay''`al-Muhaqalah which was considered to involve certain hazardous elements.[57]

8. **Bay' al-Sinīn or Bay' al-Mu'āwamah**

It is effected by saying, "I sell this commodity (fruit or harvest before the crop has grown on palm trees or others) for a year or more and when the year has ended the term of contract will be terminated between us and I shall give the price and you will give me back my commodity."[58] Holly Prophet has prohibited *Bay' al-Sinīn* because of the existence of a hazardous element in it.[59] This type of sale is also called *Bay' al-mu'awamah* because it selling of something years ahead.[60]

9. *Bay' al-Ḥamal*

It is the sale of an embryo or the sale of youngling to be brought forth later from the foetus of an animal, that is, what a female animal bears in the womb. This type

[56]E.W.Lane, *Arabic-English Lexicon*, vol.1, p.612.
[57]Aḥmad, *Musnad*, tradition no. 1959, vol.3, p.428; Abū Yusuf, Al-athār, vol.1, p.189; Al-bukhārī, *Saḥīḥ*, tradition no.2186, vol.3, p.75; Muslim, *Saḥīḥ*, tradition no.16, vol.3, p.1174.
[58] Al-murtaḍā al-Zabaydi, *Tāj al-'Arūs* vol.33, p.158.
[59] Muslim, Saḥīḥ, tradition no.85, vol.3, p.1175; Aḥmad, Musnad, tradition no.14320, vol.22, p.221.
[60] Al-Shafi'i, *al-Musnad*, vol.1, p.145.

of transaction is not allowed because the commodity is not known. It is prohibited due to uncertainty.[61]

10. *Bay' al Ḥayawān biL-laḥam*

It is narrated that the Prophet (pbuh) had prohibited bartering live animals for meat.[62] It is also considered as a kind of gambling or a game of hazard (*al-qimār*). The reason is uncertainty in their weight.

The above types of transaction are declared unlawful in *Sharī'ah* because they carry uncertainty because that may result in exploitation of the consumer. Moreover, Islamic law does not differentiate between false advertisements, trader's puff and sales talk etc. Any statement by the producer that could influence a consumer in making a purchase will make him liable under the same rules. It is also pertinent to explain here the meaning of false or misleading representation under Islamic law which is one that omits facts as well one that states false one. Even if a statement is literally truce but it misleads the public would be considered as false representation. A statement must be read in the context and light of the overall impression it might give to the people it is addressed to. The Holy Prophet (pbuh) stated: "*he who cheats us is not one of us*".[63] Therefore under Islamic law the literal truth of statements is not a defense if they convey a misleading impression upon the reader. Hence, in order to determine the legality of an advertisement the general

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[61] Al-zuhailī, *Al-fiqh al-Islāmi wa adillatuhu*, vol.4, p.3021; *Al-mausū'ah al-fiqhiyah al-kuwaitiyyah*, vol.9, p.186.

[62] Mālik, *al-Mu'aṭṭa*, tradition no. 2414, vol.4, p.947; Al-Dār Quṭnī, *Sunan*, tradition no.3057, vol.4, p.38.

[63] Muslim b. al-Hajjāj, *Saḥih*, Dār Ihyā' ul-turāth al-'arabī, Beirut, tradition no. 101, vol.1, p.99.

impression it gives will be considered and an advertisement will be considered false if it can deceive or misleads any person.[64] The manufacturer may base his argument for defense on that the consumer (plaintiff) was not likely to be deceived by the advertisement; however, the relevant interpretation would be the one made by the consumer as misleading advertisement is a relative thing which defends on the group of people addressed.[65] Now what would be the standard for a misleading advertisement so it is very easy under Islamic law being a religious law that even if a person of below average intelligence is misled by an advertisement such an advertisement in this specific case will be considered mis-leading.[66]

Hence, the contracting parties may change or limit these statutory provisions if they choose to do so under the contract. Thus, Islamic law of contract has safeguarded the interests of the consumers in cases of defective products by imposing liability upon the manufacturer and made him liable for any hidden defects, the seller is also bound by the express terms which they offer to the consumers.

5.2.3. Implied Terms in Islamic Law of contract

The Islamic law of contract has recognised various implied terms in contract through different kinds of (*khiyārāt*) options. These options highly protect rights of the consumers in contracts and commercial transactions. The purpose of option is to give chance to a consumer who suffered some loss in transaction to revoke

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[64] Naṣar, *Manufacturer's Liability under Islamic law*, LLM (unpublished) thesis submitted to the Law School, Harvard University, U.S.A. 1985, p.47.
[65] Ibid., p.48.
[66] Ibid., p.49.

contract within stipulated time. They have been designed to maintain balance in transactions and to protect a weaker party from being harmed. Some of these options are discussed below which have great impact on the protection of consumers in commercial transactions. In this context *Khiyār al "Ayb* must be highly appreciated. It is a right given to a purchaser in a sale to cancel the contract if he discovers that the object acquired has in it some defect diminishing its value. The defect is anything that is recognised by the commercial custom (*'urf tijārī*).[67] Hence, this meaning covers the various types of defects recognised in contemporary times such as manufacturing defect, design defect and instruction defects etc.

Khiyār al "Ayb is a well-recognized legal method under Islamic commercial dealings which protects society from the problems arising from purchasing defective products. It is an implied warranty imposed by the law itself and the parties do not have to stipulate it. It is thus a necessary condition of the contract. The goods are liable to be rejected if undeclared defects are discovered. In this context, it is pertinent to quote Hidāyah:

> "If the goods purchased prove unfit for use, the buyer is entitled to a full refund of the purchase price even in case of perishables, if a person purchases eggs, musk melons, cucumbers, walnuts, or the like, and after opening them discover them to be of bad quality; in that case, if they be altogether unfit for use, the purchaser is entitled to complete restitution of the price from the seller, as the sale is invalid, because of the subject of it not being in reality property."[68]

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[67] Al-Marghīnānī, 'Ali b. Abi Bakar b. 'Abd al Jalīl al-Farghānī, (d.593 A.H.), *Al-Hidāyah*, Dār Ihyā' ul-Turāth al-'Arabi, Beirut, Lebanon, (n.d),

[68] Ibid., vol.3, p.39.

Hence, Islamic law protects consumers both before and after conclusion of the sale and purchase agreement by giving them the right of inspection and the right of option. The Islamic doctrine of *khiyār al "Ayb* allows the buyer the right of inspection of the goods (to ensure its quality, etc.) and also the right of option (whether to continue with the contract or otherwise) both before and after the contract of sale and purchase is concluded.

The *Majallah* terms such option as *khiyār al-"Ayb*, or "option for defects."[69] The option of defect (*khiyār al-"Ayb*) is based on the following verse:

> "O ye who believe! Eat not up your property among yourselves in vanities: But let there be amongst you Traffic and trade by mutual good-will: Nor kill (or destroy) yourselves: for verily God hath been to you Most Merciful!"[70]

The other options are such as the Option of the Session (*Khiyār al-Majlis*), Option of Defect *(Khiyār al-"Ayb)*, Option to Ascertain the Subject-Matter (*Khiyār al-Ta'yīn*), Option of Inspection (*Khiyār al-Ru'yah*), The Option to Revoke the Contract (*Khiyār al-Sharṭ*), *Khiyār al-Ghalaṭ*, *Khiyār al-Tadlīs*. These options are provided in those contracts, which accept revocation like sale, hire, *muzara'ah* (crop sharing). These options are not available in those contracts, which do not accept revocation such as divorce, manumission etc.

Majallah has codified six options (*khiyārāt*) in favour of the consumers. They can be divided into two broad categories. First, the options that are implied warranties whether the parties stipulates them or not they exist. These are the option of defect

[69] Majallah, Art.336.
[70] Qur'ān; 4:29.

(*Khiyār ul-"Ayb*); the option of fraud (*khiyār al-tadlīs*); and the option of inspection (*khiyār al-ru'ya'*). Secondly, conventional options that are created by the mutual consent of the parties and affecting the formation of the contract such as the option of acceptance or rejection within the contractual session (*khiyār al-majlis*); the option of distinction (*khiyār al-ta'yin*); the option to defer payment within a specific time limit (*khiyār al-naqd*).[71] Of all these options, Muslim jurists have regarded *Khiyār al-"Ayb* as a rubric for the study of options.

5.2.3.1. Option of Defect *(khiyār al-"Ayb)*

Khiyār al "Ayb is a well-recognized legal method under Islamic commercial law that protects consumers against the defective products. It is a right given to a consumer in a sale to cancel the contract if he discovers that the object acquired has in it some defect diminishing its value or that makes it fall short of its requirements or specifications.[72]

Likewise, in regard to quality, the vendor guarantees to the purchaser that the sold goods are in proper condition. *"Ayb* is defined as any defect existing in the goods at the time of the contract that will call for a reduction in value as recognised by the customary standards of merchants.[73]

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[71] Majallah, Art. 336-355.
[72] Al-Kāsānī, *Bada'i' al-Sana'i'* vol. 5, p. 247.
[73] Nabīl Sālih 'Remedies for Breach of Contract under Islamic and Arab Laws' *Arab Law Quarterly*' (1989) 4 269,290.

It would be considered fraudulent of a seller's part to intentionally conceal a defect.[74] It is an implied warranty imposed by the law itself and the parties do not have to stipulated it. The ruling of Islamic provisions, the *Sunnah* in particular, has evidently envisaged the eventuality where a buyer does not possess sufficient knowledge of the product he/she has agreed to buy. A sale of this type cannot be said to reflect of the true intentions of the buyer, especially if the product turns out to be defective in a way that is not obvious to the naked eye.[75] The *Majallah* regulated the liability for hidden defects in the contract of sale in Arts. 336-355. Article 238 defines a defect as "what reduces the price of the thing sold among merchants and men of discernment". As per these provisions, upon the discovery of a defect the buyer is granted the option either to rescind the contract of sale, i.e. to practise *khiyār al-"Ayb,* or to keep the thing sold as is.

An Islamic legal mechanism used to protect consumer rights is the inclusion of option of defect in contract formation. The *''Ayb* (defect) is of two kinds: patent and hidden. Some authors have defined defect as "any increase or decrease of the merchantable quality of the original creation of anything" or refer the determination of defect to the precedent. However, precedent cannot be used to judge goods that are produced for the first time.[76]

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[74] Ibn Nujaim, *Al-bahr al-rā'iq*, vol.6, p.36.

[75] Kamālī, M. H. (2002), *Islamic Commercial Law: An Analysis of Futures and Options,* Kuala Lumpur: ILMIAH Publishers.

[76] Dayānī, A. A. R. (2007). *The Comparison of the Principles of Khiyār al-'Aib in Fiqh, Civil law, European law and French law.* Journal of Law & Political Science, 37(3), 127-154.

In this context the Majallah states: *"Any buyer in Islamic law has an automatic implied warranty against latent defects in the goods purchased".*[77] A defect consists of any faults which, in the opinion of persons competent to judge, cause depreciation in the price of the property.[78]

The option is valid in case of products, which need to be specified like a house, land or any room, which has its own individuality. The goods are liable to be rejected if undeclared defects are discovered. This type of option arises only if the contract has been concluded. If the contract is still in the state of negotiation or still under discussion, the affected party cannot exercise this option. This method is based on the Holy Qur'ān[79] and following *Sunnah* of the Holy Prophet (pbuh): *"He who defrauds another is not from us"*[80] and *"If the contracting parties speak the truth and reveal the defects of the goods then the contract will be beneficial for both. If they do not speak the truth and hide the defects of the goods they will [Allāh will] diminish the benefit of the transaction."*[81]

a) Conditions for Option of Defect (*Khiyār al-"Ayb)*

There are various conditions for exercising *Khiyār al-"Ayb* such as: the defect should be such which causes decrease in the value of the property; the defect may be obvious or hidden; the defect should have existed prior to the contract, a defect

[77] Majallah, Art.336.
[78] Majjalah, Art.338.
[79] The Holy Qur'ān has also granted the right to such option to the individual in relation to trading, civil transactions and contract (Qur'ān 2:275 and 5:(1) *"O ye who believe! Eat not up your property among yourselves in vanities: but let be there amongst you traffic and trade by mutual good will: nor kill or destroy yourselves: for verily God any hath been to you Most Merciful!"*
[80] Muslim Ibn al-Hajjāj, *Saḥīḥ*, Dār Iḥyā' ul-turāth al-'arabī, Beirut, tradition no. 101, vol.1, p.99.
[81] Al-Bukhārī, *Saḥīḥ, Kitāb ul Buyū'*, tradition no.2082, vol.3 p.59

appearing later after delivery is not valid for purpose of the option; the defect should continue after delivering till the time of the exercise of the option, if the defect disappears before this, there is no option; the buyer should have no knowledge of the defect at the time of the contract or at the time of delivering; and there should not be any agreement of non-guarantee.[82]

b) Effects of Defect on Contract

In case, the consumer has bought a defective product, he/she has the choice to confirm the sale or to cancel it in the view of majority of jurists. The Maliki jurists distinguish between the minor (*yasir*) defect and major (*fāḥish*) defect and purpose that if the defect is minor, the buyer may confirm the sale while being returned part of the price paid in proportion to the extent of the defect. In case the defect is major. He has the choice either to cancel it or to confirm it without compensatory restitution.[83] The Ḥanbali jurists hold that the buyer of an object with defect whether minor or major, may confirm the sale while being paid the difference between the price of the article in perfect condition and its price with defect.[84]

In case the seller declares at the time of sale that there is a defect in the product sold, and the consumer accepts the product with the defect, he has no option on the account of defect as he himself waived the same.[85] Hence he cannot return the product in such a situation e.g. if a consumer buys an animal with all defects of any

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[82] When the seller specifically states that he is not responsible for any defects then the buyer acts at his own risk and goods cannot be rejected.

[83] Al-Gharnāṭi, 'Abul Qāsim (d.741 A.H.), Muḥammad b. Aḥmad b. Muḥammad b. 'Abdullāh, Al-Qawāniyyin al-Fiqhiyyah, vol.1, p.176.

[84] Majd al-dīn, 'Abdul salām (d.652 A.H.), *Al-muḥarrar fi al-fiqh 'alā madhhab al-imām Aḥmad b. ḥanbal*, Maktabat al-Ma'ārif, Al-Riyādh, vol.1, p.324.

[85] Majallah, Art.341, 342.

description whatsoever whether blind, lame, or worthless, he cannot return such animal ascertaining that it had a defect of long standing.[86]

In case when a defect appears in the thing sold while in the possession of consumer, and it proves to be a defect of long standing, the consumer has no right to return the thing sold to the seller rather he has the right to claim reduction in the price. For example if the consumer buys a piece of cloth which after being cut up is found to be frayed and rotten, he cannot return it to the seller because by cutting he caused a new defect and it may not be sold again. The consumer in such a case has the right to claim a reduction in the price.[87]

When a purchaser buys a roll of linen and cuts it up to make shirts. He then finds it to be defective and sells it. He cannot claim any reduction of the price from the vendor. The reason for this is that while the vendor may state that he would take back the stuff with the defect of recent origin, that is to say, cut up, the sale thereof by the purchaser is tantamount to an adoption of the defect.[88] This indicates that the reduction may not be claimed when the thing bought is for commercial purposes and sold to a third party. When the consumer adds something to the product e.g. sewing or dying in case of a cloth such acts prevent the return of the subject matter to the seller.[89]If the consumer buys a thing and subsequently it appears to be in such a state that no benefit can ever be derived from it the sale is void and the consumer can recover the whole of the price. For example if a

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[86] Al-Marghīnānī, *Al-hidāyah*, vol.3, p. 37; Majallah, Art.343.
[87] Majallah, Art.345.
[88] Majallah, Art.348.
[89] *Al-Mausūa' al-fiqhiyyah al-kuwaitiyyah*, vol. 20, p.140; Majallah, Art.349.

consumer buys eggs which have been proved to be rotten and useless, the consumer can claim whole of his money.[90]

c) Termination of the Khiyār al-"Ayb

The death of buyer does not terminate the option. The right in such case is inherited by the heirs. The factors that terminate the *Khiyār al-'Ayb*, mentioned by jurists, are the acceptance of the product with defect by the consumer; and destruction of the object in the hands of buyer.[91] It is a matter of further investigation that whether or not the Muslim jurists had mentioned some rulings about the situation in which the destruction is caused by a defect in the product itself. Similarly, is it possible for a consumer to claim damages under the notion of *Khiyār al-'Ayb* for such loss? Traditionally, in Islamic consumer contracts, if one produces and sells defective goods to others the buyer has the right to nullify the contract or to obtain compensation (*arsh*), i.e. the balance price of the damage or loss between non-defective and defective goods.[92] In such cases, the modern legal regime may be applied if it promotes the purposes of Islamic *Sharī'ah* and leads the welfare of the Muslim *ummah*.

5.2.3.2. *Option of fraud* (*Khiyār al-tadlī or Khiyār taghrir)*

The option to rescind the contract, if the option of the defect and sight cannot be put into effect, is the option of fraud. This option exists in cases where the disappointed party can established that his agreement contract was gained by the

[90] Majallah, Art.355.

[91] Mansoori, *Islamic Law of Contracts and Business Trasactions*, p. 175.

[92] Parviz Bagheri and Kamāl Ḥalili Hassan, *The application of the Khiyār al-'Ayb (option of defect) principle in on-line contracts and consumer rights*, Eur J Law Econ (2012) 33:565–575.

deceit or wilful misrepresentation of the other party.[93] This also includes concealment of a defect in the subject matter and the seller hides it to sell the subject matter.[94] It can be revoked for fraud which causes loss of property. It is forbidden to deceive in business transaction.[95] For instance, it is prohibited to sell an animal that has not been milked for few days in order to increase the amount of milk at the moment of sale. Such fraud gives the purchaser the right of cancellation, provided he makes use of it without delay. According to *al-Shafi'i* the right of the consumer in these circumstances, can still be exercised three days after the discovery.[96] If the consumer has already consumed the milk from the animal, he should return it to the vendor together with a *Sā'* (*Sā'* plural *suwā'* is a measure for grain) of the value four *mudds* (*modius*), according to the custom of Madina" or it would be approximately five pints. The official capacity of the *mudd* of *Madīnah* (and it was called *mudd al- nabi*) would be approximately five gills.[97] It has been stated in Majalla that when in a transaction of sale one of the parties deceives another and misrepresentation is proved, the person so deceived can cancel the contract.[98] In case the victim of such misrepresentation dies his right is transmitted to his heirs.[99]

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[93] Al-Sarakhsī, *Al-mabsūṭ*, vol.13, p.39.
[94] Ibn Nujaim, *Kanz al-daqā'iq*, vol.6, p.26.
[95] Damad afindi, *Majma' al-anḥur fi sharḥ multaqā al-abḥur*, vol. 2, p.29.
[96] Al-Muzānī, *al-mukhtaṣar*, vol.8, p.181.
[97] Alfred, *The Encyclopedia of Islam* v.4, p.1.
[98] Majjalla, Art.357.
[99] Majjalla, Art.358.

5.2.3.3. *Option of Inspection (Khiyār al-Ru'yah)*

It is the basic rule that the subject matter should be known to the parties at the time of contract. The option of inspection is given to the customer buys anything not present at the time of the contract. Knowledge of the subject-matter is an essential condition for the conclusion of the contract. The option of inspection gives opportunity to the customer to examine the subject-matter at the time of the contract or by description in a manner, which removes all kinds of *Jahālah* (want of knowledge). This is known as the option of examination or *Khiyār al ru'yah.*

In order to conclude a valid binding contract the subject matter must exist at the time of the contract in order to avoid *gharar* or uncertainty.[100] But, this strict rule will caused hardship to the contracting parties. Thus the Muslim jurist had allowed exceptions to the strict rule of existence. As for example, *Bay' al-salam* (sale by advance payment for the future delivery), *Bay' al-Istiḥsān'* (contract of manufacture),[101] *Ijārah* (contract of hire) and Masqat (contract of irrigation). But still all this kind of transaction still has its own stage of uncertainty (*gharar*) because the party still has not seen the subject matter yet. Thus, to avoid uncertainty the consumer is given power to opt whether to continue or withdraw the contract concluded between them after seeing and inspect the subject matter- This option known as option of viewing or option of sight (*Khiyār al-Ru'yah*). This option also known as option of inspection. The purpose of this option is to avoid injustice that may lead to ignorance and dispute among parties, to protect the interest (*Istiḥsān*) of

[100] Al-jazirī, *Al-fiqh ala madhāhib al-arba'ah*, vol.2, p.209.
[101] Al-zuhaili, *Al-fiqh al-Islami wa Adillatuhu*, vol.5, p.3320.

Muslim and to prevent any disputes among them and to avoid unfairness when they have no experience or ability to market place to buy things they have not seen.[102]

5.2.3.4. *Option of the session (Khiyār al-majlis)*

Al-majlis (a session) is the period during which contracting parties devote themselves to the business in hand and is terminated by any event, such as physical departure from place of business, which indicates that negotiations are concluded or suspended.[103] The right of the option of session (sitting), called *Khiyār al-majlis*, is the inalienable right to repudiate unilaterally a contract concluded by both parties, so long as they have not yet separated. This is based on the tradition of the Holy Prophet (pbuh) i.e. "The contracting parties have the right of option until they separate".[104]

5.2.3.5. *Option to Stipulate (Khiyār al-sharṭ)*

Khiyār al Sharṭ is that option through which one party or both of them stipulate for themselves or for someone else the right to revoke the contract within a determined period.[105] For instance, the consumer says to the seller "I purchased this thing from you but I have the right to return it within three days". As soon as the period is over the revoke derived through this option, lapses. The result of this option is that contract which is binding (*lāzim*) initially becomes non-binding

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[102] Ibid., vol.4, p.3125; *Al-mausūa' al-fiqhiyyah al-kuwatiyyah*, vol.2, p.248.
[103] *Al-mausū'a al-fiqhiyyah al-kuwatiyyah*, vol.1, p.205.
[104] Al-Bukhārī, *Saḥīḥ, Kitāb al-Buyu'*, Maktabah Dār Tūq al-Najāt, Beirut, tradition no. 2079, vol.3, p.58.
[105] Al-jaziri, *Al-fiqh 'alā madhāhib 'al-arba'ah*, vol.2, pp.158-162; Al-zuhayli,*al fiqh al islāmi wa adillatuhu* ,vol .5, p.3535.

(*ghair-lāzim*) with the stipulation of this option. It is a right given to the parties or another person to confirm or cancel the contract during an agreed period of time. It is accepted on two reasons that were one Prophet (pbuh) accepted it and sanctioned it and two some people may not be knowledgeable about trading and need expert opinion. It is valid to compulsory, necessary and binding contracts which are cancellable even it was effecting one party e.g. sale, rent, partnership, warranty etc. Both or either one of the parties has the option of condition. Imām Abū Ḥanīfah, Imām Mālik, Imām Aḥmad b. Ḥanbal and the Shafi'īs are of the opinion that one of the parties may delegate it to the other parties. In response to a question that parties may not be knowledgeable and need expert opinion, Al-Shafi'īs are of the opinion that this is not permissible to delegate to another person. Period of Option of Condition according to Imām Abū Ḥanīfah, Imām Zufar and Al-Shafi'ī it does not exceed 3 days. But according to Imām Abū Yusuf, Imām Muḥammad and Imām Aḥmad b. Ḥanbal it can exceed 3 days and may be longer provided that the time is determined and clear. And according to Imām Mālik it is originally 3 days but can be extended to sufficient time in case where the subject matter of contract was in a place which is very far and could not be reached within 3 days.[106]

5.2.3.6. *Khiyār al-ta'yīn (option to ascertain the subject matter)*

Another option given to the customer by Islamic law of contract is that the buyer can choose, designate or determine within a pre-stated time one object out of two or more which are offered to him. It is called *Khiyār al-Ta'yīn*. This right can be

[106] Al-Marghīnānī, *Al-Hidāyah,* vol.3, p.29; Ibn Qudāmah, *Al-Mughnī,* vol.3, p.498; Ibn Rushd, *Bidāyat ul-Mujtahid wa Nehāyat ul-Muqtaṣid,* vol.3, p.225.

exercised by the customer in a situation when he is offered to buy an unascertained thing out of a number of ascertained things with a right to ascertain the exact thing later.[107] For example one buying a car out of three vehicles offered for fixed price, gets opportunity through this option to have cars examined by a specialist and chooses any one of them. The reserving of the right to ascertain the bought item later is known as the *Khiyār al ta'yīn* or the option of determination. This option can be only exercised by the buyer and it makes a binding contract non-binding in favour of the customer.

The option of determination, where a person having purchased two or three things of the same kind, stipulates a period to make his selection.[108] The purpose of this *Khiyār* is to give wide choice to the buyer to choose and the seller to specify the subject matter of the contract e.g. the object was car and has three types, Toyota, Honda and Suzuki and has different qualities and different price. In this situation, the seller has the option to determine the object, price and the qualities of the subject matter of the contract itself.

This option is applicable to the parties of the contract only in a determined time. This option cannot be stipulated by the third parties. However, some scholars are of the opinion that this option is applicable to the buyer only. Duration of this option is according to the nature of the transaction. Imām Abū Ḥanīfah maintains that the period of this *Khiyār Al-Ta'yīn* is same as *Khiyār al-Sharṭ* which is 3 days.

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[107] Al-zuhailī, *Al-fiqh al-Islāmi wa adillatuhu*, vol.4, p. 3107; Al-mausū'a *al-fiqhiyyah al-kuwatiyyah*, vol.13, p.43.
[108] Ibid.

However duration of option must be defined by contracting parties while Shafi'īs and Ḥanbalīs do not recognize this option. They are in the opinion that if the subject matter of the contract is not determined sufficiently then it is not confirming the basic principle of Islamic Transaction. They also argued that there is no authority on *Hadith* about *Khiyār At-Ta'yīn*. Ḥanafī and *Mālikī* approved *Khiyār at-Ta'yīn* on the basis of *Istiḥsān* and affirmed that the option has been introduced to prevent any damages.

5.2.3.7. Option of Mistake (*Khiyār al-ghalaṭ*)

This type of option was only introduced by the successors. This natural doctrine of a contractual system is based on the *caveat emptor* principle.[109] This principle means that the buyer must ascertain the good quality of goods he buys. In this context, the *hadith* of the Holy Prophet (pbuh) is to be mentioned. Narrated 'Abdullah bin Umar: Allāh's Messenger (pbuh) said: "*He who buys foodstuff should not sell it till he is satisfied with the measure with which he has bought it*".[110] However, the Islamic ethical system does not endorse the doctrine of *caveat emptor* that many Western courts have considered valid in several shadowy cases. It has put the responsibility on the part of seller to disclose all the defects of the product to the consumer.

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[109] Al-Maliki, Abu Abdullah (1299 A.H.), *Minah Sharh Mawahib al-Jalil*, Dar al-Fikr, Beirut, 1989, vol.5, p.279; N. J. Coulson, *commercial law in the gulf states-The Islamic legal tradition* p.69.
[110] Al-Bukhārī, *Saḥīḥ*, Dār Ṭūq al-Najāt, 1422 A.H. vol.3, p.67.

5.2.4. Compensation for Damages in Islamic Laws of Contract

Contractual liability for compensation in Islamic law is well known as *ḍamān-al-'uqūd*. When the subject matter of the contract is destroyed, as in the case where the sold property has been destroyed prior to delivery or when the hired subject matter is destroyed whilst in the possession of the hirer, the concept of warranty (*ḍamān al-'aqd*) applies. This means that the holder of the subject matter in question in warranty (*ḍamān al-'aqd*) will be responsible for the destruction of the subject matter.[111] The contract liability is applied only to damage or loss of the property that is the subject matter of the contract and does not extend to consequential personal injury or damage to the other property of the consumer. In this regard *Majallāh* states:

> "A defect of long standing is a fault which existed while the thing sold was in the possession of the vendor; any defect which occurs in the thing sold after sale and before delivery, while in the possession of the vendor, is considered a defect of long standing and justifies rejection."[112]

Such contractual liability can be applied to the various kinds of damages that may be awarded to the party seeking remedy i.e. compensatory damages, consequential damages, punitive damages and nominal damages. Islamic law too has no problem about these kinds of remedies in general and compensatory damages in particular. Compensatory damages are called *Ḍamān* which literally means compensation. The value depends on the amount of performance promised in the contract. This may be the value of the commodity sold or services rendered or other consideration.

[111] F Vogel and S Hayes, *Islamic Law and Finance*, BRILL, 2007, p.112.
[112] Majallah, Art. 339-340.

Consequential damages occur as a result of the breach and are usually lost profits. These are also termed as *Ḍamān al- 'Uqūd.* If it is known to the consumer that the product is defective and may cause damage to him or his other property, he can rescind the contract. Rescission is an equitable right to put an end to a contract and have the status quo restored.

The right of rescission (*Khiyār*-Option) is the right unilaterally to cancel (*faskh*) or to ratify (*imḍā*) a contract, and in particular a contract of sale; if it is not exercised within the proper time limit, the sale is complete (*tāmm*), with a somewhat different meaning of the term. It can be conferred by law, or agreed upon by the contracting parties.[113] The buyer has the right of rescission at the time at which he sees the object which he has bought, the act of 'seeing' not to be taken too narrowly (*Khiyār al-ru'yah*); also in the case of a defect, i.e. everything that causes a reduction in price among traders (*Khiyār al 'Ayb*) or lack of a stipulated quality.[114] The defect gives only the right of rescission, not of abatement; this last arises only if the return of the object of the sale has become impossible either by its loss or by the occurrence of a new defect after delivery but before recognition of the first defect (in which case return is possible only with consent of the seller), or by increase in value (such as the dyeing of cloth). If the seller delivers less than the stipulated quantity, the buyer has the choice between rescission of the sale and abatement of the price in proportion".[115] The waiver of the *Khiyār al 'Ayb* by the

[113] Schacht, *Introduction to Islamic Law*, p.152.
[114] Ibid.
[115] Ibid.

consumer in a contract of sale is possible; the resulting absence of obligation is called *barā'ah*. The buyer can stipulate the right of choosing from among several objects (*Khiyār al-ta'yīn)*, and by agreement of the contracting parties there can be conferred on one or on both or on a third party the general right of rescission (*Khiyār al-sharṭ*) during a period of not more than three days (according to the prevailing opinion).[116]

Dr Wahbah Zuhailī is relevant to be quoted here:

> "If the sale is valid, binding, free from option and the parties agree to abolish or terminate it, then its cancellation will be by way of rescission. And rescission, if it is separate from sale of which it generally consists, will be allowed in all binding contracts, except marriag".[117]

Hence, damage is one of the basic elements of contractual liability in Islamic law. In order to satisfy this element the consumer is only required to prove the link between the product and the manufacturer i.e. that the product is produced by a particular manufacturer. If this link is established that is enough proof for the liability of the manufacturer.[118]

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[116] Ibid.

[117] Al-Zuhailī, *al-Fiqh al-Islāmi wa Adilattuhu*, vol.4, p.3094.

[118] Munzir Kahf, "*Economics of Liabilities: An Islamic View*" (2000) 8(2) Journal of Economics and Management 85, Munzir Kahf (born in 1940) is a Syrian American professor of Islamic economics and finance. He received his Ph.D. in economics from University of Utah in 1975 and lives in Westminster, California.

5.2.5. *Limitation Period in Islamic Law of Contract*

Muslim scholars have difference of opinions regarding the limitation period for claim.[119] The *Ḥanafi* permit a claim to be barred if a certain period of time has passed.[120] The Ottoman Civil Code that is based on *Ḥanafi* school has provided for statutes of limitations in the following articles states: "a debt, or property deposited for safe-keeping, or real property held in absolute ownership, or inheritance, or actions not relating to the fundamental constitution of a property dedicated to pious purposes leased for a single or double rent, or to pious foundations with the revenue of a pious foundation, or actions not relating to the public, shall not be heard after the expiration of a period of fifteen years since action was last taken in connection therewith."[121] In the same sequence, Article 1661 states that "actions brought by a trustee of a pious foundation ... may be heard up to a period of thirty-six years. In any event these actions shall not be heard after the thirty-six years has elapsed."[122] Despite these statutory provisions, the contracting parties may change or limit these statutory provisions if they choose to do so under the contract.[123] This provides a kind of flexibility to the legislatures in an Islamic state to specify a time period for certain issues that are adequate with the requirements of a particular age.[124]

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[119] Al-mausūa' al-fiqhiyyah al-kuwaitiyyah, vol. 13, p.119.
[120] Ibn-'Abidīn, Radd al-muhtār, vol.5, p.420.
[121] *Al-mausū'a al-fiqhiyyah al-kuwaitiyyah*, vol. 13, p.119.
[122] Ibid.
[123] Majallah, Art.1661.
[124] See chapter 6 and 7 of the thesis for further discussion on time limitation in Islamic law.

5.3. ENGLISH LAW OF CONTRACT AND PRODUCT LIABILITY

5.3.1. English Law of Contract: Basic Concepts

In England the traditional law of contract and tort of negligence was the main sources of liability for defective products. The English law of contract, applies to agreements for the performance of any obligation, including agreements to sell or hire goods, implies terms into the contract in order to protect the consumer. During the 19th century a considerable body of case law developed around the buyer-seller relationship. Sir Mackenzie Chalmers was given the task of drafting Sale of Goods legislation which codified the common law position and the Sale of Goods Act appeared on the statute book in 1893. The Act was amended by the Supply of Goods (Implied Terms) Act 1973, and these and other changes were consolidated in the Sale of Goods Act 1979. This in turn has been amended by the Sale and Supply of Goods Act 1994 and most recently the Sale and Supply of Goods to Consumers Regulations 2002.[125]

According to the Sale of Goods Act 1979, "a contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price".[126] This covers almost all the standard consumer purchases of food, household items, motor vehicles and the like. The two key elements of the definition are the commitment to transfer the ownership and the requirement for a money consideration. The requirement that

[125] Geraint G. Howells & Stephen Weatherill, *Consumer Protection Law*, p.150. The author mentioned that the Law Reform (Enforcement of Contracts) Act 1954 removed the rule which rendered unenforceable contracts for the sale of goods valued at more than ten pounds which had not been evidenced in writing.

[126] S.2 (1), Sale of Goods Act, 1979.

there must be a commitment to transfer ownership explains why a hire-purchase agreement is not a sale. A hire purchase agreement involves a hire contract with an option to purchase. Although the option is a mere technicality the possibility remains that the consumer could meet his hire obligations and then decide not to exercise his option to purchase and simply return the goods to their owner. By contrast a credit sale is a straightforward sale with the buyer simply being given time to pay the price. A 'conditional sale' is more like a hire purchase agreement, since it provides for the payment of the price by instalments, with an agreement that the property will be transferred at some future time, usually when all the instalments have been paid. However, conditional sales remain within the scope of the Sale of Goods Act since there is a commitment to sell and are known as 'agreement to sell'; however, they have been assimilated to hire-purchase contracts for certain purposes.[127] If the contract is not for a money consideration, it will be one of barter or exchange which is now governed by 'the Supply of Goods and Services Act, 1982. We discuss below the difficult matter of how part-exchange contracts should be classified. The lack of a money consideration also means that the Sale of goods Act 1979 does not cover gifts which are again within the scope of the 1982 Act. The unsolicited Goods and Services Acts 1971 and 1975 allow a consumer to treat as unconditional gift goods which are sent to him unsolicited where the sender does not recover them within six months or within 30 days of having a notice served on him by the recipient. [128] Under the English law of

[127] Geraint Howells & Stephen Weatherill, *Consumer Protection Law*, p.151.
[128] Ibid.

contract, liability may be imposed for deceit,[129] for failing to disclose known dangers,[130] supplying a dangerous article into incompetent hands,[131] omitting to inspect or to warn that an inspection has not been undertaken,[132] failing to give adequate instructions or warnings of dangers,[133] and for representing that a product is safe[134] for its intended use when it is not.[135] Most recently, this liability has been supplemented by a potential but limited liability under part 1 of the Consumer Protection Act, 1987. Before further analyzing the English regime of product liability under the law of contract, the following principles of contract are pertinent to be analyzed in this regard:

5.3.1.1. Doctrine of Caveat Emptor

The principles of *caveat emptor* and *laissez faire* are part of the evolution process of consumer rights. Initially, the law of consumer protection is based on the "*Caveat Emptor*" (let the buyer beware), which imposes the burden of and responsibility regarding the purchases on the buyer himself. The caveat emptor principle, that literally means let the buyer beware, has been followed for many years by the Courts of England. These simple words were an easy focus for judicial thought, a principle to be invoked when the going is difficult, a guide to be followed amid the baffling uncertainties of litigation. Emptor in Latin is the buyer and the verb *cavere*

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[129] Langridge v Levy (1837),150 ER 863.
[130] Clarke v Army and Navy Cooperative Society [1903] 1 KB 155, CA.
[131] Burfitt v Kille [1939] 2 KB 743.
[132] Andrews v Hopkinson [1957] 1 QB 229.
[133] Fisher v Harrods Ltd [1966] Lloyd's Rep 500.
[134] Watson v Buckley, Osborne, Garret & Co. Ltd and Wyrovoyes Products Ltd (1940) 1 All ER 174.
[135] C.J.Miller, R.S.Goldberg, *Product Liability*, 2nd Edition, Oxford, p.27.

is a verb of caution: *caveat emptor* was the perfect principle for transactions involving not massive quantity of goods. The case that clearly illustrates the situation up to seventeenth century is *Chandelor* v *Lopus*[136] in which the plaintiff brought an action against the defendant for the selling of a Bezoar Stone. This particular stone, found in the stomach of some animals, was supposed to have medicinal properties. The majority of the court held that the evidence was insufficient to find the defendant liable because of the absence of any written warranty. But, this condition changed as the law recognized the inability and imperfect knowledge of the purchaser in the economic affairs. Initially, the law of consumer protection is based on the "*Caveat Emptor*" (let the buyer beware), which imposes the burden of and responsibility regarding the purchases on the buyer himself. But, this condition changed as the law recognized the inability and imperfect knowledge of the purchaser in the economic affairs. The principles of *caveat emptor* i.e. let the buyer be aware and *laissez faire* i.e 'let do or allowing events to their own course' are part of the evolution process of consumer rights. In *caveat emptor*, the rationale is that buyers should examine the items before they purchase and take responsibility for their condition, particularly if items are not covered under a warranty. However, enabling environment is necessary and the information is the best protection against purchasing defective products or falling victim to fraudulent practices. The judicial decisions in Gardiner v. Gray[137] in 1815

[136] Chandelor v. Lopus (1609) 79 Eng Rep 3; Cro Jac 4.
[137] Gardiner v. Gray 171 E.R. (1815) 4 Camp.144.

and also in Jones v. Bright[138] (1829) emphasized on contractual obligations of the parties and proceeds further to save the buyer from fraudulent transfer of the seller. The common Law has imposed special duty on the professional having expertise in their respective fields who offered their services to the public at large should show care, skill and honesty in their dealings.[139] The contractual obligations play an important role in ensuring that the seller sells products that meet the required or guaranteed standard. The contract law not only ensure the recovery of pure economic loss (i.e. a reduction in value of the product from the purchase price), it also plays a product liability role where damages are awarded for personal injury and property damage i.e. consequential loss.[140]

In the United Kingdom, consumer legislation has developed from the traditional caveat *emptor* model; with enactments that have enhanced the protection of consumer interests and allow greater space to return products that do not meet consumer expectation and legal standards of acceptance. Many companies operating their businesses in UK, as well as most consumers based economies will allow customers to return products within a specific period for a full refund, even if there is no defect with the product. Therefore, to understand the nature of consumer law in UK, the common law principal of '*caveat emptor*' etc. must be analyzed.

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[138] Jones v Bright (1829) 130 ER 1167.

[139] Ahamuduzzaman, Md. Lutfor Rahman and Nahida Nazmus Zannat , *A Contextual Analysis of the Consumer Rights Protection Laws With Practical Approach: Bangladesh Perspectives*, article, ASA University Review, Vol. 3 No. 2, July-December, 2009. Available on http://www.asaub.edu.bd/data/asaubreview/v3n2sl15.pdf last visited on 19-08-2013.

[140] Godley v Perry [1960] 1 WLR 9 (child lost his sight due to defective catapult); Grant v Australian Knitting Mills [1936] AC 85 (claimant contracted dermatitis from woollen underwear).

The doctrine of *caveat emptor* has played a vital role in the protection of consumers against defective products as prior to the sale and purchase agreement, the buyer has the right to inspect the goods in order to ensure that it is free from any unknown defect. In a sale and purchase agreement, if the seller purposely conceals any defect in the goods from the buyer, the buyer may, upon realizing the defect after the conclusion of the contract, rescind the contract and the seller may be found guilty of misrepresentation. If the seller is requested by the buyer to disclose any defect of the goods to be sold prior to the conclusion of the sale and purchase agreement, the seller must do so. If he fails to give such disclosure, or deliberately gives any misinformation on the quality or quantity of the goods, the buyer may rescind the agreement upon realizing the defect of the goods after the conclusion of the contract. When the buyer has a fiduciary relationship with the seller, the seller (regardless of any request from the buyer to disclose any defect of the goods) is obligated to disclose any defects. Should he fail to do so, the buyer has the right to return the goods and rescind the contract even if the goods were found to be defective after the conclusion of the contract. Since the doctrine caveat emptor first gained its footing centuries ago, there have also been various laws and regulations enacted for the protection of consumers' legal rights and interests, including the buyer's right to inspect the goods so as to ensure that they fulfil certain expectations and are not defective.

The consumer often had the knowledge to identify defective products and to negotiate on the price with the seller who, instead of offering a written warranty,

could accept an eventual reduction in price. The case that clearly illustrates the situation up to seventeenth century is *Chandelor v. Lopus*[4] in which the plaintiff brought an action against the defendant for the selling of a Bezoar Stone.[141] There was a narrative about the particular stone, found in the stomach of some animals, that it had some medicinal properties. The majority of the court held that the evidence was insufficient to find the defendant liable because of the absence of any written warranty.[142]

5.3.1.2. The Doctrine of Strict Liability

Strict liability is a legal doctrine that holds a person responsible for the damages or loss caused by his or her acts or omissions. This doctrine holds a person liability regardless of culpability.

Contractual rights have the advantage that liability is strict, once breach of contract is proved. The plaintiff can recover for damages which arise naturally from the breach or were in the reasonable contemplation of the parties at the time the contract was made.

Thus, a product manufacturer would be strictly liable for any injury caused by his defective product regardless of the care taken to prevent injury or the absence of intentional wrongdoing or negligence. Anyone involved in the manufacturing of a product may be held liable for damages caused by the defective product if the

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[141] Marco Pistis, From Caveat Emptor to Caveat Venditor - a Brief History of English Sale of Goods Law, availalbe at: http://www.mondaq.com/x/40206/Arbitration+Dispute+Resolution/From+Caveat+Emptor+to+Caveat+Venditor+a+Brief+Histor, last accessed on 12.04.2014.

[142] Ibid.

injury or harm occurred while a consumer was using the product in a reasonably foreseeable way—even if the product was not being used for its intended purpose. When the implied terms are breached the liability would be a strict one and there would be no need to prove fault. The concept of reasonableness in the definition of 'satisfactory quality' relaxes to a certain extent the strict liability. However, when the defect has been specifically disclosed to the buyer before sale and where the buyer examines the goods before sale and the examination ought to have revealed the defect.[143] The liability is also strict for breach of an express contractual term; guarantee/extended warranty and misrepresentation.

The contractual liability for defective products lies under: express terms in a contract of sale or supply, implied terms as to quality, fitness for purpose or description under Sale of Goods Act, 1979 and warranty/guarantee. In Wood v Letrik Ltd (1932)[144], the defendant had advertised an electric comb for sale, stating that it was guaranteed to dispose of the problem of gray hair within 10 days. Furthermore, the advertisement also guaranteed a payment of £ 500 if the device did not work. The plaintiff purchased one of the combs, used it as directed but instead of remedying his problem, it scratched the plaintiff`s scalp and caused him discomfort. The court held that the use of the word 'guarantee' was about as emphatic as could be imagined and that any ordinary, sensible person would take this to mean that the advertiser had offered to bind himself according to the terms

[143] 14(2C), Sale of goods Act, 1979.
[144] The Times, 12 January 1932.

of the advertisement.[145] This indicates that for incurring contractual liability there might be express terms, but usually they are implied.

5.3.1.3. Doctrine of Privity of Contract

Here it is pertinent to analyze the issue of *privity* of contract and its effects on the contract regime of product liability. This is a well known principle of English law of contract.[146] *Privity* has two aspects: only someone who is a party to the contract can claim under it. Second, only the person who is privy to the contract can be sued under it. In sale of goods cases, this is the retailer. If the retailer is insolvent- and many small shops are not insured against or otherwise capable of meeting large claims-the purchaser has no further remedy in contract. Traditionally he has been left with an action in negligence, usually against the manufacturer.[147] The problem caused by *privity* of contract is the position in which it places those who have not actually contracted to buy the goods, but have simply been gifted the goods or who were supposed to enjoy the goods jointly with the buyer. General principles of contract law allow buyers, in some circumstances, to claim (as their own loss) a loss

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[145] David Oughton and Jhon Lowry, *Text book on Consumer Law*, 2nd edition, Oxford University Press, p.109. See also Carlil v Carbolic Smokeball Co. Ltd [1893] 1 QB 256 and Bowerman v ABTA (1995) 145 NLJ 1815.

[146] There is a well established doctrine of *Privity* of Contract under which no one except the parties to it can sue for a breach of it. Formerly it was thought that this principle of law of contract also prevented any action being brought under tortuous liability. But this fallacy was exploded by the House of Lords in the celebrated case of Donoghue v. Stevenson. In that case a manufacturer of ginger beer had sold to a retailer, ginger beer in a bottle of dark glass. The bottle, unknown to anyone, contained the decomposed remains of a snail which had found its way to the bottle at the factory. X purchased the bottle from the retailer and treated the plaintiff, a lady friend (the ultimate consumer), to its contents. In consequence partly of what she saw and partly of what she had drunk, she became very ill. She sued the manufacturer for negligence. This was, of course, no contractual duty on the part of the manufacturer towards her, but a majority of the House of Lords held that he owed a duty to take care that the bottle did not contain noxious matter and that he was liable if that duty was broken.

[147] Rodney Nelson, Jones and Peter Stewart, *Product Liability, The New Law under the Consumer Protection Act, 1987*, pp.13-19.

suffered by such a non-buying user. However, the law on such claims is restrictive and unclear.

In practical terms, this means that in respect of a breach of the statutory rights, the consumer can sue only the seller, and even this action is not open to the consumer unless he is also the buyer. It is not possible for a non-contracting party, such as a member of the consumer's family, or a friend, or a subsequent private purchaser from the consumer, to sue the original seller, unless the buyer can be construed as acting as the agent for the non-contracting party (e.g. where a wife acts as agent for her husband). The doctrine of *privity* is thus a severe limitation on the efficacy of the consumer's statutory rights. The consequence is that an action by the consumer against the manufacturer will normally have to be base either in contract on the manufacturer's guarantee (if any) or in tort.[148] It was in 1842 that the Exchequer-Chamber decided the celebrated case of Winterbottom v. Wright.[149] In this case, the defendant, Wright, a manufacturer and repairer of stagecoaches, supplied a stagecoach to the Postmaster General under a contract to keep it in good repair. The coach subsequently broke down and overturned, injuring the driver, Winterbottom, who sued for damages. The court gave judgment for the defendant. It was held that an injury victim could not maintain a negligence action against a seller of a defective product in the absence of *privity* of contract.

This case is perhaps the best starting point to examine the evolution of products liability in both the United Kingdom and the United States. In this case Lord

[148] M J Leder, *Consumer Law*, p.84.
[149] Ibid.

Abinger concluded that liability would not attach to the contractor because "there [was] no *privity* of contract between these parties. Both U.S. and U.K. courts extended the Winterbottom *privity* rule to products liability cases. Winterbottom came to stand for the proposition that plaintiffs injured by a defective product could only maintain a cause of action in negligence or warranty if there was *privity* of contract. In an opinion reflecting the views of the other judges, Lord Abinger, C.B., remarked that to allow such claims would open up infinity of actions.... unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue."[150]

There is bulk of case law in which the *privity* rule is applied such as in Daniels v. White and Tarbard,[151] Mr Daniels purchased some lemonade from Mrs Tarbard. The lemonade, manufactured and bottled by R. White & Sons Ltd., had somehow been contaminated by carbolic acid, which made both Mr and Mrs Daniels ill. It was held that Mr Daniels could succeed on a claim against Mrs Tarbard under the Sale of Goods Act but Mrs Daniels had no claim against Mrs Tarbard as she had not bought the lemonade and so was not a party to the contract.

The victims of defective products can never rely on contractual rights, because there is lack of 'horizontal *privity*' as they were not a party to the contract under

[150] Abed Awad, The Concept of Defect in American and English Product Liability Discourse: Despite Strict Liability Linguistics, Negligence is Back with a Vengeance, Pace International Law Review, Vol.10, Issue.1, Summer,1998 available at: http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1262&context=pilr, last accessed on 12.03.2014.

[151] Daniels v. White and Tarbard (1938).

which the goods were supplied. This would exclude the recipients of gifts, possibly members of a group who did not pay for goods consumed and bystanders. The 'vertical *privity*' restricts the possible defendants to the final seller.[152] In this context, it has to be noted that when a retailer who is liable to a customer for breach of the statutory rights in the Sale of Goods Act can normally seek an indemnity from his own supplier for breach of the Act, who in turn can claim against his supplier and so on back through each link in the chain of distribution to the manufacturers.[153]

Similarly, in Priest v Last,[154] the husband bought the hot water bottle and his wife was injured by it. He was entitled to recover expenses that he incurred in paying for her medical treatment but, as she was not a party to the contract, she could not claim damages for her injuries.

Later on it will be discussed that the provisions of the Consumer Protection Act, 1987 have improved the position of the consumer somewhat, but this is only in respect of physical harm suffered as a result of the defectiveness of the product in question.[155] There is a significant disadvantage to contractual liability as only the parties who are the parties to the contract will be able to have a claim under the same. If the buyer buys the goods which are defective, he or she can only have a claim under contract of sale against the Seller e.g. retailer. If the retailer is insolvent there are no further claims possible. The Buyer will therefore be left without any

[152] Geraint G. Howells, The Law of Product Liability, 2nd Edition, LexisNexis Butterworths, p.265.
[153] Ibid.
[154] Priest v Last [1903] 2 KB 148.
[155] David Oughton, *Text Book on Consumer Law*, p.104.

remedy. No third parties will be able to claim against the retailer either.[156] In this context Prof Geraint Howells writes:

> "If the injured person is a party to the contract he will be helped by a comprehensive range of rights which can be relatively easily enforced since they impose strict liability. It is still necessary however to prove the breach of contract and the causal connection between the breach and the injury."[157]

Thus the law of contract is inherently limited in its scope. It covers parties to the contract, but it neither protects nor imposes legal liabilities on anyone else. This situation is not even altered in practice by the enactment of Contract (Rights of Third Parties) Act, 1999.

4.3.2. Express Terms in English Law of Contract

If the seller promises to provide specific results-either in terms of performance of the product or its suitability to the consumer-the existence of an express warranty will be recognized. The promise may have been made within the agreement itself or outside of it.[158] These may be oral or in drafted form. In other words an express term is an assurance declared by the seller of property or goods to the buyer that the goods or the property being delivered to him/her will be as promised. It acts as a guarantee to the buyer that the products are reliable and are also free from any

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[156] See article entitled, *"What is product liability in contract and in tort?"* http://www.inbrief.co.uk/regulations/product-liability-in-contract.htm last accessed on 20/04/2014.

[157] Geraint Howells, *Product Liability: A Global Problem*, Managerial Law, Vol. 29 Iss: 5/6, pp.1 – 36.

[158] Stephen E. Blythe, Contractual Liability of Suppliers of Defective Software: A Comparison of the Law of United Kingdom and United States, North-western Journal of International Law and Business, Vol.26, Issue 1 Fall, available at: http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1617&context=njilb, last accessed on 06.03.2014.

known defects. Furthermore it gives an assurance to the buyer that the seller will, with no payment, repair or replace defects parts within a particular time limit and under specified conditions. A warranty gives an assurance that the product meets the required specifications needed by the buyer. When one purchases a product, an individual in the chain of distribution of the product legally warrants that the given product is reasonably safe.[159] Express term is made in three broad ways: affirmation of fact made by the seller of the products to the buyer linked to the goods; by method of description of the goods and through a model, all this constitutes the bargaining basis. Words spoken during sales contract negotiations, a model, purchase of similar product earlier or tags fixed to the product are forms of express warranty. When a salesperson declares that the product is guaranteed free from defects within a period of one year from the date of purchase, an express warranty is formed. Once a seller recommends the use of a good, he/she makes an express warranty.[160] In case the good does not meet the required purpose, the buyer can file a suit. Breach of one of the aforementioned warranties, contains aspects of tort and contract law. Hence, consumer has a right under the contract regime in case of the manufacturer's guarantee[161] provided that the consumer knows about the guarantee before he makes the contract with the retailer, and that he fulfils any requirements imposed by the manufacturer (e.g. return of a guarantee card). Then the consumer

[159] Miller &Jentz, *Business Law Today*, 9th Edition, Cengage Advantage Books, 2007, p. 358.
[160] Jennings, *Foundations of Legal Environment of Business*, Cengage Advantage Books, 2005, p.200.
[161] It has to be noted here that a manufacturer's guarantee is often called a "*warranty*". This use of the word "*warranty*" must not be confused with the same word "warranty" in its alternative meaning of minor contractual term, as opposed to a "condition". The meaning which the word carries will be clear from the context in which it is employed.

can establish a "collateral" contract with the manufacturer and can sue on it. To adopt the technical language of the law of contract, the "offer" is found in the terms of the guarantee) which have to be communicated to the consumer before acceptance), while the act of purchasing the goods from the retailer, and the fulfilment of any other requirements of the guarantee, constitute both the "*acceptance*" of and the "*consideration*" for the contract of guarantee. The consumer has become privy to a contract with the manufacturer. In other words, the parties have entered into a direct and enforceable contractual relationship together.[162] The famous case of Carlill v. Carbolic Smoke Ball Co.[163] is a forerunner of the enforceability of guarantees. Mrs Carlill bought a smoke ball on the strength of an advertisement by the defendants in which they offered to pay 100 to anyone who caught influenza after using on e of their smoke balls in the prescribed way. "To show their sincerity" the defendants deposited 1000 with named bankers. Mrs Carlill used the smoke ball in the prescribed way but nevertheless caught influenza. She sued for the 100. It was held by the court that she was entitled to succeed. The advertisement was an offer to the world at large, which Mrs Carlill had accepted by buying and using the smoke ball as prescribed; in the absence of any requirement to the contrary, there was no need to communicate "acceptance" of the guarantee to the defendants. Similarly, the example of a case with explicit, result oriented warranties is St. Albans City v. International Computers Ltd.[164] The City, as the Plaintiff, entered into an agreement with defendant software supplier. The

[162] M J Leder, *Consumer Law*, p.85.
[163] Carlill v Carbolic Smoke Ball Co [1893] 1 QB.
[164] St. Albans City v. International Computers Ltd, [1996] 4 All E.R. 481.

software was required to be capable to maintain a reliable database of the names of the city's taxpayers, i.e. it had to be fit for its intended purpose. However, the computer software was not fit for its intended purpose in a sense that the defective software underestimated the number of taxpayers in the community, causing the city to charge each taxpayer less than it should have, resulting in a loss of tax revenues to the city coffers. Hence, the software provider was held liable for the amount of the lost revenue.[165]

It should be clearly understood that if the consumer does sue on an express term, his only rights are those granted by the term itself. Thus if the express term provides for repair of goods and replacement of defective parts, then that is all that the consumer is entitled to under the guarantee; he cannot claim as against the manufacturer that his statutory rights have been infringed, a point often misunderstood.[166]

According to section 5 of the Unfair Contract Terms Act where goods are of a type ordinarily supplied for private use or consumption, a manufacturer's guarantee cannot exclude or restrict liability for defects in the goods while in consumer use, resulting from negligence during manufacture or distribution of the goods. Goods are to be regarded as "*in consumer use*" when in use otherwise than exclusively for the purposes of a business. Section 5 does not apply to a dealer's guarantee.[167]

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[166] M J Leder, *Consumer Law*, p.85.
[167] Ibid., p.86.

Prior to the enactment of s.5 manufacturers' guarantees sometimes took away more rights than they actually awarded, in which case a consumer would have been well advised not to accept the guarantee by returning the guarantee card (if any). Now, however, it is impossible for the consumer, in consequence of accepting a guarantee, to lose the right to sue the manufacturer or a distributor in the tort of negligence. But s.5 does not strictly speaking create new rights; it merely prevents the consumer from being deprived of his common law right to sue a negligent manufacturer or distributor. The manufacturer is not subjected to strict liability for defective products- negligence must still be proved as a condition of liability. Further, nothing in s 5 alters the rule that the manufacturer is not liable (apart from any obligations specifically assumed under the guarantee) in the contract whether for breach of the statutory rights or for the breach of any contractual obligations of the seller.[168]

Under the statutory warranties the recovery is allowed both for physical and purely economic loss caused by breach of quality standards.[169] It is also pertinent to note here that these liabilities are "strict liabilities", a term which has a sharp settled meaning in U.K. jurisprudence. A strict liability is defined as one for which reasonable care –i.e. absence of fault is no answer.[170] This is the litmus test for the term. In determining from case law whether a specific liability is strict, this test can be applied in either of two ways:

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[168] Ibid.
[169] P.S. Atiyah, *The Sale of Goods*, ch. 12 (9th ed. 1995).
[170] A Concise Dictionary of Law, p.398.

1. If there is any case in which, despite the court clearly judging that the defendant had conducted himself with all reasonable care, liability is imposed, then that liability is strict.

2. If there is any case in which, despite the court clearly judging that the relevant risk was unforeseeable, liability is imposed, then that liability is strict.

Since it is possible to be held in breach of a U.K. sales warranty even though it is agreed by both sides that the risk/defect was unforeseeable and/or that the defendant used reasonable care it follows that they are strict liabilities.[171] These warranties operate as terms implied into the contract of sale by the legislation.[172] Claims for breach of such warranties are therefore contractual claims and as such are governed by the classical rules of contract, including the doctrines of consideration (establishing which promises are enforceable) and *privity* (determining who can do the enforcing). The latter is of crucial importance because, despite some flirting with reform, U.K. courts and the legislature have so far stuck very firmly to the view that, at least with respect to defective goods, only those purchasers who paid the consideration are privy to the contract. This means that as in the United States where courts gradually began to extend the protection of sales warranties to parties who would not have been regarded by classical contract law to be in *privity* with defendant, no such extension has occurred in the United Kingdom. Only buyers can sue and they can only sue the other party to

[171] Frost v Aylesbury Dairy Co. (1905).
[172] Jane Stapleton, *Product Liability in United Kingdom: Myths of Reforms,* Texas International Law Journal, Vol. 34:45.

their contract of sale-the party who sold to them.[173] Thus, under the contract regime the doctrine of *privity* of contract shielded the manufacturer.

4.3.3. Implied Terms in English Law of Contract

There are certain terms that are called 'implied terms'. These are set out for the parties by statutory law i.e. *Sale of Goods Act 1979* , *The Sale of Goods (Implied Terms) Act 1973* and *The Supply of Goods and Services Act 1982 and* The Sale and Supply of Goods to Consumers Regulations 2002 etc. or by custom or by necessity. The area of liability of defective products is mainly covered by the statute, however, the importance of common law even today cannot be denied. In a contract for the sale of a product or for hire purchase of the goods, contains certain implied terms which are required to be fulfilled for the contract to be lawfully executed. These implied terms are satisfactory quality and correspondence with description or fitness for purpose etc. . Such terms will not be able to be excluded from the contract. If they were excluded such a provision would be contrary to the Unfair Contractual Terms Act. In order for a person to face contractual liability, there has to be some sort of contractual promise or contractual term which would have to be breached and there must be a clear intention to create these contractual relations. These contractual relations must intend to be binding. Description of the goods must comply with the one stated in the contract. If the description does not comply this could constitute fraudulent or negligent misrepresentation. In this case a person could be eligible

[173] Ibid.

for damages. Contractual liability will enable the party to recover compensation for damage which was caused by the use of defective products and it gives the party the option to reject such defective goods.[174]

In the context of product liability s. 14 (2) of the Sale of Goods Act, 1979 is very important. It implies terms regulating the quality and fitness of goods into all contracts of sale[175] as follows: where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality.[176] According to the section the defendant must be selling in the course of business. Goods are of satisfactory quality[177] if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.[178] The quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods[179]—

[174] See article entitled, "What is product liability in contract and in tort?" http://www.inbrief.co.uk/regulations/product-liability-in-contract.htm last accessed on 20/04/2014.

[175] Where the seller sells goods in the course of a business. This excludes private sales, where the risk to the purchaser is defined by the maxim caveat emptor-`let the buyer beware`.

[176] 14 (2), Sale of Goods Act, 1979.

[177] A significant expansion of the concept of satisfactory quality and applicable remedies for breach has been made by the Sale and Supply of Goods to Consumers Regulations 2002, which entered into force on 31 March 2003 and amend Sale of Goods Act. The Regulations implement Directive 1999/44/EC on Certain Aspects of the Sale of Consumer Goods and associated Guarantees.

[178] 14 (2A), Sale of Goods Act, 1979.

[179] 14(2B), Sale of Goods Act, 1979.

a. Fitness for all the purposes for which goods of the kind in question are commonly supplied,[180]

b. Appearance and finish,

c. Freedom from minor defects,

d. Safety, and

e. Durability.

The satisfactory quality standard, imbued with the concept of reasonableness, is arguably a lower standard of safety than under the Consumer Protection Act, 1987 (which protects safety "as persons are generally entitled to expect").[181]

In practice if the goods are sold in the course of a business, and they turn out to be unsatisfactory in the sense that they are defective in some way, the customer has the unqualified right to a remedy. What this remedy consists of may depend on who the customer is: that is, whether they are a consumer or not. Section 14(6) Sale of Goods Act, 1979 tells us that the implied terms from section 14 (2) and (3) are 'conditions'. In contract law, what this means is that the non-breaching party (the customer) has the right to bring the contract to an end, or 'terminate' it. In the sense of sale of goods, this means the customer has a choice to keep the goods in question but demand that they be fixed or give the goods back and receive their money or give the goods back and receive alternative goods.

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[180] The word *'fit'* here means the goods should be both appropriate for the purpose made known and able to do what was expected of them.

[181] Chris Willett, *The Role of Contract Law in Product Liability*, in Grubb & Howells (eds.), *The Law of Product Liability* (2000), p. 77.

This can otherwise be expressed by saying that the customer has the right to one of the 'three Rs': Repair; Refund or Replacement. If the goods fail to conform to description or fail to meet the satisfactory quality standard then the consumer will be entitled to reject them, terminate the contract and sue for damages or take advantage of the new remedies of repair, replacement, price reduction or rescission. This scheme of remedies was introduced into Sale of Goods Act, 1979 by the Sale and Supply of Goods to Consumers Regulations 2002. However, buyers cannot expect a legal remedy in respect of fair wear and tear; misuse or accidental damage; and if they decide that they no longer want the item.

The claimant has to establish on the balance of probabilities that the breach caused the damage. To put the buyer in the position he would have been had the contract been properly performed is the basic purpose of assessment of contractual damages. The seller will be liable for damages likely to result from the breach.[182]

According to s.61 (1) of the Sale of Goods Act, 1979 "good" includes all personal chattels, other than things in action and money, and in Scotland all corporeal moveables except money; and in particular goods includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale and includes an undivided share in goods.

The definition clearly includes tangible moveable items, ie household items, food, clothes, domestic animals etc. . The definition also includes large chattels such as aircraft or ships, but these are also governed by other sector-specific legislation (see

[182] Hadley v Baxendale (1854) 9 Exch 341.

for example the Merchant Shipping Act 1995). However 'real property' (freehold interests in land) and 'chattels real' (leasehold interests in land) are not included.[183]

It is undoubtedly the case that if goods are unsafe they will fail to reach the required qualified standard and the retailer will be liable for the lack of their safety. Where the consumer suffers harm to his person or damage to property other than the defective product itself, such harm is remediable in an action for consequential loss, provided it satisfies the contractual principles of remoteness of damages.[184]

It includes unsafe food[185] , clothes[186] and packaging in which goods are supplied. Thus if glass bottle in which a soft drink is supplied causes an injury to the consumer[187], it too fails to satisfy the sale of goods Act 1979, s.14. Similarly, solid fuel or other material which causes an unexpected explosion, thereby resulting in property damage[188], fails to satisfy the requirements of satisfactory quality and fitness for purpose. Accordingly, consequential loss damages may be awarded to the consumer who suffers personal injury or damage to property other than the defective product itself, provided that loss is not too remote.

"Goods supplied" includes their containers: e.g. Morelli v Fitch and Gibbons (1928), where a bottle of ginger wine broke at the neck when the plaintiff was opening it with a corkscrew. The condition imposed is that of merchantable

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[183] Geraint G.Howells, *The Law of Product Liability*, 2nd Edition, LexisNexis Butterworths, p.53.

[184] Waddam, *The Strict Liability of suppliers of Goods*, (1974) 37 MLR 154; available at: http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1974.tb02374.x/pdf, last accessed on 20-08-2013.

[185] Heil v Hedges [1951] 1 T.L.R. 512; (1951) 95 S.J. 140.

[186] *Grant v The Australian Knitting Mills* ([1936] A.C. 562).

[187] Geddling v Marsh [1920] 1 KB 668.

[188] Wilson v Rickett Cockrell & Co. Ltd [1954] 1 QB 598; Vacwell Engineering Co. Ltd v BDH Chemicals Ltd [1969] 3 All ER 1681.

quality. An example of its breach is Wren v Holt (1903), in which beer bought by the plaintiff from the defendant`s beer house contained arsenic and he was poisoned through drinking it. Although the price is relevant circumstance under the act, the mere fact of cheapness does not justify the sale of unsafe products. In Godley v Perry (1960), the catapult purchased by a six years old plaintiff which broke and he was struck in his left eye. The catapult had been made with the cheapest kind of injection moulding material which proved unsuitable. It was held that the catapult was not of merchantable quality.

These statutory rights cannot be limited or excluded in consumer contracts (see the Unfair Contract Terms Act 1977, s.6 (2)). Unfair Contract Terms Act, 1977 and the Unfair Terms in Consumer Contracts Regulations 1999 now offer extensive statutory protection to the consumers against unfair terms in contract that restrict consumer`s right.[189]

4.3.4. Compensation for Damages in English Law of Contract

In English law there are a variety of damages that may be awarded to the party seeking relief. These are compensatory damages; consequential damages punitive damages and nominal damages. In case the goods are not in compliance with the description or fail to meet the satisfactory quality standard or not fit for a particular purpose then the consumer will be entitled to terminate the contract, reject the goods and sue for damages. The consumer can also take advantage of the new remedies of repair, replacement and price reduction. This new scheme of remedies

[189] David Oughton and Jhon Lowery, *Text Book on Consumer Law*, p.105.

was introduced into the Sale of Goods Act by Sale and Supply of Goods to Consumers Regulations, 2002. Normal causation rules apply i.e. the burden of proof is on the claimant to establish on the balance of probabilities that the breach caused the alleged damage. Contractual damages are assessed in order to put the buyer in the position he would have been had the contract been properly performed. The remoteness principle applies so that seller will be liable for damages "arising naturally from the breach" and those "in the reasonable contemplation" of the parties at the time of contract as likely to result from breach.[190] Therefore, although contractual damages are primarily aimed at recovering pure economic loss (i.e. a reduction in the value of the goods from the purchase price due to the defect), they may also be available for compensation for consequential loss, including personal injury[191], death and property damage.

4.3.5. Limitation Period in English Law of Contract

The limitation period for the suits of product liability under the current contract regime has been given in the Limitation Act, 1980. In this context, according to S.5 of the Limitation Act, 1980, an action for the violation of contract regime of product liability cannot be brought after a period of 6 years from the date on which the cause of action occurred i.e. the time of supply. Hence, the maximum period under contract regime is 6 years. Thus, the limitation period under the contract

[190] Hadley v Baxendale (1854) 9 Exch 341.
[191] Godley v Perry [1960] 1 WLR 9 (child lost his sight due to defective catapult); Grant v Australian Knitting Mills [1936] AC 85 (claimant contracted dermatitis from woollen underwear).

regime is more restrictive as compare to the limitation periods in tort and under Consumer Protection Act, 1987, which run from the date the damage occurred.[192]

4.3.6. Advantages and Disadvantages of English Contract Regime of Product Liability

4.3.6.1. Advantages:

The contract law offers a wide range of potential rights and remedies to a buyer in a contract to acquire goods and service. These rights are available not only against the actual suppliers but also the retailers who make pre-contractual statements. In some cases it is even available against those who are financing the contract of sale or supply (i.e. they are not the manufacturer neither supplier). In cases when the manufacturer provides some kind of guarantee he is liable even if he is not seller or supplier. Another advantage of the contract regime of product liability is that there is no need to establish a duty of care and its breach like that in tort as it is strict liability in most of the cases. Thus, if a seller, manufacturer or supplier makes a contractual promise regarding the standard of the goods or that they will be repaired in case they break down then there is breach if the goods are below that standard or if they are not replaced or repaired as promised. The promisor is not shielded from being in breach simply because he did not owe a duty of care to the consumer, or because he is not negligent. Similarly when the implied terms are violated by the seller or supplier the buyer is not bound to establish that the breach

[192] See http://www.biicl.org/files/1123_overview_uk.pdf last visited 17-8-2013.

was the result of negligence of the seller or supplier. The seller or supplier is in breach for failing to supply goods of the relevant standard. Moreover, the pure economic loss and consequential economic loss are also covered by the contract regime.[193] These losses are not recoverable in the tort regime or under the CPA, 1987. The contact regime, as we have seen, offers a wide range of remedies e.g. rejection, repair, replacement, price reduction and rescission remedies available to the potential claimants.[194] As it is arguable that the manufacturer should also be held liable in contract when the goods are of poor quality, as he benefits from the retailer having sold the goods to the buyer.

4.3.6.2. Disadvantages

The chief limitation of contractual liability results from the doctrine of *privity*[195] of contract; in general, a contract cannot confer rights or impose obligations on any person except the parties to it. Contract law is flawed as a method of consumer protection by the requirement of *privity* of contract. [196] This has two aspects: Only someone who is a party to the contract can claim under it. Second, only who is privy to the contract can be sued under it. In sale of goods cases, this is the retailer.

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[193] Pure economic loss means the loss that is caused by the product not being worth what it would have been if it had conformed to the contract and Consequential loss means any loss that consequential upon basic economic loss such as the hiring of a replacement.

[194] Geraint G. Howells, *The Law of Product Liability*, pp.50-51.

[195] See Winterbottom v Wright [1842] 152 Eng. Rep. 42. The harshness of the doctrine of *privity* was lessened to a certain extent by the enactment of the Contracts (Rights of Third Parties) Act 1999, as well as developments in the law of negligence which allowed claims to be taken against manufacturer and the enactment of the Consumer Protection Act 1987. However, these would rarely be satisfied in the product liability context and in any event there is no right to enforce if the parties did not intend the term to be enforceable by the third party. It is where the third party is expressly identified in the contract (section 1(3)) or if the contract purports to confer a benefit on him/her (section 1(1)).

[196] Daniels v. White [1938] 4 All E.R.258.

If the retailer is insolvent-and many small shops are not insured against or otherwise capable of meeting large claims-the purchaser has no further remedy in contract. Traditionally he has been left with an action in negligence, usually against the manufacturer.[197] Moreover, the limitation period under the contract regime is more restrictive as compare to the limitation periods in tort and under Consumer Protection Act, 1987, which run from the date the damage occurred.[198]

Another problem caused by *privity* of contract is the position in which it places those who have not actually contracted to buy the goods, but have simply been gifted the goods or who were supposed to enjoy the goods jointly with the buyer. General principles of contract law allow buyers, in some circumstances, to claim (as their own loss) a loss suffered by such a non-buying user. However, the law on such claims is restrictive and unclear.

In this regard G. Howells writes:

> "Unfortunately the *privity* of contract requirement remains a serious limitation to the effectiveness of contractual remedies. This not only excludes non-purchasers but limits the potential defendants to retailers, who will often not be the manufacturers of the product. This is unsatisfactory since nowadays consumers are more likely to rely upon the manufacturer's advertising and literature than the advice of the retailers; in any event the manufacturer is in the best position to control the product's quality and to act as an insurer, spreading the cost through higher prices to all consumers of the product."[199]

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[197] Rodney Nelson-Jones & Peter Stewart, *Product Liability, The New Law under the Consumer Protection Act, 1987,* pp.13-19.

[198] See Overview of UK: Product Liability Law available http://www.biicl.org/files/1123_overview_uk.pdf last visited 17-8-2013

[199] Geraint Howells, *"Product Liability : A Global Problem"* Managerial Law, Vol. 29 Iss: 5/6, pp.1 – 36 available at http://www.emeraldinsight.com/journals.htm?articleid=1655960.

In Priest v Last,[200] the husband bought the hot water bottle and his wife was injured by it. He was entitled to recover expenses that he incurred in paying for her medical treatment but, as she was not a party to the contract, she could not claim damages for her injuries. Later on it will be discussed that the provisions of the Consumer Protection Act, 1987 have improved the position of the consumer somewhat, but this is only in respect of physical harm suffered as a result of the defectiveness of the product in question.[201]

Thus the law of contract is inherently limited in its scope. It covers parties to the contract, but it neither protects nor imposes legal liabilities on anyone else. This situation is not even altered in practice by the enactment of Contract (Rights of Third Parties) Act, 1999. In this context Prof Geraint Howells writes:

> "If the injured person is a party to the contract he will be helped by a comprehensive range of rights which can be relatively easily enforced since they impose strict liability. It is still necessary however to prove the breach of contract and the causal connection between the breach and the injury."[202]

The same situation exist under the Islamic law of contract however as the Islamic law of contract has provided a wide range of remedies that mitigate the damage in Islamic legal system in cases of product liability.

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[200] [1903] 2 KB 148.

[201] David Oughton, *Text Book on Consumer Law*, p.104.

[202] Geraint Howells, *"Product Liability: A Global Problem"* Managerial Law, Vol. 29 Iss: 5/6, pp.1 – 36 available at http://www.emeraldinsight.com/journals.htm?articleid=1655960, accessed on 05.08.2013.

CHAPTER 6

PRODUCT LIABILITY UNDER THE LAW OF TORTS: A COMPARISON OF ISLAMIC AND ENGLISH LAWS

CHAPTER 6

PRODUCT LIABILITY UNDER THE LAW OF TORTS: A COMPARISON OF ISLAMIC AND ENGLISH LAWS

6.1. INTRODUCTION

In case there is no contractual relationship between producer of a product and consumer of a defective product, the manufacturer's liability to the consumer would be based on tort for damages and injuries caused by defective products. This chapter expounds the English law of torts and that of Islamic law in the context of product liability and has covered a number of issues in order to analyze the notion of product liability under both the legal systems. The salient features of English law of tort and that of Islamic law have been thoroughly explained in the context of product liability. It starts with explaining the definition and scope of the law of tort in both the legal systems. The basis and nature of the liability for defective products under the law of torts is thoroughly analyzed in both the legal systems. The chapter evaluates the role played by both Islamic law of tort and that of English law. The famous "*Neighbour Principle*" of English law of tort that has been given in the landmark judgment in *Donoghue v Stevenson*[1] is highly celebrated in this regard and it has also been evaluated in the light of Islamic law. The chapter has discussed that whether or not the liability is fault-based in Islamic law of tort as it is the case in English law. Moreover, the key notions on which the tort regime

[1] Donoghue v Stevenson, [1932] UKHL 100; [1932] All ER Rep 1; AC 562.

of English product liability law is based such as the notion of product, producer, defect, potential claimants, potential defendants, causation, damage, and time limitation etc are thoroughly analyzed from the perspective of Islamic. The chapter also addresses the issue that whether or not the Islamic law distinguishes between the contractual and tortuous remedies. It has also discussed that in case a statutory duty is breached whether or not any tortuous liability may arise under English law of torts and that of Islamic law. These and many other important questions have been posed in this chapter in order to analyze and compare the product liability under the English law of torts and that of Islamic law.

6.2. PRODUCT LIABILITY AND THE ISLAMIC LAW OF TORT

6.2.1. Islamic Law of Tort: Basic Concepts

In case there is no contractual relationship between a manufacturer and the consumer of a defective product, the manufacturer's liability to the consumer would be based on the Islamic of tort. Islamic law of tort is termed in Arabic as "*fiqh al-'ḍamān*". [2] The word "*'ḍamān,*" has variety of meanings such as liability, obligation, commitment, fine and compensation etc.[3]

The classical Muslim jurists have also used the term 'ḍamān' in the meaning of surety ship.[4] In Islamic legal context, the word *'ḍamān* has been defined as "the

[2] Islamic law of torts actually refers to the traditional rules of *Sharī'ah* that are contained in the *Fiqh* manuals. To know about the product liability under Islamic law of torts one has to analyse the general principles of Islamic law of torts and then evaluate this specific emerging area of law.

[3] Ibn Manẓūr, *Lisān al-'arab*; Ferūz abādi, Al-qāmūs al-muḥīṭ; Sa'dī, Abū Ḥabīb, *Al-qāmūs al-fiqhi,* Dār al-fikr, Damascus, 1993, p.224; Nicholas H D Foster, *'The Islamic Law of Guarantees'*, *ALQ,* 16, no. 2 (2001), 139.

[4] Al-dardir, *Al-sharḥ al-kabīr,* vol.3, p.329.

duty to compensate damage either by replacing the damaged property or paying its value" or "repaying the value or equivalent of the damaged property"[5].

These definitions demonstrate that Muslim jurists used the term *'ḍamān* to indicate liability or duty to compensate for the damage caused to someone's reputation, person or property. According to *Majallāh (the Ottoman Civil Code)*, *'ḍamān* means: "the giving of an equivalent to the thing if it was a fungible, or the giving of its value if it was a non-fungible object."[6] According to Shaikh 'Ali al Khafif the basis of *'ḍamān* is the causing of damage through transgression (*ta'addī*) that attracts chastisement, and one of the basis of *Sharī'ah* is that the effect of damage must be eliminated.[7] Therefore, a person doing an act resulting in damage to others is under an obligation to make good the damage he caused. Islamic law's position in this regard is same with that of classical Roman law, which prohibits illegal acts leading to loss (*damnum injuria datum*).[8]

This is based on the well established principle of Islamic law: "No harm and no counter harm"[9] Therefore, a person doing an act resulting in damage to others is under an obligation to make good the damage he caused. This liability gives rise to

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[5] Ibn Qudāmah, *Al-Mughnī*, vol.4, p.403; Zuhaili, *Al-Qawā'id al-Fiqhiyyah wa Taṭbiqātuhā fi al-Madhāhib al-Arba'ah*, Dār al-Fikr, Damascus, 2006, vol.1, p.547.

[6] Majallāh, Art. 415-416. Other rules pertaining to civil liability in general and *ḍamān* in particular, could be found in Book VIII, Arts. 2-100.

[7] Ali Al-Khafif, *ḍamān in Islamic Jurisprudence* (Cairo: Arab League's Institute of Research and Arabic Studies, 1971), p. 218.

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

[9] Ibn Nujaim, *Al-ashbāh wa al-naẓā'ir*, vol.1, p.74.

an obligation to provide similar thing, the intention being to make good the damage. This liability has a religious basis in Islamic law.[10] The legitimacy of *'ḍamān* is proved from Qur'ān, Sunnah and 'Ijmā' in order to protect and preserve lives and wealth of the people. There are many verses of the Holy Qur'ān in this context such as:

> "If then any one transgresses the prohibition against you, Transgress ye likewise against him."[11]

Qur'ān says:

> "The blame is only against those who oppress men and wrong-doing and insolently transgress beyond bounds through the land, defying right and justice: for such there will be a penalty grievous." [12]

Qur'ān also says:

> "And if ye do catch them out, catch them out no worse than they catch you out: But if ye show patience, that is indeed the best (course) for those who are patient."[13]

There are many traditions that prove the legality of *'ḍamān* in Islamic law. It has been reported that the she-camel of Barā' b. Azib entered the garden of a man and did damage to it. The Apostle of Allāh (pbuh) gave decision that the owners of properties are responsible for guarding them by day, and the owners of animals are responsible for guarding them by night.[14] Similarly it is reported that 'Āyishah, the

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

[11] Qur'ān 2:194.

[12] Qur'ān 40:42.

[13] Qur'ān 16:126.

[14] Aḥmad, *Musnad*, vol.30, p.570; 'Abul Razzāq, *Muṣanaf*, tradition no.18438, vol.10, p.82.

prophet's wife, had broken a pot of food given to the prophet by his other wives, and that the Prophet (pbuh) had said to her *"A pot like pot and food like food."*[15]

It is also reported that the Holy Prophet (pbuh) said: "The hand that takes is responsible for what it has taken until it returns it."[16]

The famous Ẓahirī jurist Imām b. ḥazam has said that the property is sacred therefore it is not allowed to make someone liable to pay damages for an act unless proved. The same should be endorsed by a text or consensus.[17] This is based on the narration from the Holy Prophet (pbuh) said: *"It is unlawful for a Muslim to take the wealth of his brother without his consent".*[18]

Hence, in the context of this research the meaning of 'compensation' for the term '*ḍamān*' has been focused. It subsumes compensation as a restitutionary remedy (*restitutio in integrum*), including any form of monetary compensation or material remedy imposed at the party at fault in favour of the injured party, with regard to loss infringing his property.[19]

There are some basic elements to establish *'ḍamān* under Islamic law of tort. These are known as '*ta'addī*' and '*ḍarar*'. *Al-ta'addī* literally means to overstep or exceed.[20]

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[15] Al-ṭirmidhī, *Sunan*, tradition no. 1359, vol.3, p.33.

[16] Aḥmad, Musnad, tradition no. 20086, vol.33, p.277. This has become an established legal maxim in Islamic fiqh, see Al-burnu, *Al-wajīz fi 'idah al-qawā'id* al-fiqhiyah', p.372.

[17] Ibn ḥazm, *al-muḥallā*, Dār al-fikr, Beirut, v.6, p.404.

[18] Al-dār quṭnī, Sunan, tradition no.2885, vol.3, p. 424;

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

[20]Dictionary of Modern Arabic available at: http://www.studyquran.org/resources/HansWehr-cowan.pdf, last accessed on 12.08.2014.

In technical sense it is the violation, breach or infringement of law. In the context of *fiqh* it is used in the context of overstepping the bounds of permissible action.[21] A permissible action means that one which has not been declared impermissible by *Sharī'ah*. *Al-ḍarar* literally means harm. In *fiqh* it denotes the meaning of damage caused to someone's reputation, person or property.[22] The causational link between the *ta'addī* and *ḍarar* is known as al-*rabiṭah* (the link). [23]

'Damān has been classified by Muslim jurists into *'ḍamān 'aqd*, *'ḍamān-al-fā'il* and *'ḍamān-al-ghasb*. The concept of *'ḍamān al-'uqūd* has been thoroughly analysed in chapter five of the thesis while discussion about the contract regime of product liability. This chapter expounds the notion of *''ḍamān al-fā'il'* in the context of liability for defective products.

Modern jurists define *''ḍamān al-fā'il'* as "the civil liability or duty that obliges or requires a person to compensate others for damage that results from his own act".[24] Therefore, *'ḍamān-al-fā'il'* can accurately be translated as tortuous liability. It was upon the following Qur'ānic verse, as well as other related *Sunnah*, that the traditional manuals established the principle of *'ḍamān-al-fā'il*:

> "To Solomon We inspired the (right) understanding of the matter: to each (of them) We gave Judgment and Knowledge; it was Our power that made the hills and the birds celebrate Our praises, with David: it was We Who did (all these things)."[25]

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[21] Al-Zuhailī, *Naẓariāt ul-ḍamān*, p.18.
[22] Ibid.. p.23.
[23] Ibid.. p.26.
[24] Zarqā, *Al Madkhal Al Fiqhi A'ā-m*, p.1017.
[25] Qur'ān, 21:79.

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

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

"....there shall be neither harm nor reciprocating harm".[26]

The Islamic law of tort is that body of law concerned with civil injury or wrong. Civil injury means any injury, legal action for which is brought to the civil court by the injured party himself, not by the state. Any injury or wrong which is designed to punish the defendant and the legal action or legal proceedings for which are taken and conducted in the name of the state is called as crime.[27] In other words it is the violation of man's rights while crime is the violation of right of Allāh and

[26] Al-Bayhaqī, *al-Sunan al-kubrā*, tradition no.11384, vol.6, p.114; Aḥmad, Musnad, tradition no.2865, vol.5, p.55; Ibn Mājah, Sunan, tradition no.2340, vol.2, p.784; Al-dār Quṭnī, Sunan, tradition no. 4539, vol.5, p.407. This was codified in the *Majallāh* as Art. 19.

[27] Abdul Basir Moḥammad, *The "Egg-Shell Skull" Rule in Cases of Nervous Shock in Islamic Law of Tort*, Islāmiyyat, 30, 2008, pp.3-28.

right of state. In Islamic law, the criminal cases have been analysed and discussed by the Muslim scholars in their mutual texts in the topic of *hudūd* (pl. *ḥadd*, i.e. limits). Cases other than *ḥudūd* which are treated in the topic *jināyah* (offence), or of qiṣāṣ (retaliation), or of *diyyah* (blood-money/blood-wit), or of *arsh* (compensation), or of *siyal* (assault), or of *ghash* (usurpation), or of *sulh* (compromise) are dealt with as tort.[28] In the words of Sir 'Abdul Rahīm':

> "...the line which divides the two kinds of wrongs, torts and crimes, is sometimes very narrow or as the Muhammadan jurists put it there are some matters in which the rights of the public and of individuals are combined. The test is, to whom does the law grant the remedy, the public or the individual. If to the latter, the wrong which gave rise to the remedy will be regarded as a tort, and, if to the former, it will be called a crime".[29]

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

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[28] Ibid.

[29] Abdul Raḥīm, *Muhammadan Jurisprudence*, All Pakistan Legal Decisions, Lahore.1977, p.351.

6.2.2. *The Nature of Liability in Islamic Law of Tort*

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

A person is negligent when he does not take ordinary care in his/her actions or omissions. There are detailed rules regarding the tort of negligence in classical Islamic Jurisprudence.[30]

The tort of negligence in Islamic jurisprudence is older than its counter-part in English law. As Allāh has given man reason and made him capable of thinking. Therefore, a person is totally responsible for his actions – a responsibility brought upon him by his reason, his will, inclinations, and choice.[31] An act is generally directed towards an object (*maḥall*). In that case intention in order to be complete must be considered with reference to the act itself as consisting of motion of the body as well as the object. Sometimes the act itself may happen, but directly affect an object other than the one intended. This may be attributable to the means actually employed in doing the act or to ignore of the outward circumstances affecting the accomplishment of the object in view. In the employment of such

[30] Joseph Schacht has negated the notion of negligence in Islamic law. He says: "The concept of negligence is unknown to Islamic law" (Joseph Schacht, An *Introduction to Islamic Law*, p.182). However, this is not correct.

[31] Liaqat 'Ali Khan Niazi, *Islamic Law of Tort*, p.234

means or such ignorance is due to not using that amount of judgment, attention or effort as men ordinarily use, the act is said to be negligent, heedless or careless otherwise it is called a mistake or accident (*khaṭā'*).[32]

Any act that is wrongful in itself the perpetrator of such act will always be held liable e.g. a public road is meant for traffic and any other use of it amounts to trespass. Therefore, if a person makes a projection on a public road and the projection falls on a passerby and injures him or damages his property, the owner of the projection will be liable.[33] In the context of product liability we can take the example of a person who produces wine that is substandard and harms the consumer in a way that it takes his life or caused him severe harm, the producer of such wine will be held liable as the act is void *ab initio* under Islamic law. Every person is under an obligation to take care of others. In negligence cases the defendant ought to have foreseen that his act may cause injury to others.

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

> "....if a snake or a scorpion is thrown on a road and it bites someone, then the person who threw it is liable, because his act of throwing was intentional unless the snake or scorpion moves from the place in which it was thrown to another."[34]

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[32] 'Abdur Raḥīm, *Mohammedan Jurisprudence*, p.221.

[33] Ibid.,p.354-55.

[34] Al-Kasānī, (d.587 A.H.) *Badā'i' al-Sanā'i' fi Tartīb al-Sharā'i'*, Dār al-Kutub al-'Elmiyyah, 1986, Vol.7, p.273.

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

> "Ibn e Qāsim said: If you fear for your life in trying to rescue a drowning man and you let him go, then there is no liability. If you are teaching someone to swim and you fear for your life and you let him go, you are liable for his indemnity but you are not liable just as in the case of the drowning man. If someone falls into a well and asks you to lower a rope for him and in the process of pulling him up you let him go because it proves too much for you, and consequently the man dies, you are liable for his death."[35]

Al-Qarāfī further writes:

> "If you hold a rope for a man in a well to hold on to and the rope breaks, then you are not liable because it is not your (negligent act). You are liable if the rope slips from your hand."[36]

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

In case of liability for medical negligence, it is presumed that the medical professionals perform their duties with good intention for the safety and welfare of their patients unless proved otherwise. The basis of the above rule is moral. *Sharī'ah*

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[35] Al-Qarāfi, *Al-Dhākhirah*, Dār al-Gharb, Beirut, Lebanon, 1994, Vol.12, p.261.
[36] Ibid., p.261.

does not allow a person to practice medicine who is not qualified to do so.[37] In this regard *Majjala* states:

> "Some persons, who are a public harm like an unskilled doctor, are also restrained'.[38]

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

> "A person who adopts the medical profession, though he is not a doctor, is liable (for negligence and human loss and must pay compensation)."[39]

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

> "A surgeon who, on proper authorization, bleeds any one or applies leeches to him, is in no way responsible for the consequences; and an executioner who carries out a sentence of death or of flogging upon the authorization of the Sovereign is merely the latter's instrument, unless he

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[37] Ibn Mājah, *Sunan*, tradition no.3466, vol.2, p.1148; Al-nasā'ī, *Sunan*, tradition no. 4830, vol.8, p.52; Al-dār quṭnī, *Sunan*, tradition no.3438, vol.4, p.265.

[38] Mejjala, Art.964.

[39] 'Awadā' Abdul Qadir, *Al-Tashrī' al-jinā'ī fi al islām*, Vol.1, p.523.

> knows that the order is from tyrant, or given in error. In these two cases he would himself be liable under the law of talion, unless acting under violent compulsion."[40]

According to the Hidāyah, it states:

> "If a surgeon performs the operation of phlebotomy in any customary part, he is not responsible in the case of the person dying in the consequences of such operation. This is the view taken by Al-Mabsūṭ. The ground on which the law proceeds in this particular is ,that it is impossible for the operators to guard against consequences, as those must depend upon the strength or weakness of the constitution in bearing any disorder or pain, and as this is unknown , it is therefore impossible to restrict the work to the condition of safety."[41]

Whatever is required from a doctor he should not authorize anyone else for doing the same. If the surgeon operated upon a patient and asked someone else (most probably he delegated the duty of stitching the wounds to his subordinate staff or junior colleague and the patient dies as a result of the negligence on the part of the person who was delegated the duty as mentioned above) his legal position will be analogical with the surgeon who asks a patient to take poison for medical purposes for immediate treatment. In case of anaesthesia the doctor should follow all the limits prevailing in the profession and must take maximum care in order to avoid harm to the patient. If has crossed any limits then nothing shall exonerate him from liability. The doctor must exercise best practices in the field and take maximum care of the patient. They are responsible for gross carelessness due their

[40] Ibn Qudāmah, *Al-Mughnī*, Vol.5, p.398; vol.9, p.165.

[41] Al-Marghinānī (d.593 A.H.), *Al-Hidāyah*, Dār Ihyā' ul-Turāth al-'Arabi, Beirut, vol.3, p.243.

acts and omission. Liability for negligence extends to the hospital and other staff of the hospital as well such as medical officers, house officers, visiting surgeons, physicians, anaesthetists and radiographers etc. The Islamic law regarding medical negligence is so exhaustive that it extends even to druggists, barbers and circumcisers. All of them are liable to pay compensation for their negligent act.

According to Imām Nawawī:

> "It is not obligatory before majority, though it is recommended to proceed to this operation on the seventh day after birth and not to put it off unless the child has not yet sufficient strength to support it. Any one, who performs circumcision at an age when child is not yet strong enough to support, is liable under the law of tort, if the operation caused death. On the other hand a guardian is not responsible for the consequences of circumcision effected at an epoch when the child has a constitution sufficiently developed to be able to undergo the operation".[42]

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

> "to protect surgeon against claim for *diyyah* it seems to have been normal practice that people formally engaged themselves in the law court not to bring an action against a surgeon who, at their request, was about to treat or operate upon themselves or their next of kin, in case something went wrong. This was certainly a necessary precaution, since a circumciser, who by misunderstanding, cut off a boy's glans penis, had to pay his father damages."[43]

[42] Al-Nawawī (d.676 A.H.), *Minhāj al-Ṭalibīn*, 2005, Vol.1, p.306.
[43] Uriel Heyd, *Studies in Old Ottoman Criminal Law*, edited by V.L. Menage, (Oxford Clareden Press, 1973), p.309.

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

As it is clear from the above discussion that Islamic law has highly stressed on the fulfilment of duty to take proper care while performing some obligation and the violation of such duty of care is strongly condemned. In Islamic law of tort the violation of such a duty is termed as '*al-ta'addī*'. Here Muslim jurists distinguish between acts mentioned in the Qur'ān or the Sunnah and those that are not. Thus, if a person violates a duty, *wājib*, imposed by the Quran or if he commits a forbidden act, *Harām*, he is liable.

Although the Qur'ān indicates the conduct a Muslim should follow, it does not prescribe the punishment for violations of its rules. The custom is the second criterion used to classify conduct into permissible or impermissible the jurists adopted public customs in deciding cases related to public affairs and private custom for all other. In deciding the liability of a professional, they would look at the custom of the profession of which he is a member. This is based on the well known notion of Islamic law i.e. that "*what is permitted by custom is the same as what is permitted by God*".[44]

Simply, the determinant in deciding if a person has committed a tort is whether he has violated a divinely ordained order or custom thus, the recent classification of

[44] Al-burnu, *Al-wajīz fi idah al-qawā'id al-fiqhiyyah*', p.306.

the Islamic law of torts as a fault system is questionable because an infringer may be held liable without fault on his part.[45] For example , if a man walks on a slippery floor with due care and without any fault or carelessness and falls and damage property belonging to another he will still be liable under Islamic law; under a fault system he will not be liable because he is not in breach of his duty of care. This applies to all *mubasharahh* cases which do not require *ta'addī*.[46]

Even in *tasbīb* cases, *ta'addī* does not always coincide with the notion of fault. For example, in a case in which a man digs a well deeper than custom dictates, he will be liable for breaking custom even though he sought the advice of an expert who advised him that he could dig deeper than the usual depth as long as he digs to the normal depth he will not be held liable, regardless of whether he should not have dug in the first place, or whether he should have sought the advice of an expert hence whether the infringer should have reasonably foreseen the likelihood of the damage is irrelevant.[47]

Hence, the liability under Islamic law of tort is fault based. It is pertinent to mention here that according to M. Muṣliḥ-ud-Dīn, civil liability in Islam is neither *"fault liability"* nor *"strict liability"*, but may be described as *"damage liability"*. Thus general principle of liability in Islam is "no liability without damage" which

[45] Al-zuhailī, *Naẓriāt ul-ḍamān*, p.196.
[46] Ibid.
[47] Majallah, Art.924; Ali-zuhailī, *Naẓariāt ul-ḍamān*, p.199; Al-zuhailī, *Al-fiqh al-Islāmi wa adillatuhū*, vol.7, p.5646.

repudiates the idea of both "strict liability" and "fault liability" and steers clear of the confusion to which law of torts is subjected.[48]

6.2.3. *Potential defendants in Islamic Law of Torts*

Under Islamic Law, the list of potential defendant is even wider than English law. It means that everyone who causes damage to another will be held liable. As we have gone through the principle that under *Sharī'ah* there is *no harm and no counter harm, harm has to be removed* and other principles alike. It is because of this that some Muslim writers named the liability under the Islamic law of torts as damage-based liability rather than fault or no-fault liability. Muslim scholars are of the view that if an infant under the age of seven accidently damage the property of another while walking or riding, he will be held liable and must compensate for the damage out of his own asset. If he owns nothing, his guardian will have to pay out of his own assets here contrary to the law of contracts, in which minors are not allowed to form a valid contract; it is irrelevant whether this infant could comprehend what happened.[49] Similarly, lunatics are liable for their tortuous acts. In spite of the fact that traditional *Shī'ah* did not adopt the notion of fault or negligence to determine the liability of an offender, it does use terms like careless, negligent, squander etc. in connection with *ta'addī* these subordinating terms are not criteria upon which liability is based but merely a few examples of different

[48] Muṣlih-ud-Din, Muḥammad, *The Concept of Civil Liability in Islām and the Law of Torts*, pp.351-3.
[49] Al-zuhailī, *Naẓariat ul-ḍamān*, p.265.

ways in which *ta'addī* can occur.[50] The important point in *'ḍamān al fāi'l* whether *mubasharahh* or *tasbīb*, is not whether the infringer is at fault, comprehends his acts or foresees their results, but the fact that damage caused by his act renders him liable to compensate for it. This leads some modern scholars to conclude that *'ḍamān-al-fāi'l* is a system of strict liability. They based their view on the Islamic principle "*Al ghurmu bi Al ghunum*", "damage for profits" which the Prophet used in his statement "*Al Khirāj Bi Al 'ḍamān*", which means that a person who gains the profit or benefits of a thing should bear the related risks.[51] In the context of manufacturing of products for the commercial purposes according to the well known principle of Islamic commercial law every profit has a corresponding liability i.e. *Al-kharāj bil-'ḍamān*, everyone who is gaining some sort of profit can be held liable. Hence, manufacturers, producers, retailers, distributors and sellers can be held liable if the defect in the product is due to their acts or omissions as all of them are entitled to profit. Therefore, the liability imposed upon them should be in proportionate according to their profit.

6.2.4. Potential Claimants in Islamic Law

The role of individuals as complainant of violation of their rights is highly stressed upon in the sources of Islamic law. Therefore Islamic law has assigned the duty of ordaining right and repelling evil to every member of the Muslim society. It has mentioned guidelines for both i.e. individuals and the state to realize the concept of

[50] Ibid.

[51] Ibn Qudāmah, *Al-mughnī*, vol.3, p.489; Shah Waliyyullāh Al-dihlwī, *Hujjat-ullāh al-bāligbah*, Dār al-jil, Beirut, Lebanon, vol.2, p.174; Al-maqdisī, Ziyā' ul dīn, *Al-sunan wa al-aḥkām 'anil-muṣṭafā 'alaihi al-salām*, Dār Mājid Al siri, Sa'ūdī Al 'arabiah, 2005, vol.4, p.389.

rational consumption and protection of consumer's interests. Hence, every individual especially those whose rights are violated is authorised to file a complaint against the violation of any consumer right to a competent authority. In fact, the individuals obsession to the injunctions of the *Qur'ān* and the *Sunnah* regarding commercial activities firstly secure their happiness and of the whole society as it is the foundation for the whole Muslim community especially today when all the people have become materialistic, the return to the direct revelation of the Holy *Qur'ān* and the *Sunnah* of the Prophet (pbuh) has become unavoidable to bring all from the darkness to the light.[52]

6.2.5. Product and Types of Defects in Islamic Law of Tort

In Islamic Law, only those products may be covered that are valuable in the eyses of Islamic law and produced through human effort such as anything manufactured in factories, bakeries, restaurants etc. Things that are naturally produced such as agricultural products i.e. crops may not be covered in the definition of product because nobody can be held liable in cases of harms caused by such defective agricultural products. These cases may be considered as the act of God which is a valid defence against liability under the Islamic law.

As far as kinds of defects in products from Islamic law perspective is concerned, Islamic law has recognized various warranties in favour of the consumers such as

[52] The following teachings of the Holy Qur'ān are significant in this regard: "O people of the Book! There hath come to you our Messenger, revealing to you much that ye used to hide in the Book, and passing over much (that is now unnecessary). There hath come to you from Allāh a (new) light and a perspicuous Book" (Qur'ān; 5: 15); "Wherewith Allāh guideth all who seek His good pleasure to ways of peace and safety, and leadeth them out of darkness, by His will, unto the light, guideth them to a path that is straight" (Qur'ān; 5: 16); "Verily, this is my way, leading straight: follow it: follow not (other) paths: they will scatter you about from His (great) path: thus doth He command you. That ye may be righteous." (Qur'ān; 6:153).

The 'instruction defect' will be considered under Islamic law when it is the duty of the producer of a product to provide adequate warning of the product's danger and direction for safe use and he fails to do the same. Islamic law makes no distinction between products with concealed dangers and those with patent dangers. In both cases, the manufacturer is liable for inadequate warning but the mere fact that the warning is clear does not exclude the manufacturer's liability unless the warning is sufficient to extinguish the possibility of its occurrence. For example, if a product is flammable and a manufacturer's just says "keep in a cool place", a consumer might think the product will deteriorate rather than explode when subjected to heat and, hence, the manufacturer's duty is not discharged. If he warns, "flammable, keep in a cool place", his liability is discharged as there is no "*ta'addī*" on his part. Sometimes, a warning is not sufficient to discharge the manufacturer's liability. This happens when the dangers of the product are not remitted by the mere statement of the warning and, thus, such warnings are ineffectual. Manufacturer's liability here depends on the manufacturer's knowledge of the danger, but assumes that he is able to discover any dangerous feature of the product and give suitable warning and directions for safe use.[57] This is due to the fact that if the danger exists and does not know about it, this in itself is a *ta'addī* which renders the manufacturer liable. The function of warning is to illustrate the dangers of a product, while the function of instructions is to indicate how to obtain the most

[57] Nagla Sa'ad Maḥmud Naṣar, '*Manufacturer's Liability under Islamic law*', LLM (unpublished) thesis submitted to the Law School, Harvard University, U.S.A. 1985, p.14.

beneficial results from the product.[58] The latter alone is insufficient to illustrate the dangers of a product. At the same time, warning of the dangers of the product may be inadequate without direction as to usage. *Sharī'ah* has no objection on holding the manufacturer liable if he fails to recall a dangerous product already marketed once its danger has been discovered. Such attitude constitutes *ta'addī* on the part of the manufacturer.[59]

Islamic law of tort has recognised all these warranties in favour of the consumers and also made him responsible to act vigilantly to prevent violation of his rights. What if the defect cannot be discovered by normal means of inspection as in the case of current age where almost every product is the outcomes of technological mysteries and it is beyond the capacity of a man of common prudence to identify the defects or the harms that the products may cause? Islamic *Sharī'ah* would definitely recognise all means to prevent such harms under the notion of *Sadd al-dharāi'* i.e. block the ways leading to unlawful results.[60]

However, the consumer should give an immediate notice to the seller after such defect is discovered. In such cases the consumer has the option of defect and he can cancel the sale and claim damages or to keep the sale object and claim compensation for the absence of the expected characteristics due to the defect. Not exercising his option would result in losing his right to claim. The question here is that whether or not the seller's ignorance of such defect constitutes a defence? Ignorance on the

[58] Ibid.
[59] Ibid.
[60] Ibn ul-Qayyam, *I'lām al-muwaqi'in*, Dār al-kutub al-'elmiyyah', Beirut, vol.3, p.108;

seller's part in such case is no defence. However, knowledge in the consumer's part is construed as indication of *mala fide,* and is therefore an acceptable defence, be that knowledge actual or constructive. These *'ḍamān* rules will be applicable as soon as the product is transferred to the consumer.

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

> "If one of the merchants finds in the bazaar, the outskirts of town, or the streets orders one of his employees to water down the outside of neighbouring houses and this act causes death of a person, the one who has given the order is responsible. If, however, he has ordered his employee to make his ablutions and this employee goes out into the street [and causes an accident there], the employee is liable, the reason being that the ablution is for the benefit of the one who performs it, whereas the watering down benefits the one who ordered it.....".[61]

In this context Sahnūn is relevant to be quoted:

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[61] Abu Yūsuf (d.182 A.H.), *Kitāb al-Kharāj,* Al-Maktabah al-Azhariyyah Li al-turāth, vol.1, p.175 Herbert J. Liebesny, *The Law of Near and Middle East,* p.218.

> "A launderer who has much clothing to launder, hires a helper whom he orders to go to the river to wash some of the garments. He is responsible if the helper loses any of the clothes".[62]

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

6.2.6. Evidence and Causation in Islamic Law

Under the traditional Islamic law a consumer has to prove the defective condition of the product and the causal link between it and the damage caused to him. If a manufacturer wants to discharge his responsibility he has to prove that he committed no *ta'addī.* He will have difficulty proving this unless he can show that the harm was due to faulty component products or containers. He must then prove that these defects were concealed and that no intermediate inspection or examination could reveal them. Even if the manufacturer of the end product discharges his liability, the manufacturers of components or containers still face liability.

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[62] Malik, *Al-Mudawwanah*, (Riwayāt Sahnūn) Dār al-Kutub al-'Elmiyyah, 1994, vol.3, p.401.

In order to establish the liability for manufacturing products under the traditional Islamic law of torts it is very much important to under the concepts of *mubasharah* and *tasbīb*. Traditional manuals distinguish between the direct, *mubasharah*[63], and indirect, *tasbīb*[64] inflictions of harm or destruction.[65] The legal concept of these two expressions is based on their literal meanings, "*mubasharah*" denotes cases in which damage is caused due to direct contact by the offender while "*tasbīb*" denotes the situation in which harm or destruction has resulted from several causes, one of which is the offender's act.

In the traditional manuals there are endless numbers of examples for both *mubasharah* and *tasbīb*. For instance, if a sleeping person rolls over a thing placed by his side and damages it, this is destruction through *mubasharah* because the damage was due to direct contact between the sleeping person and the damage object. [66] The reason is that capacity is not a requirement to hold some one liable under the Islamic law of tort.[67]

However, the direct contract which is a feature of *mubasharah* must not necessarily be physical contact. Thus if a person who is hunting mistakenly damage property belonging to someone else with his arrow, he is then liable for damages. This case is considered a *mubasharah* case because the shot of the

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[63] *mubasharah* is derived from "*Bashar*" which means to be in direct contact with something or someone, or to practice a job or carry out a task.

[64] *tasbīb* is derived from "*Sabab*" which means to be the cause of or to motivate.

[65] Here it is pertinent to explain that defining *mubasharah* and *tasbīb* the as direct and indirect must be distinguished from the notion of direct damages which are recoverable and indirect damages which are not because the causal link between them and the offender's act is weak. Here, using the words direct and indirect must not be taken as an indicator that the causal link in cases of *mubasharah* is stronger than in cases of *tasbīb* because this would be a misleading concept.

[66] *Al-mausua'ah al-fiqhiyyah al-kuwaitiyyah*, vol.42, p.24; Al-zuhailī, *Naẓariāt ul-ḍamān*, p.197.

[67] Ibid.

arrow directly caused the damage to the property. Such is not the case if one lights a fire and a gust of wind carries some sparks to a neighbouring house which is burned as a result. Here the offender's act would have not resulted in a fire if the wind had not carried sparks to the neighbour's house and, hence, this is a *tasbīb* case. This distinction between *mubasharah* and *tasbīb* is one of great practical importance. In the former it is irrelevant whether the offender violated an obligation or not because he will still be held liable for the damage he caused in the later case, a person can only be held liable if he violated a duty imposed on him.[68]

6.2.7. *The Notion of 'Damages' in Islamic Law*

Sharī'ah secures interests of the people and avert harm from them. It provides mechanism to protect an individual against the actual as well as expected harm. In Islamic law of tort, various types of remedies may be granted to the plaintiff such as injunctions, *qiṣāṣ* i.e. retaliation e.g. in a situation when the manufacturer produces a harmful product with a mala fide intention, *diyyah (blood-mony), ghurrah,*[69] *radd* (restitution/refund), recovery, abatement of nuisance, distress damage feasance, action for measne profits, self defence and

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

[69] Ghurrah: This kind of compensation is due in the case of destruction of an embryo or a full form child stillborn as a result of assault, for example, suffered by the mother during her pregnancy (N.J. Coulson, *A History of Islamic Law*, p.195).

action in cases of *ghasb* and *itlāf*. Moreover, *arsh* and *'ḍamān* may also be granted.

Thus, in cases of product liability the possible remedies that may be granted under Islamic law of tort are: *'ḍamān*, injunctions, restitution, recovery of pecuniary loss, *diyyah, arsh, ghurrah* and compensation for any loss caused to a person or his property. For example in the context of product liability an injunction may be granted against a manufacturer producing a defective product that is harmful to the consumers. In this regard Majjalah states: "Excessive damage in whatever way it may be caused is to be removed".[70] The provisions related to *Qiṣāṣ, Diyyah* and *Arsh* may be invoked where the product has caused someone's death or injury in his body. However, *'ḍamān* seems to be the most applicable remedy in cases of product liability. It may be granted as a distinct remedy or jointly with another remedy.

Under the traditional *Sharī'ah* the defendant is liable for all losses resulting from his own act, whether or not foreseeable or normal. Consequently, if a defective heater explodes and burns the house, the manufacturer of such product would not only be liable to replace the house and its belongings; for if there was a precious diamond in the house, he would also be liable to replace it, even if it was not foreseeable that in ordinary circumstances such an expensive item would be kept at home.[71] Also, if in the above mentioned example, the owner of the house dies and his wife upon hearing the news becomes paralysed, the

[70] Majallah, Art.1200.

[71] Nagla Sa'ad Maḥmoud Naṣar, '*Manufacturer's Liability under Islamic law*', LLM (unpublished) thesis submitted to the Law School, Harvard University, U.S.A. 1985, p.15.

manufacturer would be liable for the *diyyah* of accidental homicide plus *arsh* to compensate the injuries of the wife, though they are not normal or foreseeable results of his act.[72]

It is pertinent to answer here the question that whether or not the traditional Islamic law distinguished between contractual and tortuous liability. There are two groups of modern writers on this point. According to some modern writers such distinction is not known under Islamic law since it never laid down general principles or legal theories.[73] This is true, but to say that consequently the Islamic law knew no practical distinction is misleading. In cases of *'ḍamān al 'Aqd,* contract, the two parties must be prudent otherwise they cannot sue since in the first place they were not supposed to contract. Also, if there is more than one party, they may be held jointly liable, while in *'ḍamān al fā'il,* tort, Islamic law does not recognize any kind of joint or several liability. Thirdly, the jurists made such distinction clear in the measure of damages in each case. In *'ḍamān al-'Aqd,* contrary to what is adopted under *'ḍamān al fā'il,* the defendant is only liable for damages to the property itself and not to its qualities because the acquisition of the goods was due to a lawful cause, while in *'ḍamān al fā'il* the damage is due to *ta'addī* and, hence, the defendant has to pay full compensation. Finally, in cases of contractual liability the defendant's liability is usually limited to the contract price, while in tortuous liability it is not. For example, if

[72] Ibid.

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

a seller of a car completely destroyed it before handing it over to the buyer who had paid for it, the seller would only be liable to pay him the sale price, but if the buyer had destroyed the car before concluding the contract, he would have been liable to pay its market value and not the sale price. Other than these distinctions, the 'heads' of damages, as discussed hereafter, are the same in tort and contract.

a) *Personal injuries:* The subject of personal injuries has invoked much attention since such injuries are often serious and sometimes even fatal. They may be classified into pecuniary loss that include physical and material damage and non-pecuniary loss that includes psychological pain and suffering. The general view is that nervous shocks and other purely psychological illnesses are not compensable. Ibn Qudāmah, the Ḥanbali jurist, stated that:

> "....if a person slaps another on his face causing him no damage, then he is not liable because he has not ruined his beauty, besides the usage of the face was not affected. The same applies to scalding".[74]

It is pertinent to mention here the view of Imam Muḥammad b. al-Ḥasan, who is reported to have said:

> "....even if the injury is of the kind that heals leaving no mark, still damages should be paid to compensate the pain suffered by the injured person".[75]

[74] Ibn Qudāmah (d.620 A.H.), *Al-Mughnī*, Maktabah al-Qāhirah, 1968, vol.8, p.484.
[75] Al-Sarakhsi, Al-mabsūṭ, Dār al-Ma'ārifah, Beirut, 1993, vol.26, p.81; Ibn 'Ābidīn (d.1252 A.H.), Rad al-Mukhtār, Dār al-Fikr, Beirut, 1992, vol.6, p.582; Ibn Nujaim (d.970 A.H.), Al-bahr ul-Rā'iq, Dār al-Kitāb al-Islāmī, vol.8, p.388.

What if Islamic law is applied to *Donoghue v. Stevenson*,[76] whether or not Mrs. *Donoghue* would have recovered any compensation for emotional distress supposed she would have claimed the same.[77] The dominant view in Islamic law is that the compensation for emotional losses e.g. nervous shocks and other purely psychological illnesses are not compensable under Islamic law. However, Islamic law has well established of removing any kind of harm i.e. no harm and no counter harm and harm has to be removed etc. It is also argued that compensation under Islamic law does not only aim to replace pecuniary damages; the best example is *diyyah*. The paying of *diyyah* will not revive the dead person and that its true aim is to console the deceased's family which is the same aim for compensating non-pecuniary losses and, hence, they also should be recoverable under *Sharī'ah*. These arguments are quite strong, yet the uncertainty and the impossibility of accurately calculating non-pecuniary losses make the view of the majority the more acceptable under *Sharī'ah*. In spite of this fact, the latter view is the one can be supported in modern times.

b) Pecuniary Losses

1. Property Damage: Under Islamic law compensation must not necessarily be a sum of money, and thus, if a person ruins another's car or clothes he has to replace them. Also if the object is partly ruined, such as, a defective heater, the compensation will only be the difference between the

[76] Donoghue v Stevenson, [1932] UKHL 100; [1932] All ER Rep 1; AC 562.
[77] The condition which was arrived in Donoghue v Stevenson was at least partly psychological in origin (Goldberg, Product Liability, p.645).

price paid for a sound product and the actual price of the defective one. But if the defect completely renders the product useless and unfit for its purpose, the consumer will have the option of giving back the defective product and taking the sale price.

2. Physical Damages: Any one intentionally or un-intentionally caused death of a person or injured another is subject to *Diyyah* (blood-money).[78] *Diyyah* is actually a tortuous remedy for the violation of a private right of the injured person or his heirs who are entitled to recover it from the wrongdoer or his *'Āqilah.*[79]

Generally speaking, homicide is of five kinds in Islamic law, namely: (i) intentional murder; (ii) quasi-intentional murder; (iii) murder by mistake; (iv) murder equivalent to mistake; and (v) indirect murder.[80] However, it only in case of *Qatl-i-'Amad* (intentional murder) that gives the right to *Qiṣāṣ* (retaliation) and in all the others *diyyah* is paid to the heirs of the victim. Even

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[78] In this regard the Holy Qur'ān states. "Never should a believer kill a believer; but (If it so happens) by mistake,(Compensation is due): If one (so) kills a believer, it is ordained that he should free a believing slave, and pay compensation to the deceased's family, unless they remit it freely. If the deceased belonged to a people at war with you, and he was a believer, the freeing of a believing slave (Is enough). If he belonged to a people with whom ye have treaty of Mutual alliance, compensation should be paid to his family, and a believing slave be freed. For those who find this beyond their means, (is prescribed) a fast for two months running: by way of repentance to God: for God hath all knowledge and all wisdom" (Qur'ān 4:92).

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

[80] Awdā', *al-Tashrī' al-Jinā'i al-Islāmī,*. Vol.2, p.7-9; Anwārullāh, *The Criminal Law of Islām*, p.55. This is in the view of Imām Abū Ḥanīfah. According to majority of the jurists homicide in Islamic criminal law is of three kinds, namely: (i) Intentional murder (*Qatl-al-'amad*); (ii) Quasi-intentional murder (*Qatli-Shibh-al-'amad*) and (iii) Murder by mistake (*Qatl-al-Khaṭā'*). Imām Mālik is of the view that murder is only of two kinds, namely: (i) intentional murder and (ii) murder by mistake.

in cases of *qatli 'amad* when *qiṣāṣ* is not possible right to *diyyah* is always there.[81]

In cases of injury, when a person intentionally injures another he is subject to *qiṣāṣ* i.e. retaliation and fixed compensation i.e. *arsh* and in cases of un-intentional physical injuries the offender is only liable for *arsh*. The term is unanimously used by the Muslim jurists to denote the meaning of compensation for physical injuries.[82]

Hence, both *diyyah* and *arsh* are money paid in compensation for death or physical injury. They are both fixed by law and find their basis in the Qur'ānic verse.[83] Fixed compensation for physical injury is called *arsh* while unfixed compensation is called *'ḍamān*.[84] The amount of *arsh* is asserted against the amount paid as *diyyah*.

6.2.8. *Breach of Statutory Duty and Post-Marketing duty in Islamic Law*

Islamic law has also put responsibility on the manufacturer not to commit *ta'addī* or *taqṣīr* is a continuous one. Therefore, if after marketing, the product is discovered to be defective and possibly dangerous, the manufacturer has to withdraw the product from the market and do whatever possible to prevent harm; otherwise he will be held liable for it. The duty imposed on manufacturers not to cause harm to consumers emerges from the

[81] Qiṣāṣ is based on Qur'ān; see chapter no. 2, verse no. 178.
[82] Ibn Qudāmah, Al-Mughnī, vol.4, p.111; Al-ghānim, Majma' al-ḍamanah, vol.1, p. 48; Ibn 'Ābidīn, Rad al-Mukhtār, vol.5, p. 16.
[83] Qur'ān: 4:92.
[84] Anwārullāh, *The Criminal Law of Islam*, p.118.

general rules of tort, but is also a statutory obligation imposed by the ruler out of his right to *Ta'zīr*. To ensure the preservation and protection of *Maqāṣid -al- Sharī'ah,* Islamic law has mentioned different types of punishments for various offences. In this regard the Islamic penal system should briefly be analysed. The offences for which specified penalties are provided are called *Ḥudūd*. Those in which *Qiṣāṣ* or reparation is provided are called *Jinayā t*. Punishments that are at the discretion of the judge when the offence is related to a private injury are called *ta'zīr*. Offences that are mainly directed against the system and society or where the pure right of the state is affected are called *siyāsah* penalties. Some offences that are corrected by acts of personal penance are called *kaffārah* (expiation).[85]

Thus, it is clear that Islamic law allows the Islamic state to ordain punishments for the protection of community interest under the concepts of *Ta'zīr*. Keeping in view the gravity of offences and penalties related to the issues of consumers some of the characteristics of *Ta'zīr* have been highlighted here. The broad purpose of *Ta'zīr* punishment is the prevention of any conduct prejudicial to the good order of the state. The state may intervene under this head in cases of a strictly civil nature; in particular, it may punish persons who have committed homicides or assaults when they have been pardoned by the victim or his representatives.[86]*Ta'zīr* punishments vary in both quantity and quality according to the seriousness of the offence. To

[85] Niyazee, *Outlines of Islamic Jurisprudence*, Centre for Islamic Law and Legal Heritage, Islamabad, 1998, p. 243.
[86] N.J. Coulson, *A History of Islamic Law, Edinburgh*, 1971, pp.120-34.

protect the interests of the consumers, Islamic state may inflict punishments for omission of duties and commission of wrongs. [87]

Moreover, once any product is proved to be defective its further supply should be stopped by the concerned authority. This action is also endorsed by the well established principle of Islamic law *sadd ul-dharā'i'* i.e. (blocking the means). Hence, a mean which leads to an evil, or an unlawful end, will be regarded unlawful, though it may otherwise be valid.[88] The notion of *sadd al-dharā'i'* refers to an act which has a benefit but it leads to an evil. Thus, it is prohibited by the lawgiver and there are number of verses of the Holy Qur'ān and traditions of the Holy Prophet (pbuh). Qur'ān says:

> "And insult not the associators, lest they insult God out of spite and ignorance".[89]

The means to an evil is blocked by putting a ban on the idol-worshippers. Similarly, the Prophet (pbuh) forbade to be alone with a woman who is not within prohibited degree of marriage. He said: "if you do that, you will cut off your kinships".[90]

Similarly, in the context of defective products they may cause harm to the general body of consumers, hence its further sale and supply has to be controlled and the already supplied products are to be recalled. The manufacturer may suffer great loss the loss in order to avoid greater harm from the general body of consumers. This is

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[87] Ibid.
[88] Ibn al-Qayyam, *I'lām al-muwaqi'in*, Dār al-kutub al-'elmiyyah', Beirut, vol.3, p.108.
[89] Qur'ān 6:8.
[90] Al-Tabrānī, *Al-Mu'jam al-kabīr*, vol.11, p.337.

endorsed by the Islamic notion of *'al-maṣlah al-'ammah tuqadam 'ala maṣlaha al-khāṣṣah'* i.e. public interest is to be preferred over private interest.[91]

In imposing this duty upon the manufacturer there is no distinction between chattels dangerous per se and others; in both cases, manufacturers have to give adequate warning of danger and proper direction for use. The fulfillment of this duty may not always free the producer from liability. It is not important under Islamic law that whether or not the manufacturer has anticipated the damage or ought to have reasonably foreseen it. A manufacturer will be held liable even if he could not have reasonably foreseen the damage.

6.2.9. *Defences under Islamic Law of Tort*

In Islamic law the liability in tort can only be avoided in case of: force majeure or act of God; act of a third party; the act of the victim itself.[92] However there are five exceptions to this rule (a) when the direct action is founded on the cause, (b) when the indirect injurer misleads or forces the direct injurer, (c) when there is an ill intention on the part of the direct injurer but not on the part of the indirect injurer, (d) when the indirect action is most effective in creating injury, and (e) when it is impossible to make direct injurer liable for the injury.[93]

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[91] Aḥmad Al-raisūnī, *Naẓriat ul-Maqāṣid 'inda Imām al-shaṭibī*, Al-dār al-'alamiyyah lilkitāb al-Islāmī, vol.1, p.167.

[92] Munẓir Kahaf, *"Economics of Liabilities: An Islamic View"* (2000) 8(2) Journal of Economics and Management 92.

[93] Muhammad Fayyāḍ, *The Transposition of the European Directive 85/374/EEC on Product Liability into Palestine and Jordan: Is it Adaptable to Islamic Law?* Global Journal of Comparative Law 1 (2012) 194-224.

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

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

> "If a person knowingly and wilfully passes over a road in which water has been spelt and perishes in consequences of falling in it, nothing whatever is incurred by the person who spilt the water, since here the deceased has perished from his own wilfulness or obstinacy".[94]

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

a) Vis major: It means an irresistible force, e.g. a storm, or an earthquake.[95] In Islamic jurisprudence the circumstances that generally affect the legal capacity of a person are classified into two types: Natural causes (*Samāwī*) are those which are beyond the control of man and acquired causes (*Maksūbah*) that is, those which are created by man.[96] If someone usurps the property of another, he is liable for any damage which may include removing earth from the land,

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[94] Al-Marghīnānī, *Al-Hidāyah*, vol.4, p.474.
[95] John Burke, *Osborn's Concise Law Dictionary*, p.342.
[96] 'Abdur Rahīm, *The Principles of Muhammadan Jurisprudence*, p.219.

damaging the foundation of the building, digging a well or cultivating the land or any other injurious act. If such land is damaged by Act of God while in the possession of the usurper, the wrongdoer will not be liable to pay compensation. This is the view of Imām Abū Ḥanifa and Imām Abū Yūsuf. Whereas Imām Muḥammad and Imām Shafi'ī make the wrongdoer responsible in such a situation. Act of God may include severe damage to property, e.g. if some house or building collapses or is eroded by flood. The defendant has to prove the same.[97]

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

> "If someone destroys the property of another under the impression that it is his own property, he will be held liable".[98]

If an act which under ordinary circumstances would amount to an offence be done under a mistake, the person doing it will be given benefit of the doubt, so that sentences of the nature of *ḥadd* and retaliation will not be inflicted on him.[99]

Though the general view in Islamic law of torts is that when the cause of damage is both *mubāshir* and *mutasabib* only the *mubāshir* is subject to liability if it was a vital cause of the harm. But, if the *mutasabbib and not the mubāshir* was the main cause of the damage, then the former and not the latter is liable to compensate such

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[97] 'Abul-hussain al-yamani (d.558 A.H.), *Al-bayān fi mazhab al-Imām Al-shafi'ī*, Dār al-minhāj, Jeddah, 2000, vol.6, p.497.
[98] Majjallah: Art. 914.
[99] 'Abdur Rahīm, *The Principles of Muhammadan Jurisprudence*, p.225.

damage.[100] For example, if a person falsely testifies as to the ownership of property and the judge gives it to someone other than the real owner, the witness is liable to compensate such property, and not the judge, who is the *mubāshir*. Same rule would be applied in cases of product liability. In cases of product liability, which are usually cases of *Tasbīb* and not *Mubasharah*, such as if an electrical heater was defectively designed in such manner that it could not be used continuously for a long time, the manufacturer, the *Mutasabbib*, and not the user, the *Mubāshir*, would be held liable for any damage caused by it. In some cases mutasabbib alone is made liable such when the harm cannot be attributed to the mubāshir i.e. seller in this case. [101]

Under Islamic law manufacturer's defences will not be effective unless they extinguish the *ta'addī* and *taqṣīr* on the part of the manufacturer. Also, if more than one person contributed to causing the damage, each will incur a proportionate share of responsibility. This rule applies even if the *ta'addī* contributing to the manufacturer's liability is that of the consumer or a third party.

Similarly in Islamic law, advertisement will not excuse the manufacturer's liability because it does not remit the danger and is ineffective. It also does not extinguish the fact that the manufacturer committed *ta'addī*. The most an advertisement may do is entitle the manufacturer to a reduction in damages because of contributory *ta'addī* on the part of consumer.

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[100] Al-zuhailī, *Naẓriyyat ul-Ḍamān*, p.191.

[101] See for a detailed discourse on the topic Al-zuhailī, *Naẓrriyyat ul-Ḍamān*, p.188-193.

c) *Limitation as a Defence:* In classical era of Islam a person's rights were not barred by the lapse of time and the *Qāḍī* was obliged to hear the claim under the law. However, *Sharī'ah* has not put any bar on the adaptation of means to ensure speedy justice and reduce the number of undue litigation.[102] The limitation period in Islamic law varies from case to case. In cases of criminal nature such as *Qatli-shibh-'Amad,* the *'Āqilah* of the offender must pay compensation within three years. This period may be extended in suitable cases wherein the compensation may be recovered in installments and paid to the heirs of the victim. In case of *Isqāt al-Janīn,* the *ghurrah* must be paid within the period of one year according to the *Ḥanafi* School while *Shafi'i* School is of the view that the period in such cases is 3 years.[103] This applies only to cases in which the defendant denies the facts, but if he confesses, the judge is obliged to view the case and the limitation period never runs out.

Thus, limitation periods like that of English law are absolute defences under Islamic law, and case cannot be heard after the limitation period.[104] However, in some cases permission to time barred suits may be given especially in cases in which the damage is still maturing or in which even though the manufacturer had denied the facts, there is strong evidence on the part of the consumer. The judge in such cases has much discretion in allowing the hearing.

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[102] See chapter 7 of the thesis for further discussion on limitation period in Islamic law.

[103] Al-ghānim (d.1030 A.H.), Abū Bakar, *Majma' al-ḍamanāt,* Dār al-kitāb al-Islāmī, vol.1, p.200; Ibn 'Ābidīn, *Radd al-muhtār,* Dār al-fikr, Beirut, vol.6, p.588; Al-marghīnānī, *Al-hidāyah,* vol.4, p. 471.

[104] Al-Zuhaili, *Naẓariyyat ul-ḍamān,* p.104.

6.3. PRODUCT LIABILITY AND ENGLISH LAW OF TORT

6.3.1. *English Law of Tort: Basic Concepts*

The word '*tort*' has been derived from the Latin word '*tortum*', meaning wrong.[105] It means conduct which is crooked or twisted as opposed to that which is straight or right. In English law the term tort has been defined by the eminent jurist Sir John Salmond in the following words:

> "As a civil wrong for which the remedy is a common law action for un-liquidated damages, and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation".[106]

The law of tort is derived from common law principles. Tort is a complete concept of English Jurisprudence. Tort law gives the (a) *rights not be injured*, (b) *rights of action against the tortfeasors*, (c) *right of civil recourse* and (d) *right against the state to legislate for the recourse of wrongs* derives from natural right or the natural privilege. Civil recourse theory explains more efficiently than other theories that tort is a law of rights and responsibilities[107].

The primary function of the law of tort is to define the circumstances in which a person whose interests are harmed by another may seek compensation.[108] In this regard Winfield writes:

> "The law of tort may be said to be concerned with the allocation or redistribution of those losses which are bound to occur in our society. It is obvious that in any

[105] Blacks Law Dictionary, 9th Edition; http://www.lawteacher.net/contract-law/essays/contract-liability.php,last accessed on 15.06.2014.

[106] Salmond and Heuston, *Law of Torts*, Sweet & Maxwell (London, 1981), p.11.

[107] John C.P.Goldberg and Benjamine C.Zipursky, *Rights and Responsibility in the law of Torts*, eds. *D. Nolan & A. Robertson, Rights and Private Law, 2012, pp. 251-274; http://www.hartpub.co.uk/pdf/samples/9781849461429sample.pdf*, last accessed on 13.03.2015.

[108] Hepple & Mattews, Tort: Cases and Materials, Butterworth (London, 1974), p.1.

> society of people living together numerous conflicts of interest will arise and the actions of one man or group or men will from time to time cause damage to others. This damage to property, damage to financial interests, injury to reputation and so on – and whenever a man suffers damage he is inclined to look to the law for redress. It is the business of the law of tort to determine when the law will and when it will not grant redress for damage suffered".[109]

Thus, tort is the breach of a duty imposed by law, the breach of which entitles some person to sue for damages. Damages, is the general and most suitable form of remedy, which is very conspicuous in this breach of the civil law.[110] Rules of the law of tort have been adapted in a number of ways as a consumer protection technique. The immediately obvious example is the adaptation of the tort of negligence in relation to the liability of manufacturers and producers for defective products and the liability of the supplier of a service, but tortuous principles are also relevant in other respects. In particular, the law of tort may be of some limited use in the field of advertising law and in relation to the misuse of property belonging to another by both the consumer and the trader with whom he deals.

United Kingdom's traditional law of tort is another important aspect of product liability. In tort the cause of action for a product liability claim arises due to negligence (breach of a duty of care) or breach of a statutory duty. The source of modern negligence is the product liability case of *Donoghue v Stevenson*[111] which is a landmark in the field of consumer protection law in providing that a manufacturer

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[109] Winfield and Jolowicz, *Tort*, p.1.

[110] Encyclopaedia Britannica, vol. 22, p.311.

[111] Donoghue v Stevenson, [1932] UKHL 100; [1932] All ER Rep 1; AC 562.

owes a duty of care to consumer s in respect of the safety of his product.[112] According to the facts of the above case Mrs Donoghue visited a cafe and there drank from a bottle of ginger beer which had been bought for her by a friend. Among the contents of the bottle Mrs Donoghue then discovered a decomposing snail, previously hidden by the opaque glass of the bottle. Mrs Donoghue became ill and claimed damages from the manufacturer. It was held by the House of Lords that the manufacturer of goods sold by him to a retailer or other distributor in circumstances which prevent the retailer or ultimate consumer from discovering by inspection any defect, is under a legal duty of care to the ultimate consumer to take reasonable care that the goods are free from any defect likely to cause injury or damage. After Donoghue v. Stevenson it was recognized that those engaged in the commercial manufacture and supply of goods and services owed such duties (though the conduct required to discharge the duty varied according to the position of the defendant within the chain manufacture and supply, and to product sector).[113]

It is clear now that pure economic loss due to the acquisition of defective property is not recoverable in the United Kingdom in a negligence claim. But negligence claims, unlike claims for breach of sales warranties, are not limited to complaints against a party with whom the plaintiff was in a relation of *privity*, or to complaints only about "goods" (so it is clear that software may be the subject matter of a negligence complaint as might be the service of repair to a good), or to

[112] Ibid.
[113] Ibid.

the condition of the good when supplied (so pre-supply injuries are actionable while recognition of post-supply duties are the doctrinal prompt for product recalls). All attempts by those acting in course of business to exclude or limit negligence liability for personal injuries are void in the United Kingdom, while equivalent attempts to limit or exclude liability for property damage are subject to statutory reasonableness requirements.[114] Liability for a defective product may rest jointly upon both manufacturer and retailer.

5.3.1.1. Neighbour Principle in English Law

The famous case of *Donoghue v Stevenson* has transformed the status of *privity* rule by giving the consumer of a ginger beer that contained a decomposed snail to recover compensation for physical injury against the manufacturer. In *Donoghue v Stevenson*, the House of Lords held the plaintiff was declared to recover compensation from the defendant. A new principle was introduced called "*neighbouring principle*" by Lord Atkin. Lord Atkin in Donoghue v Stevenson comments:

> "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question".[115]

[114] See Unfair Contract Terms Act 1977.
[115] Salmond, *Torts*, p.199.

In the above lines of the famous case of *Donoghue v Stevenson*, Lord Atkin introduced neighbour principle to the English law.[116] It implies that one must take responsible care to avoid acts or omissions which one can reasonably foresee would be likely to harm one's neighbour. Neighbour in the eyes of law is any such person who is so closely and directly affected by one's acts or omissions. He further enunciated the fundamental product liability law principle in the following words:

> "...a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."[117]

Lord Atkin has clearly mentioned that a manufacturer of products sold in a form intended to reach the ultimate consumer in the form in which they left him; with no reasonable possibility of intermediate examination; and with the knowledge that the absence of reasonable care in the preparation of the products will result in personal injury or property damage, owes a duty to the consumer to take that reasonable care.[118] However, this liability for defective products under torts was not absolute rather based on proving negligence on part of the manufacturer. In other words liability in negligence rests on proof of fault. This is difficult for the

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[116] Donoghue v Stevenson, [1932] UKHL 100; [1932] All ER Rep 1; AC 562.
[117] Ibid.
[118] Rodney Nelson, Jones & Peter Stewart, *Product Liability: The New Law under the Consumer Protection Act, 1987*, pp. 19-20.

consumer to prove, despite the *res ipsa loquitur*[119] doctrine and the courts best efforts to assist plaintiff's- e.g. holding the employer liable for the negligence of his employees[120] and not requiring proof of exactly what went wrong or who exactly was responsible for the error.[121] Here it is pertinent to mention here that according to the neighbour principle, the "ultimate consumer" need not necessarily be a purchaser but could be anyone foresee-ably injured by a dangerous product.

5.3.2. The Nature of Liability in English Law of Tort

Under the English law of torts the liability is fault based. In the tort of negligence in cases related to product liability, the major problem is that the liability is fault-based. The burden of proving the negligence is on the claimant and he has to prove that the manufacturer owed consumer a duty of care; the manufacturer breached that duty (by failing to meet the required standard of care); and causing damage (which must not be too remote i.e. which was or ought to have been foreseeable at the time of breach). In this regard, the standard of care is that of a reasonably

[119] The term *'res ipsa loquitur'* is latin for 'the thing speaks for itself,' a doctrine of law that one is presumed to be negligent if he/she/it had exclusive control of whatever caused the injury even though there is no specific evidence of an act of negligence, and without negligence the accident would not have happened. Examples: a) a load of bricks on the roof of a building being constructed by Highrise Construction Co. falls and injures Paul Pedestrian below, and Highrise is liable for Pedestrian's injury even though no one saw the load fall. b) While under anesthetic, Isabel Patient's nerve in her arm is damaged although it was not part of the surgical procedure, and she is unaware of which of a dozen medical people in the room caused the damage. Under *res ipsa loquitur* all those connected with the operation are liable for negligence. Lawyers often shorten the doctrine to "res ips," and find it handy shorthand for a complex doctrine (http://dictionary.law.com/Default.aspx?selected=1823).

[120] Hill v James Crowe (Cases) Ltd [1978] 1 All E.R. 812.

[121] Grant v Australian Knitting Mills [1936] A.C.85.

competent person and must be exercised at all stages of production process. If the standard of care is breached it will render the product "defective"."[122]

But it is indeed very difficult to establish that the fault occurred in the course of the production process[123]or that the fault in the product was the cause of the damage to the plaintiff. It will be clarified in the upcoming chapter that many such problems have been alleviated by the promulgation of the Consumer Protection Act, 1987.[124]

6.3.3. Potential defendants in English Law

In the English law of torts the list of potentially liable defendants in product liability cases is wide. Although the *Donoghue v Stevenson* was a case against a manufacturer, its principle has since been extended to a wide variety of defendants such as repairers[125], assemblers and erectors[126], installers[127], importers and distributors[128], retailers, for instance where they create or aggravate a danger by negligent storage or when they fail to pass on a warning[129], hirers e.g. firms renting out cars or televisions, and also those who exchange goods[130], suppliers[131],

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[122] See Overview of UK: Product Liability Law available http://www.biicl.org/files/1123_overview_uk.pdf, last accessed on 13.08.2013.

[123] Evans v Triplex Safety Glass Co Ltd [1936] 1 All ER 283.

[124] See INSITE LAW magazine: Daily online Law news and blogs, available at: http://www.insitelawmagazine.com/ch11productlaibility.htm last accessed on 20-07-2013.

[125] In Haseldine v Daw (1941), where a firm of engineers was held liable for negligently repairing a lift which fell to the bottom of the shaft and injured the plaintiff visitor.

[126] A monumental mason who negligently erected a tombstone which fell on the plaintiff in a churchyard: Brown v Cotterill (1934).

[127] An electricity authority which wrongly connected wires when installing an electric meter in a factory, with the result that a fireman was electrocuted: Hartley v Mayoh & Co (1953).

[128] Watson v Buckley Osborne Garrett & Co Ltd (1940), a case of dermatitis due to hair dye produced by a Spanish company, in which the distributors were held liable for failing to test the product, and for advertising it as safe and harmless.

[129] In Kubach v Hollands (1937), chemists were held liable for supplying as manganese dioxide a substance which contained a mixture of antimony sulphide, with the result that a schoolgirl lost an eye in an experiment.

[130] Griffiths v Arch Engineering Co Ltd [1968] 3 All ER 217.

inspectors[132], regulatory/certification bodies[133] and governmental departments[134] etc. This list is not exhaustive. Other potential defendants include designers, testing agencies, distributors marketing defective products without adequate instructions, warnings and without conducting intermediary safety tests and, arguably, even endorsers of products.[135]

6.3.4. Potential Claimants in English Law

The *"neighbour principle"* of Lord Atkin widens the scope of potential claimants and includes every person who is so closely and directly affected by the acts of the defendant. In Donoghue v Stevenson Lord Atkin stated:

> "you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be-persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."[136]

Consequently the principle in *Donoghue v Stevenson* does not only apply to consumers of products. It has been extended to cover, for instance, employees, retailers, passengers and even bystanders. In Stennett v Hancock and Peters

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[131] For example a local authority which supplied water that became poisonous when passed through a lead pipe as was the case in Barnes v Irwell Valley Water Board (1939);
[132] Davies v Eli Lilly & Co Ltd [1987] 3 All ER 94, Nash v Eli Lilly & Co (1991) 2 Med LR 169 ('Opren litigation'); 140 NLJ 1349).
[133] HIV Haemophiliac Litigation (1990) 41 BMLR 171.
[134] A and others v National Blood Authority and another [2001] 3 All ER 289.
[135] See Rodney Nelson-Jones & Peter Stewart, *Product Liability: The New Law under the Consumer Protection Act 1987*, pp.21-22.
[136] Donoghue v Stevenson, [1932] UKHL 100; [1932] All ER Rep 1; AC 562.

(1939)[137], a pedestrian was allowed to recover damages from a motor repairer when a flange came off a moving lorry and struck her on the leg. Any person may claim for damage due to a defective product, provided that the defendant owed him a duty of care.[138]

6.3.5. Product and Types of Defect in English Law of Tort

Under the English law of torts in cases of negligence wide range of products are covered and liability has been imposed regarding them. It includes household items, defective drinking water[139], hair dye[140], cars[141] and underwear etc.[142] Moreover, the liability extends to labeling, warnings and instructions.[143] In tort of Negligence under English law the duty of care exist at different stages and the breach of that results various kinds of defects in the product. These defects are of the following kinds:

1. **Manufacturing defect:** In case when defect exist in raw materials, components or something went wrong in the manufacturing process or the manufacturing process itself are defective that is called a manufacturing defect.[144]

2. **Design defect:** In case when the product has been produced according to specification but there was a defective design at the pre-production or

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[137] Stennett v Hancock & Peters [1939] 2 All E.R. 578.
[138] Rodney Nelson-Jones & Peter Stewart, *Product Liability: The New Law under the Consumer Protection Act 1987*, p.28.
[139] Read v Croydon Corpn [1938] 4 All ER 631.
[140] Watson v Buckley [1940] 1 All ER 174.
[141] Herschtal v Stewart and Arden Ltd [1940] 1 KB 155.
[142] Grant v Australian Knitting Mills Ltd [1936] AC 85.
[143] Distillers Co (Bio-Chemicals) Ltd v Thompson [1971] 1 All ER 694.
[144] Carroll v Fearon [1999] ECC 73.

design stage. When the defect was discoverable (and caused the alleged damage), liability will attach. This kind of defect is known as a design defect. [145]

3. **Marketing defect:** This kind of defect occurs when there is a failure to adequately warn all reasonably foreseeable users. When the manufacturer knows or can find out through scientific knowledge about any risk in a product it is his duty to warn the ultimate users as it will make the use of product safe. The defect is assessed on Risk/utility basis. This liability can be challenged by the manufacturer on the basis if the product passed through an intermediate examination and could not reveal the defect. Compliance with safety standards may indicate that there is no defect, but not always as it is evident from the well-known Irish case of *"Best v Wellcome Foundation [1992] IRLM 609"*. In this case the court held that the applicable regulations only laid out a minimum standard and a higher degree of care may be required depending on the circumstances.[146]

6.3.6. Evidence and Causation in English Law

Under the English law of torts, the burden of proving negligence and its necessary causal link with the injury is on the plaintiff. He must make it appear at least that, on a balance of probabilities, the breach of duty caused, or

[145] Vacwell Engineering Co Ltd v BDH Chemicals Ltd [1971] 1 QB 88; Whittaker, S.. "The EEC Directive on Product Liability", Yearbook of European Law, 1985.

[146] See Overview of UK: Product Liability Law available at: http://www.biicl.org/files/1123_overview_uk.pdf last visited On 20-08-2013.

materially contributed to, his injury."[147] Thus the claimant has to establish that the defendant's breach of duty of care caused or materially contributed to the alleged damage.[148] Thus the primary line of defence is that he has failed to do so. In seeking to overcome this, the plaintiff may rely on the maxim *res ipsa loquitur*-the thing speaks for itself. The plaintiff may ask the court to draw irresistible inferences from circumstantial evidence. In Grant v Australian Knitting Mills Ltd it was held that:

> "....if excess sulphites were left in the garment that would only be because someone was at fault. The appellant is not required to lay his finger on the exact person in all the chain who was responsible, or to specify what he did wrong."[149]

In tort cases proving causation can be a formidable barrier especially in cases involving pharmaceutical products and vaccines in which arguments have often regard as to whether the claimant`s injury was caused by the drug or vaccine, or whether it was due to constitutional causes and would have occurred in any event.[150]

It is relevant to mention here that in hard physical injury cases especially in the purview of pharmaceutical products where the claimant can prove on the basis of statistical evidence that the drug causes damage of the kind suffered but he cannot identify the manufacturer supplied him the drug. In such cases the proportional liability solution is given in the famous US case of Sindell v

[147] Bonnington Castings Ltd v Wardlaw [1956] 1 All ER 615 HL(Sc).
[148] Wilsher v Essex Health Authority [1988] AC 1074.
[149] Rodney Nelson-Jones & Peter Stewart, *Product Liability: The New Law under the Consumer Protection Act 1987*, p.25.
[150] Ibid.

Abbott Laboratories.[151] But so far no equivalent can be seen in UK and the so called 'toxic torts', it is impossible for the claimant to establish the proof. Defendants are entitled to adduce evidence that they have taken all reasonable care; if they have, they are not liable in negligence. They can also allege that the product in question has not led to any other injury or complaint, and argue that their system is fool proof. To prove a safe system is not of itself sufficient, however, since a manufacturer can still be vicariously liable for the individual negligence of an employee.[152]

There are various reasons due to which causation may be frustrated. Some of them are listed below:

a. dearth of scientific proof as to the risks associated with the product (to establish general causation i.e. that the drug can cause the damage),

b. lack of evidence regarding design or manufacturing process

c. due to the state of scientific knowledge at the time of design or manufacture;

d. and the problem of multiple defendants and multiple claimants (which may frustrate claimants' ability to show specific causation i.e. that the drug caused the claimant's damage).[153]

[151] Sindell v Abbott Laboratories 607 P 2d 924 (Cal.1980).
[152] Hughes, Phil, and Ed Ferrett. *"Health and safety foundations"*, Introduction to Health and Safety in Construction, 2008.
[153] Ibid.

6.3.7. *The Notion of 'Damages' in English Law*

In English law of torts the idea behind damages in negligence is to restore the original position of the claimant. The damage must be of type that was foreseeable. The plaintiff may recover the following kind of damages:

a. compensation in respect of personal injury (including loss of earnings, medical costs, pain and suffering and psychiatric harm),

b. death ;

c. and/or damage to property owned by him/her at the time of damage.

In negligence the pure economic loss (i.e. diminution in the value of the defective product itself, as opposed to damage to other property owned by the claimant) cannot be recovered.

6.3.8. *Breach of Statutory Duty and Post-Marketing duty in English Law*

Another relevant tort under the English law is the breach of a statutory duty. It is committed by breaking a duty imposed by an Act or Regulations including EC legislation. The damage must be of a type that the statute was intended to prevent. Normal causation rules apply. The liability is not strict, as such, since the concept of duty implies a duty of care, albeit statutory. The same damage may give rise to a claim in negligence and breach of statutory duty. An action for damages will

arise in the statutes imposes a duty for the protection of a specific class of citizen. The damage must be of the kind that the statute was intended to prevent.[154]

Although it does not give rise to a cause of action in tort, it is convenient to mention here the Vaccine Damage Payments Act 1979. This makes provision for a payment by the Department of Health and Social Security to anyone who suffers severe disablement as a result of vaccination against certain specified diseases, such as whooping cough. The tort of private nuisance occurs when a person is injured or otherwise prejudiced or disturbed in the enjoyment of land. The nuisance must have arisen elsewhere, so it usually results from acts done on neighboring land. The example for this is where asbestos dust escapes from a factory and is breathed by neighboring householders.[155] The rule formulated in the case of Rylands v Fletcher (1868) is that:

> "the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so is prima facie answerable for all the damage which is the natural consequence of its escape." This rule overlaps with the tort of nuisance. It has been applied to the escape of gas, electricity, oil and poisonous waste.[156]

[154] Examples are: The Factories Act, 1961 e.g. where the occupier fails to provide a safe lift as required by the Employers Liability (Defective Equipment) Act 1969 whereby an employee who suffers injury due to defective equipment supplied by his employer can recover damages from him, even if the employer had no reason to be aware of the defect; and the Defective Premises Act 1972 requires, inter alia, any person carrying out work to a dwelling to see that the work is done with proper materials.

[155] See Rodney Nelson-Jones & Peter Stewart, *Product Liability: The New Law under the Consumer Protection Act 1987*, pp.28-29.

[156] Rylands v Fletcher, [1868] UKHL 1.

The duty of care owed by the manufacturer/producer (etc.) to the consumer (etc.) continues once the product is on the market. This duty applies to all types of defect i.e. manufacturing, design and marketing. The reason is that the manufacturer is in the best position to know about the defects in the product. Though post-marketing duties are not covered by the Consumer Protection Act 1987, but the negligence aspect is always applicable. Moreover, the manufacturers, producers and others in the supply chain are under statutory post-marketing duties under Directive 2001/95/EC on general product safety. Breach of such a duty would constitute breach of statutory duty.[157]

6.3.9. *Defences in English Law*

Under English law in torts related to product liability two defences are common i.e. contributory negligence and the *volunti non fit injuria*. Under the Law Reform (Contributory Negligence) Act 1945 it is a defence to liability, if it is shown that the claimant should have known of the defect but negligently failed to recognize it, negligently used the product, or ignored instructions for use. *Volutai non fit injuria* (i.e. one who consents to injury cannot be heard to complain of it thereafter) is a total defence; if it is established, the victim recovers no damages.[158] Thus it is to be contrasted with the defence of contributory negligence, which usually operates as a partial defence to reduce damages.[159] Moreover, limitation is a well recognized

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[157] See Overview of UK: Product Liability Law http://www.biicl.org/files/1123_overview_uk.pdf last visited On 20-08-2013.

[158] Rodney Nelson, Jones and Peter Stewart, *Product Liability: The New Law under the Consumer Protection Act, 1987*, p.77.

[159] Ibid.

defence in English law of torts. Under the English law, the limitation period in Tort claims is 6 years from the date damage occurred as provided in S.2 Limitation Act, 1980. The limitation period in cases of personal injury is three years from the day cause of action arises.[160] However, under section 33 Limitation Act the court may disregard the limitation period in cases of personal injury or death.[161]

[160] Sec.11A (3), Limitation Act, 1980.
[161] See Limitation Act 1980 for further detail.

CHAPTER 7

SHARĪ 'AH APPRAISAL OF UK'S STRICT PRODUCT LIABILITY REGIME - PART I CONSUMER PROTECTION ACT, 1987

CHAPTER 7

SHARĪ'AH APPRAISAL OF UK'S STRICT PRODUCT LIABILITY REGIME-PART I CONSUMER PROTECTION ACT, 1987

7.1. Introduction

In preceding chapters it has been discussed and pointed out that the traditional principles of contract law and negligence have limitations which prevent some persons injured by defective products from relying on them as a means of redress. This chapter analyses the application of strict product liability in England through enactment of the Consumer Protection Act, 1987. The background and need for the application of strict product liability in England is highlighted in this regard. The chapter has posed important questions such as: what is meant by the notion of strict product liability under English law? Which particular act was enacted through which the EU Directive on product liability was adopted in England? Does Islamic law recognizes the notion of strict product liability? What is meant by 'product' in CPA and Islamic law? What does defect mean and what are its various kinds under CPA? How Islamic law deals with the notion of defect and its various kinds? Who are the potential defendants under the CPA, 1987 and what is the case in Islamic law? What defences are provided to the defendants under CPA, and what is the position under Islamic law? How to establish the link between the harm caused and defective product in English law and Islamic law? What is the time limitation under CPA, 1987 for product liability cases and what is the case in

Islamic law? Moreover, in order to check the status of English product liability law in the perspective of *Sharī'ah*, all the key notions of English strict product liability regime that are contained in the Consumer Protection Act, 1987, have been analyzed in the light of Islamic law.

These and many other important issues have been tackled in the chapter. Moreover, the chapter has also assessed the compatibility of the English product liability regime with the injunctions of Islamic law and also analysed the feasibility of the adoption of the same in Islamic jurisdictions.

7.2. Consumer Protection Act, 1987

7.2.1. Background of CPA, 1987

Before the enactment of Consumer Protection Act, 1987 the product liability law in United Kingdom was based contract law and law of torts. Royce-Lewis writes in this context:

> "...before the CPA was passed, English courts had used contract law and the law governing the tort of negligence to solve problems on product liability".[1]

In United Kingdom before the introduction of strict product liability can be seen to be deficient, mainly due to the *privity* requirement in contract law and fault requirement in the law of tort.[2] The victims of defective products can never rely on

[1] Royce-Lewis, Christine A., *Product liability and consumer safety: a practical guide to the Consumer Protection Act* (ICSA Publishing Limited, London 1988), p. 3. Cf. Simon Deakin, Angus Johnston, and Basil Markesinis, Markesinis and Deakin's Tort Law (5th edn, Clarendon Press, Oxford 2003), p. 603.

[2] Geraint G. Howells writes in this context: "The United Kingdom's product liability law can be seen to be deficient, mainly due to the *privity* requirement in contract law and the fault requirement

contractual rights unless they bought them, because there is lack of *'horizontal privity'* as they were not a party to the contract under which the goods were supplied. This would exclude the recipients of gifts, possibly members of a group who did not pay for goods consumed and by-standers. The *'vertical privity'* restricts the possible defendants to the final seller.[3]

On the other side, in the tort of negligence in cases related to product liability, the major problem is that the liability is fault-based. The burden of proving the negligence is on the claimant and he has to prove that the defendant owed him a duty of care. The defendant breached that duty by failing to meet the required standard of care and causing damage. In such cases the standard of 'care' is that of a reasonably competent person and must be exercised at all stages of production process.[4] If the standard of care is breached it will render the product "defective". J.A. Jolowicz remarks in this context:

> "I think that in this matter of the civil remedies of the consumer public opinion, or perhaps better, public belief as to the law and the law itself, have got rather far apart. I think also that the main reason for this is the law's insistence on privity of contract and on non-contractual liability only for fault. There are signs in other areas of the law that privity of contract is beginning to yield to the pressures of modern society, for example in the case of Hedley Byrne & Co.Ltd v. Heller & Partners Ltd., and

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in tort law. The thalidomide disaster provoked widespread discussion of product yeliability and the matter was referred to the English and Scotish Law Commissions in 1971 and the Pearson Royal Commission on Civil Liability and Compensation for Personal Injury. All three recommended that producers should be strictly liable for personal injury or death caused by their defective products" (Geraint Howells, *Product Liability: A Global Problem).*

[3] Geraint G. Howells, *The Law of Product Liability*, 2nd Edition, LexisNexis Butterworths, p.265.

[4] Overview of UK: Product Liability Law available at: http://www.biicl.org/files/1123_overview_uk.pdf, last accessed on 15.08.2013.

> it is time that in the consumer field also we should prepare ourselves to sacrifice that and other some of the other sacred cows of the law. Popular belief about the law is often wrong and I am far from agreeing that the law should always be so simple that everyone can understand it. But in a field which touches every one as loosely as does consumer law, there is something to be said for a re-examination of the law in the light of what it is popularly, if erroneously, supposed to be".[5]

In this scenario, in England public concern at the problem experienced by *thalidomide* claimants in trying to recover damages under the existing laws of contract and tort led to renewed pressure for their reform.[6] The *Thalidomide* disaster provoked widespread discussion of product liability and the matter was referred to the English and Scottish Law Commissions in 1971 and the Pearson Royal Commission on Civil Liability and Compensation for Personal injury. All three recommended that producers should be strictly liable for personal injury or death caused by their defective products.

Simultaneously the common market was seeking to harmonize the product liability laws of member states. It was deemed an important area for harmony, since differing legal liability in member states affects the price to be charged for a product and distorts competition. The commission to the Council of Ministers of the

[5] J.A. Jolowicz, *The Protection of the Consumer and Purchaser of Goods under English Law*, The Modern Law Review, Vol.32, No.1, January 1969.

[6] In early 1960s, the drug *thalidomide* affected about 10,000 birth defects and caused thousands of fatal deaths worldwide. The affected babies typically suffered from failure of the limbs to develop. These unfortunate children were cruelly referred to as '*flipper babies*.' Thalidomide had been prescribed to pregnant women to help reduce morning sickness, but tragically, it turned out to be toxic to developing foetuses (The Tragedy of Thalidomide and the Failure of Animal Testing available at: http://www.prijatelji-zivotinja.hr/index.en.php?id=582, last accessed on 14.08.2013).

European Communities embarked upon the task in 1972. It submitted a draft Directive in 1976 and a revised draft in 1979.[7]

Hence, in Europe, one of the most significant milestone achieved in the history of consumer protection law on 25 July 1985 with the promulgation of the Council Directive on the Approximation of the Laws, Regulations, and Administrative Provisions of the Member States concerning Liability for Defective Products' (hereafter the Directive).[8] The Green Paper on liability for defective products makes clear that the goal of the Directive was to provide a balanced approach giving, on the one hand, a protection to victims but avoiding, on the other hand, a crushing liability, e.g. by requiring the victim to prove the defective nature of the product and by providing limitations in time.[9] The Directive intended to address dangerous products after they are sold and used, in addition to providing redress to an injured consumer. [10]

The purpose of the Directive was to: introduce the notion of strict product liability i.e. liability without fault on the part of the manufacturer in favour of the consumer; establish joint and several liability of all operators in the production chain in favour of the injured party, so as to provide a financial guarantee for compensation of the damage; place the burden of proof on the injured party insofar

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[7] Rodney Nelson, Jones & Peter Stewart, *Product Liability: The New Law under The Consumer Protection Act, 1987*, p. 33-34.

[8] Helen Delaney and Rene van de Zande, A Guide to the EU Directive Concerning Liability for Defective Products (Product Liability Directive), U.S. Department of Commerce, National Institute of Standards and Technology, available at: http://gsi.nist.gov/global/docs/EUGuide_ProductLiability.pdf, last accessed on 13.08.2013.

[9] Michael G. Faure. "Product Liability and Product Safety in Europe: Harmonization or Differentiation", Kyklos, 11/2000.

[10] See chapter 4 of the thesis for a detailed discourse on EU Directive on Product Liability, 1985.

as the damage, the defect and the causal relationship between the two are concerned; provide for exoneration of the producer when the producer proves the existence of certain facts explicitly set out in the Directive; set liability limitations in terms of time, by virtue of uniform deadlines; set the illegality of clauses limiting or excluding liability towards the injured party; set a limit for financial liability; and provide for a regular review of its content in the light of the effects on injured parties and producers.[11]

The Consumer Protection Act, 1987 was promulgated in UK to incorporate the EU Directive on Product Liability, 1985 (85/374/EEC). It was applied to damages caused by products which were put into circulation by the producer after 1 March 1988. Section 1(1) states: "Part I of the Act shall have effect for the purpose of making such provision as is necessary in order to comply with the product liability Directive and shall be construed accordingly".[12]

7.2.2. Consumer Protection Act, 1987: An Overview

The principal statutory provisions are contained within Part I of the Consumer Protection Act 1987(CPA). Part I of the Consumer Protection Act, 1987 implements the Directive. The Act has five parts in all: Part I sets out the circumstances in which, under its operation, a consumer can make a claim for damages caused by a defective product; Part II contains the consumer safety

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[11] Helen Delaney and Rene van de Zande, A Guide to the EU Directive Concerning Liability for Defective Products (Product Liability Directive), U.S. Department of Commerce, National Institute of Standards and Technology, available at: http://gsi.nist.gov/global/docs/EUGuide_ProductLiability.pdf ; also Muhammad Fayyad, *The Transposition of the European Union Directive 85/374 /EEC on Product Liability into Palestine and Jordan: Is it Adaptable to Islamic Law?* Global Journal of Comparative Law 7 (2012) 794-224.

[12] Sec.1 (1), Consumer Protection Act, 1987.

legislation; Part III deals with misleading price indications; Part IV details the methods of enforcing the legislation in Part II and III; and Part V consists of miscellaneous provisions concerning, for example, the definition of certain terms. In addition there are five schedules of which the first, the most important, sets out the time limits for starting court action under the Act. Part I of the Act, 1987 implements the Directive and it is a domestic adaptation of the EU Directive on product liability, 1985. Liability in the Act is strict but not absolute as there are a number of defences available under the legislation. The Act covers the establishment of liability in respect of damages caused by a defect in a product.[13] There are two heads of loss mentioned in the law that are personal injury, death and damage to private property over 275 pounds.[14]

Section 5 (2) has expressly ruled out the recovery for damage to product itself (so Murphy-type economic loss not covered) and 'complex structure' type economic loss, so long as part X , causing damage to the product Y (into which X is incorporated) so long as Y was already incorporated when Y was supplied. According to the Act, there are four classes of persons who can be held liable under the Act: Producers[15] that comprises manufacturers, abstractors, and persons who are in neither class (i) nor (ii) but who give an agricultural product an essential characterisation by means of an industrial process; brand-namers[16] who hold

[13] Sec. 2 (1), Consumer Protection Act, 1987.
[14] Sec. 5(1) & S.5(4), Consumer Protection Act, 1987.
[15] Sec.1(2) & 2(2)(a), Consumer Protection Act, 1987.
[16] Sec. 2(2)(b), Consumer Protection Act, 1987.

themselves out as the producer; EC Importers[17] in case where they import from non-EC producer, the former would be liable for damage caused to UK Citizen; 'Silent' Suppliers[18] which covers the situation where the supplier (S) supplies to a buyer (B) and then (B) asks for the identity of the person against whom the action would normally be brought. Section 3 of the Act governs the definition of defect. Defect is defined in terms of the safety of the product being below the standard of safety which one is generally entitled to expect.[19] There are various defences for the defendant to show that he falls within one of the statutory defences. These are compliance with rule of law[20], product never supplied to another[21], non-business supply,[22] defect occurring after the time of supply[23], development risks[24], installation defect in a subsequent product[25] and contributory negligence[26].

7.2.3. Case Law on Product Liability under the Consumer Protection Act, 1987

The Consumer Protection Act, 1987 was first mentioned in AB v South West water services Ltd[27] albeit in a secondary manner. There then followed a series of unsuccessful attempts to invoke strict liability in Worsley v Tambrands Ltd[28]

[17] Sec. 2(2)(c), Consumer Protection Act, 1987.
[18] Sec. 2(3), Consumer Protection Act, 1987.
[19] Sec. 3(1), Consumer Protection Act, 1987.
[20] Sec. 4(1)(a), Consumer Protection Act, 1987.
[21] Sec. 4(1)(b), Consumer Protection Act, 1987.
[22] Sec. 4(1)(c), Consumer Protection Act, 1987.
[23] Sec. 4(1)(d), Consumer Protection Act, 1987.
[24] Sec. 4(1)(e), Consumer Protection Act, 1987.
[25] Sect. 4(1)(f), Consumer Protection Act, 1987.
[26] Sec. 6(4), Consumer Protection Act, 1987.
[27] AB v South West water services Ltd [1993] 1 All ER 609.
[28] Worsley v Tambrands Ltd [2000] PIQR P95.

(tampons), Richardson v LRC Products Ltd[29] and Foster v Biosii[30] (breast implants) where the judgments showed little appetite for making out strict liability as being distinct from negligence. There followed a pro-claimant Court of Appeal decision in Abouzaid v Mothercare (UK) Ltd[31] (pushchair liner) and of the High Court in A v National Blood Authority[32] (infected blood). Post that landmark case the claimants were in Bogle v McDonalds Restaurants Ltd[33] (hot coffee) and in the Court of appeal in Pollard v Tesco Stores Ltd[34] (child resistant closure on dishwasher powder) and Piper v JRI (Manufacturing) Ltd[35] (replacement hip), but successful in Palmer v Palmer[36] ('Klunk Klip' seat belt device).[37]

The basic elements on which the UK's strict product liability regime is based has been analysed in the light of Islamic law as follows.

7.3. Strict Product Liability in CPA, 1987 and Islamic Law

7.3.1. The European Directive: Strict or Fault-Based?

The CPA 1987 places strict liability for defective products on a range of possible defendants. The discussion so far indicates that the modern law of product liability in United Kingdom is based on the rule of strict liability. As it is discussed earlier that the existing English product liability regime is based on EU Directive on

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[29] Richardson v LRC Products Ltd [2000] Lloyd's Rep Med 280.
[30] Foster v Biosii (2001) 59 BMLR 178.
[31] Abouzaid v Mothercare (UK) Ltd [2000] All ER (D) 2436; Williamson, S.. "Strict Liability for Medical Products: Prospects for Success", Medical Law International, 2002.
[32] A v National Blood Authority [2001] 3 All ER 289.
[33] Bogle v McDonalds Restaurants Ltd [2002] EWHC 490.
[34] Pollard v Tesco Stores Ltd [2006] EWCA 393, [2006] All ER (D) 186 (Apr).
[35] Piper v JRI (Manufacturing) Ltd [2006] EWCA Civ 1344, (2006) 92 BMLR 141.
[36] Palmer v Palmer [2006] EWHC 1284 (QB), [2006] All ER (D) 86 (Jun).
[37] Geraint G. Howells, *The Law of Product Liability*, 2nd Edition, LexisNexis Butterworths, p.277.

Product Liability (85/374 EEC) that is based on the notion of strict product liability. The Directive envisages imposing liability on importers and suppliers even when they have used all reasonable care, the liability to which those parties are exposed is clearly strict. Similarly, the Directive also imposes on producers when the defect was due to the activities of a party further up stream in the process such as an out of house designer or a component part producer. Similarly, it is expected that U.K. judges will continue to impose covert strict liability for manufacturing errors.[38]

7.3.2. Strict Liability in Cases of Defective Products under Islamic Law

It has been thoroughly analysed in the preceded chapters that the Islamic law of contract and that of tort have offered adequate protection to the interests of consumers against defective products. Here, it is pertinent to address the issue that whether or not Islamic law approves strict liability in torts cases. Further can such liability be extended to the cases of defective products? In this regard in the primary source of *Sharī'ah*, the Holy Qur'ān a number of verses propounds the strict liability of a tort-feasor in committing wrong. Some of these are given below:

> "The blame is only against those who oppress men and wrong-doing and insolently transgress beyond bounds through the land, defying right and justice: for such there will be a penalty grievous."[39]

> "If any one does a righteous deed, it ensures to the benefit of his own soul; if he does evil, it works against

[38] Jane Stapleton, *Product Liability in United Kingdom: Myths of Reforms*, Texas International Law Journal, Vol. 34:4; http://dev.oldsquaredns.net/pdf_articles/3100126.pdf accessed on 12-09-2014.
[39] Qur'ān, 42:42.

(his own soul). In the end will ye (all) be brought back to your Lord."[40]

"O our Lord! truly Thou dost know what we conceal and what we reveal: for nothing whatever is hidden from Allāh, whether on earth or in heaven."[41]

"Not your desires, nor those of the People of the Book (can prevail): whoever works evil, will be requited accordingly. Nor will he find, besides God, any protector or helper."[42]

"Say: "Shall I seek for (my) Cherisher other than God, when He is the Cherisher of all things (that exist)? Every soul draws the meed of its acts on none but itself: no bearer of burdens can bear of burdens can bear the burden of another. Your goal in the end is towards God: He will tell you the truth of the things wherein ye disputed."[43]

While explaining the above verse, Sayyid Abū Al A'lā Maudūdī (d.1400/1979) writes: "Every person is responsible for whatever he does, and no one is responsible for the deeds of others".[44] So, a man cannot deny his liability after his intention is established. All these verses mean that a person will not be liable except for his own torts and wrongs. He cannot be accountable for the torts or mistakes of other people.[45] The traditions of the Prophet (pbuh) further elaborated the above principle. There are number of traditions regarding the matter, following are some

[40] Qur'ān, 45:15.
[41] Qur'ān, 14:38.
[42] Qur'ān, 4:123.
[43] Qur'ān, 6:164.
[44] Maudūdī, Sayyid Abū Al Ā'lā, *Towards Understanding the Qur'ān*, (Leicester: The Islamic Foundation, 1408/1988), 2:299.
[45] 'Abdul Baṣīr b. Muḥammad, *Strict Liability in the Islamic Law of Tort*, Islāmic Studies, IRI, International Islamic University, Islamabad, vol.39, No.3 (Autumn 2000), pp. 445-462, available on http://www.jstor.org/stable/23076062 accessed on 23/08/2013.

of them: *"You will not do him wrong and he will do you wrong"*;[46] *"Indeed, your son does not commit any offence against you, nor do you commit any offence against him"*;[47] and the Holy Prophet (pbuh) said: "No person should be apprehended for an offence committed by his father or brother".[48] Similarly, it has been mentioned in the last sermon (Khuṭbah Hujjat ul Widā') of the Holy Prophet (pbuh) is as under:

> "Beware; no one committing a crime is responsible for it but himself. Neither the child is responsible for the crime of his father, nor the father is responsible for the crime of his child."[49]

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

There are various Islamic legal maxims that can be related with the rule of strict liability. These maxims are:

"Injury is to be removed".[50]

"Injury should be avoided as much as possible".[51]

"Private injury should be borne to avoid public injury".[52]

"Repelling evil is preferable to acquisition of interests".[53]

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[46] Abū 'Abd ul Allāh Muḥammad b. Yazīd b. Mājah, *Sunan Ibn Mājah* (Cairo: Isa al-Babi Halabi wa Shrukah, n.d.), vol.2, p.890.

[47] Abū 'Abd ul Allāh Muḥammad b. Yazīd Ibn Mājah, *Sunan Ibn Mājah* (Cairo: Isa al-Babi Halabi wa Shrukah, n.d.), vol.2, p.890.

[48] *Al-Nasā'ī (d.303 A.H.), Sunan,* Maktabah al-Maṭbū'āt al-Islāmiyyah, Ḥalb, 1986, vol.7, p.127; 'Abdul Qādir Awdā', Al-tashrī' al-jinā'ī al-Islāmī muqārinah bil Qānūn al-Waḍ'ī, Mu'assisah Al-risālah, Beirut, 1993, vol.1, p.395. It means that in a tort action for what is committed by a person, he who acts is liable for what he has done, not another.

[49] Al-ṭirmidhī, Sunan, tradition no.2159, vol.4, p.31; Ibn Mājah, Sunan, tradition no.2669, vol.2, p.890.

[50] Majallah, article: 20. This principle is applied throughout the code and it means that grave (*fāḥish*) injury, however it may be caused, must be removed e.g. when a mill is made adjacent to a dwelling-house. The house is weakened by turning of the mill wheel, or it becomes impossible for the owner of such a house to dwell in it by reason of the great quantity of smoke or bad smell from that mill. These acts amount to injury which must be removed (Majallah article: 1200).

[51] Majallah, Art. 31.

[52] Majallah, Art. 27.

"A major harm has to be removed with a lesser harm".[54]

The above maxims denote that anyone causes any harm (i.e. intentionally or negligently) to another should strictly be liable for that. These maxims are incorporated in Al-Majallah.

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

1. "If a person drowns people by opening up a river dam, or spreads fire, or destroys a building and causes loss of life, he is liable for his action".[55]
2. "If any person destroys property of another, whether intentionally or unintentionally, and whether in his own possession or in the hands of some person to whom it has been entrusted, he is liable for the loss".[56]
3. "If a person slips and falls upon and destroys any property belonging to another, he is bound to make good the loss."[57]
1. "If a person destroys the property of any other person under the mistaken belief that it is his own, he is liable for the loss".[58]

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

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[53]Majallah, Art. 30.
[54] Abu Dawūd, *Sunan, abwāb al-ijārah,* tradition no.3508, vol.3, p.284.
[55] Ibn Ḥazm (d.456 A.H.), *Al-muhallah,* Dār al-Fikr, Beirut, vol.11, p.219.
[56]Majallah, Art. 912.
[57] Majallah, Art.913.
[58]Majallah, Art. 914. Similarly Majallah states in Art.916: "Every person has a right of way on the public highway, subject to the safety of others. That is to say, provided no harm is caused to others in circumstances which can be avoided e.g. if a porter drops the load he is carrying on the public highway and destroys the property of another, the porter must make good the loss. If sparks fly from a blacksmith's shop while he is working iron and set fire to the clothes of a passer-by in the public highway, the blacksmith must make good the loss".

The *fuqahā'* have also followed the rule of strict liability in a number of cases e.g. "If a person, in the exercise of his right, does an act which involves risk to another person or property of others, he will be held liable for the damage if damage occurs. He should be held liable to ensure safety of those other persons. For instance, if a person carries timber along a public road and a piece of timber falls on a passerby and causes damage to the person and property, the carrier (*ḥāmil*) will be held responsible (*ḍāmin*) for the damage caused."[59]

The contemporary Muslim jurists termed strict liability as *'al-mas'ūliyyah al-taqṣīriyyah'*.[60] This clearly shows that the rule of strict liability appears in Islām and is not alien to Islamic law of tort. In English law and Islamic law both liability is established on the principle of "fault". In both the defendant is liable because he has acted intentionally or negligently causing harm to the plaintiff's interest. Hence, the concept of strict liability is compatible to Islamic law. However, the English law is in a developed form today and the rule of strict liability is extended to many new situations including strict product liability as in English law this rule has been practiced and applied intensively and thoroughly over a long period of time. Muslim jurists should consider the legal developments that have taken place in modern times.

It is also pertinent to mention here that according to M. Muṣlih-ud-Dīn, civil liability in Islām is neither *"fault liability"* nor *"strict liability"*, but may be described

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[59] Al-marghinānī, Al-hidāyah, vol.4, p.194; Tabyīn al-haqā'iq, ḳanz ul-daqā'iq, vol.5, p.146; Ibn 'Ābidīn, Ḥashiyyah Rad al-mukhtār.
[60] Al-zuhailī, *Nazriat ul-ḍamān*, p.251.

as *"damage liability"*. Thus general principle of liability in Islam is "no liability without damage" which repudiates the idea of both "strict liability" and "fault liability" and steers clear of the confusion to which law of torts is subjected.[61] In this case, establishing the liability will be comparatively easy.

In the context of product liability, it is pertinent to mention that Muslim jurists *(Fuqahā')* held craftsmen *(Ajir Mushtarak)* strictly liable for destruction or harm to the products in their possession.[62] Ijārah (hire) has been legalised by Islamic law due to the need of the general body of consumers to acquire goods and services and if the contract of lease is not legalized people will fall in trouble (*mashaqah*). There are two types of *Ijārah* contract; *Ijārat ul-ashkhāṣ* (hire of employees) and *Ijārat ul-Ashyā'* (hire of things).[63] Then *Ijārat ul-ashkāṣ* (services of persons) is further classified into two *ajir mushtarak* (one who renders his services to everyone like tailor, shoemaker and the like) and *ajir khāṣ* (one who renders services to specific person).[64]

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

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[61] M.Muṣlih-ud-Dīn, *The Concept of Civil Liability in Islām and the Law of Torts*, p.351-53.
[62]Ibn Qudāmah (d.620 A.H.), *Al-Mughnī*, vol.5, p.391.
[63] Al-marghīnanī, Al-hidāyah, vol.3, p.242.
[64] Some professions are strictly prohibited in Sharī'ah (Qur'ān: 5:4) such as astrologers and if the *Muḥtasib* finds anyone indulging in these practices must expel him and punish him(Ibn Al Ukhuwwah, op.cit., pp.67-68). The prophet said: *"He who goes to a diviner and believes his word misbelieves that which had been revealed through Muhammad* (Al Baihayqī, *Al Sunan Al Kubrā*, Kitāb ul Qasāmah, Bāb al Takfīr, Hadith no. 16494). Similarly, prostitution, gambling and other unlawful services should be stopped by the authorities.

compensate. Thus, if a tailor received a piece of cloth from his customer and while in his custody some loss occurred to it, the tailor will be held liable to compensate the loss was a result of some calamity and act of nature.[65]

The reason for this ruling is that adopting the rule of non-liability for paying compensation by craftsmen whose trustworthiness is taken for granted may make them negligent about the goods in their custody with the result that the owners have to suffer great loss. They may abuse the trust and misuse the facility. Now through this new ruling the burden of proof was shifted to the craftsmen, who had to show of negligence.

Hence, the craftsmen (*ajir mushtarak*), according to the dominant view in *fiqh*, were held accountable for the loss of goods in his possession if they are destroyed by his fault or transgression, the craftsmen were held liable for paying compensation.[66]

This ruling has been given by the jurists (*fuqahā'*) on the grounds of public interest so that trustees and tradesmen exercise greater care in safeguarding people's properties.[67]

It is reported that Ḥadrat 'Alī (R.A.) held craftsmen liable for the loss occurred to the property in their custody.[68] This ruling, *inter alia*, highly ensures protection of consumers' interests against harms etc.

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[65] Al-Salāmī, Muḥammad Al-Mukhtār, *Al-Qiyās* and Its Modern Applications, translated into English by Muḥammad Ḥashim Kamālī, Islamic Research and Training Institute, Islamic Development Bank, available at: http://uaelaws.files.wordpress.com/2012/05/al-qiyas-analogy-and-its-modern-application.pdf, pp.108-9.

[66] Al-sarakhsī, Al-mabsuṭ, vol.15, p.82.

[67] Al-Marghīnānī, *Al-Hidāyah*, vol.3, p.242.

[68] Ibn al Qudāmah, *Al-mughnī*, vol.5, p.390.

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

7.4. The Notion of Product in CPA, 1987 and Islamic Law

7.4.1. The Notion of Product in CPA, 1987

The term 'Product' indicates an item which has been manufactured and then sold, perhaps through an intermediary, to the consumer. In market transactions, a product is anything that might satisfy a want and offered to the market. It is also called merchandise. According to manufacturing, products are bought as raw materials and sold as finished products. In project management, products are the formal definition of the project deliverables that make up or contribute to delivering the objectives of the project.[69] Under the general English law of negligence no definition of product exists. Under the new rules, however, 'product' is a central concept-if no 'product' is involved then the new regime of strict liability will not be attracted. What should be the boundary between products and other things? The Winterbottom v Wright, though it was not a case of product liability, may be considered as the starting point to examine the evolution of product liability in United Kingdom. In this case the plaintiff, a coachman, was injured due to the failure of the defendant to maintain the coach. The defendant was a contractor in charge of maintaining coaches for the

[69] Michael G. Faure, "Product *Liability and Product Safety in Europe: Harmonization or Differentiation?*" (2000) 53 Kyklos: International Review for Social Sciences 470; also quoted by M. Fayyad's in his article on the *Transposition of the European Directive 85/374/EEC on Product Liability into Palestine and Jordan: Is it Adaptable to Islamic law?* Global Law Journal, 2012.

stagecoach company. The court held that the liability would not attach to the defendant as there was no *privity* of contract between the parties. [70] Mr. Winterbottom's case was an impediment from which English law did not recover until *Donoghue v. Stevenson* in 1932, having spent more than a century with an apparent dichotomy between 'dangerous chattels' and other goods. General negligence principles have been applied to what could be called product liability cases.[71]

As the English regime of product liability is based on EU Directive on Product Liability, it is, therefore, important to know the meaning of the word "product" in the Directive. According to the EU Directive; a "product" means physical property and goods, as opposed to land or rights in or to real property.[72] According to this definition, the following are to be products: any goods which can include substances, growing crops and things comprised in land by virtue of being attached to it and any ship, aircraft or vehicle; electricity-defects do not include a power cut; products comprised in other products as component raw material or likewise. This means that buildings themselves will not be included whereas the materials used to make up those buildings will be. In the original Directive, primary agricultural products and game were excluded (article 2). This

[70] Winterbottom v. Wright (1842) 10 M. & W. 109.
[71] Alister Clark, *Product Liability*, Sweet & Maxwell Publishers, p. 47.
[72] Art.2, EU Directive on Product Liability 85/374 (EEC).

modification was only made when consumers had been alarmed by outbreak of mad cow disease.[73]

The Consumer Protection Act, 1987 has defined "Product" in as: "any goods or electricity and (subject to subsection (3) below) includes a product which is comprised in another product, whether by virtue of being a component part or raw material or otherwise".[74] "Goods" is further defined as including: "substances, growing crops and things comprised in land by virtue of being attached to it and any ship, aircraft or vehicle".[75]

The criteria must be met for an article to constitute a product. It must be movable. Cars and ovens are products.[76] "Product" obviously includes standard consumer goods such as lawnmowers and televisions. It also includes components, such as brakes in a car. It includes raw materials incorporated into goods. It includes ships, hovercrafts, aero-planes, gliders, trains and other vehicles. It includes gas, water and electricity. It includes waste when supplied as a product in its own right, but not where it is merely an unwanted incident of the production process, e.g. effluent from a factory. Land and buildings are not products, because they are immovable. However, s.45 of the Consumer Protection Act, 1987 clearly covers such items as bricks, wood and cement, even though they become part of a house. Hence, building materials are products but

[73] Hans-W. Micklitz, N. Reich and P. Rott, *Understanding EU Consumer Law* (Oxford: Intersentia Publications, 2009) 246.
[74] s.1 (2), CPA, 1987.
[75] s.45, CPA, 1987.
[76] Rodney Nelson, Jones & Peter Stewart, Product liability: The New Law under the Consumer Protection Act, 1987, p.36.

not the building itself; the effect is that the Act applies to building material producers but not normally to the work of building and civil engineering contracts. If your house falls down due to defective bricks, you may sue under Part I of the Act. If it falls down due to defective design or assembly, you must rely on the existing laws of contract and tort (including the Defective Premises Act 1972).[77]

Now the question may arise that liability should also be imposed for nuclear accidents? Nuclear accidents are excluded from the Act. In this regard A.14 of Directive states: This Directive shall not apply to injury or damage arising from nuclear accidents and covered by international conventions ratified by the Member states.[78] In the UK the relevant conventions are mainly implemented by the Nuclear Installations Act 1965. In this context, s.6 (8) provides states: 'Nothing in this Part shall prejudice the operation of section 12 of the Nuclear Installations Act 1965 (rights to compensation for certain breaches of duties confined to rights under that Act)'.[79] The most contentious exception concerns agricultural produce which has amended as mentioned earlier. Agricultural produce is outside Part I, but industrially processed agricultural produce is within it. A fisherman is not liable for selling sickly fish, but a food manufacturer would be liable for producing defective fish fingers. If contaminated wheat eventually forms part of defective biscuits, it is the biscuit manufacturer rather than the wheat grower who will be liable under Part I. The

[77] Sec. 45, Consumer Protection Act, 1987.
[78] Art.14, EU Directive on Product Liability, 1985.
[79] Sec. 6 (8), Consumer Protection Act, 1987.

industrial manufacturers then have to exercise their rights of contribution and indemnity against the producers of the primary foodstuff. If a consumer is directly injured by primary agricultural produce, such as rotten tomatoes, Part I does not apply at all and he must rely on the existing law. The major consequences of the breadth of meaning ascribed to the term "product" is that, despite the statute's short title of the Consumer Protection Act, 1987, Part I's scheme of strict liability will have a wider application than to consumer goods. As noticed earlier, major disasters stemming from for examples chemicals or aircraft could well be litigated under the Act. The extension of the term "goods" to include movables which have been incorporated into immoveable is of some interest. This clearly covers moveable items such as windows, frames, pipes, and central heating systems which have been so incorporated. In this way the Act implements A.2 of the Directive.

Many difficult propositions are likely to arise in relation to the scope of product. In this regard, the first one is to determine the boundaries the term product covered by the Act.

Another important point which has caused some anxiety is the position of those who produce printed textbooks, manuscripts and the like. In their Explanatory and Consultative Note the "Special problems arise with those industries dealing with products concerned with information, such as books, records, tapes and computer software. It has been suggested, for example, that it would be absurd for printers and bookbinders to be held strictly liable for faithfully reproducing

errors in the material provided to them, which-by giving bad instructions or defective warnings-indirectly causes injury. It does not appear that the Directive is intended to extend liability in such situations. On the other hand, it is important that liability is extended to the manufacturer of a machine which contains defective software and is thereby becoming unsafe, and to the producer of an article accompanied by inadequate instructions or warnings, the article thereby become a hazard to the consumer. The line between those cases may however not be easy to draw, particularly in the field of new technology where distinction between software and hardware is becoming increasingly blurred."[80]

In modern context the most debated question that arises is whether or not computer technology can be categorized as a product. There is no doubt that hardware is covered by the Directive and no doubt providing a modicum of comfort to those working in close proximity to 'killer robots'. The difficulty arises in relation to the question of software. The arguments against software being classified as a product are essentially threefold. Firstly, software is not moveable, therefore is not a product. Secondly, software is information as opposed to a product, although some other obiter comments on the question of the status of software suggests that information forms an integral part of a product. Thirdly, software development is a service, and consequently the legislation does not apply.[81] On the contrary, it can be argued that software should be treated like electricity, which itself is specifically covered by the

[80] Alister M. Clark, *Product Liability*, Sweet & Maxwell Publishers, p.53.

[81] *Maurice Jamieson, Liability for Defective Software*, available at: http://www.journalonline.co.uk/magazine/46-5/1000702.aspx, last accessed on 13.08.2013.

Directive in article 2 and the Act in section 1 (2), and that software is essentially compiled from energy that is material in the scientific sense. Ultimately it could be argued that placing an over legalistic definition on the word "product" ignores the reality that we now live in an information society where for social and economic purposes information is treated as a product and that the law should also recognize this.

Furthermore, following the St Albans[82] case it could be argued that the trend is now firmly towards categorizing software as a product and indeed the European Commission has expressed the view that software should in fact be categorized as a product.[83] The new bill on consumer rights protection introduced in the British Parliament in 2013 has covered, inter alia, the digital-content.

7.4.2. The Notion of Product in Islamic Law

Islamic law has not given any specific definition of the term 'product'; instead, it uses the term '*mabī'* means subject matter to indicate all sold 'valuable' things.[84] The subject matter *mabī'* must be valuable, evaluated or able to be evaluated, exist at the time of concluding the agreement or be going to exist in the future and be legal in order to be recognized by Islamic law.[85] Otherwise, there are not any other conditions. For this reason, a product may be non-material, immovable, and so on

[82] St Albans City and DC v International Computers Ltd [1995] FSR 686; [1996] 4 All ER 481.
[83] *Maurice Jamieson, Liability for Defective Software*, available at: http://www.journalonline.co.uk/magazine/46-5/1000702.aspx, last accessed on 13.08.2013.
[84] M.Fayyāḍ, *'Misleading Advertising Practices in Consumer Transactions:* Can Arab Lawmakers Gain Advantage from European Insight? (2012) 26(3) Arab Law Quarterly Journal 287.
[85] Al-Kāsānī, Badāi' al- Sanā'i', vol.5, p.192. See chapter 3 of the thesis for a detailed discussion on the conditions of a product in Islamic law.

in Islamic law. For example, agriculture products and cattle are products within the meaning of Islamic law. For instance:

The Prophet Muḥammad (pbuh) happened to pass by a heap of eatables (corn). He thrust his hand into that heap, and his fingers were moistened. He said to the seller of the heap: What is this? These have been drenched by rainfall.' He (Holy Prophet) remarked: Why did not you place this drenched part of the heap over other eatables, so that people could see it? He who deceives is not my follower.[86]

In another case:

The Muslim scholar Ibn ul-Asqā Wathilh said: 'I bought a camel from a seller and when leaving the place of contract 'Uqbah b. Nāfi' followed me and said: The camel seems fat and healthy; did you buy it for meat or travel? I said: For travel (hajj). He said: Its toe has a hole, and it is not appropriate for your travel. Are you looking to rescind the agreement? The seller asked 'Uqbah. 'Uqbah responded: I heard Prophet Muḥammad (pbuh) say that the contracting parties have the choice.[87]

Islamic *Sharī'ah* has specific stance towards some products and does not allow its consumption e.g. drinking substandard. Hence overall, the English regime of product liability on the notion of product is compatible with Islamic law. As in Islamic law and English law both the term is very wide and covers almost all products including animals. It is pertinent to discuss here the issue that whether someone can be held liable for giving a wrongful advice. Islamic *Sharī'ah* has held a

[86] Muslim b. Ḥajjaj, *Saḥīḥ, Kitāb ul-imān*, tradition no. 102, vol.1, p.99.

[87] Aḥmad b, Ḥanbal (d.241 A.H.), Musnad, tradition no. 16013Mu'assisah Al-Risālah, 2001, vol.25, p.394.

person liable for giving a wrongful advice. Advice is a matter of trust in Islām.[88] Whosoever gives a wrong piece of advice to a person as a mufti is said to have committed a sin. Concept of engagement of an agent or a counsel is recognized by Islām. Hence advice can be considered as a product under Islamic law like that of English law and liability may be attributed to the person giving wrong piece of advice.

7.5. The Notion of Defect in CPA, 1987 and Islamic Law

7.5.1. The Notion of Defect in CPA, 1987

In order to establish liability under Consumer Protection Act proof of defect is essential. The plaintiff has to prove that the product is defective.[89] According to S.3 (1) of CPA, 1987, a defect exists where the safety of the product is not such as persons generally are entitled to expect. The test is based on consumer expectations i.e. what they expect generally. It is subject to a reasonable test.[90] In S. 3(2) of CPA, 1987 states certain factors to be taken into account in assessing consumer expectations of a product's safety. These are: the manner in which, and purposes for which, the product has been marketed, it's get up, the use of any mark in relation to the product and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product; reasonably expected use; and the time that the product was supplied by its producer to another.

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[88] There are many traditions of the Holy Prophet (pbuh) in this regard. See Aḥmad b, Ḥanbal, Musnad, tradition no.22360, vol.37, p.43; Ibn e Mājah, Sunan, tradition no.3746, vol.2, p.1233; Abu Dāwūd, Sunan, tradition no.5128, vol.4, p.333.

[89] Foster v Biosil (2000) 59 BMLR 178.

[90] Richardson v LRC Products Ltd [2000] Lloyd's Rep Med 280.

However, there is no defect if:

(a) The product is perfectly safe;

(b) The product is as safe as persons generally are entitled to expect, in view of its nature and presentation;

(c) The damage only arose through the disregard of instructions or warnings;

(d) The damage only arose because the product was put to an unexpected use;

(e) The damage was solely caused by fair wear and tear;

(f) Knowledge that the product could be made safer only became available after its producer supplied it.[91]

In addition to factors to guide the analysis of whether there is a defect, there is also the question of what standard of defect is required for the product to be unsafe and for liability to attach.

This differs from case to case. There is not much case law developed so far that's why the notion of defect and standards to determine the defectiveness of something need to be refined. The three kinds of defect pointed out from the case law on negligence i.e. manufacturing, design and marketing are appropriate and expected to be adopted in future litigation.[92]

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[91] Rodney Nelson, Jones and Peter Stewart, *Product Liability: The New Law under the Consumer Protection Act, 1987*, Fourmat Publishing, London, 1988, p.61.

[92] Overview of UK: Product Liability Law, available at: http://www.biicl.org/files/1123_overview_uk.pdf, last accessed on 15.08.2013.

The 'manufacturing defect' is covered by the CPA, 1987. This is the defect in a product because it fails to conform to design specification as was in the case of 'A v National Blood authority'. The case has made a clear distinction between standards and non-standard products. Burton J held that the infected products were non-standard, unsafe and, in the absence of warnings to the public about the risk of infection, were not what the public was legitimately entitled to expect and were therefore defective. The fact that infection was unavoidable (due to the lack of screening tests available at the relevant time) was irrelevant to the analysis of defect. In 'Bogle and Others v McDonald's Restaurants Ltd'[93] the court held that 'consumers expectations of coffee were that it should be served hot and therefore the product (coffee in a Styrofoam cup with lid) was not defective merely because it could scald when spilled'.

When the design itself is defective that is called design defects. These kinds of defects are more complex as there is no 'standard' product against which to compare the allegedly 'non-standard' product. All products involve inherent risk and the benefits of the product must be weighed against its potential benefits. A product will be considered to have design defect when its risks are much more as compare to its benefits and if such risks could have been avoided by an alternative design. To meet the regulatory standards may indicate that there is no design defect, although this cannot be guaranteed. Where the design permits the risk to arise and

[93] Bogle and Others v McDonald's Restaurants Ltd [2002] All ER (D) 436 (Mar).

there is no warning to the user, the product's safety will fail the consumer expectations test as was the case in 'Imān Abū zaid v Mothercare (UK) Ltd'.[94]

S.3 (2) (a) of the Consumer Protection Act contains the failure to warn/manufacturing defect. Failure to issue adequate and proper warnings of associated risks or instructions to avoid their materialization, the product will be considered a defective one. In Worsley v Tambrands Ltd, the plaintiff filed a suit against the defendant, a tampon manufacturer, claiming compensation for personal injuries suffered as result of toxic shock syndrome after inserting a regular tampon, a type she had used since she age 15. The plaintiff contended that the warnings on the packet were defective. The court held that the box gave unambiguous instructions to read the detailed leaflet inside, and the leaflet was true and accurate. The claim failed.[95]

7.5.2. The Notion of Defect in Islamic Law

Under Islamic law it is a right of the consumer that the product supplied to him should be free from any defect. It has been considered the seller's duty to disclose all the defects of a product.[96] The consumer has been given an implied warranty against latent defects in the products purchased.[97] The option of defect *(khiyār al-'ayb)* is considered the most important one in this regard. It is a right given to a consumer in a sale to rescind the contract if he discovers that the object acquired

[94] Imān Abū zaid v Mothercare (UK) Ltd [2000] All ER (D) 2436.
[95] Worsley v Tambrands Ltd [2000] PIQR P95.
[96] See chapter 5 of the thesis for a detailed discourse on the subject of implied warranties under Islamic law of contract.
[97] Majjallah, Art. 336.

has in it some defect diminishing its value.[98] This well established rule of Islamic law protects society from the problems arising from purchasing defective products. It is an implied warranty imposed by the law itself and the parties do not have to stipulate it. Hence, it is a necessary condition of the contract. The products are liable to be rejected if undeclared defects are discovered. Islamic law protects consumers both before and after conclusion of the sale and purchase agreement by giving them the right of inspection and the right of option. The Islamic doctrine of *khiyār al 'ayb* allows the buyer the right of inspection of the goods (to ensure its quality etc.) and also the right of option (whether to continue with the contract or otherwise) both before and after the contract of sale and purchase is concluded. The option of defect (*khiyār al 'ayb*) is based on the following verse:

> "O ye who believe! Eat not each other's property by wrongful means..."[99]

The Holy Prophet (pbuh) in many places said:

> "A Muslim is the brother of a fellow-Muslim. It is not lawful for a Muslim to sell his fellow-Muslim a deficient item, unless he shows him this defect;[100] it is not lawful for a person to sell a commodity in which he knows that there is a defect, unless he makes it known;[101] the seller and the buyer have the right to retain or return goods as long as they have not parted or till they part; if both the parties spoke the truth and described the defects and qualities (of the goods), then they would be blessed in their transaction, and if they told lies or hid something, then the blessings of their transaction would be lost."[102]

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[98] Al-Marghīnānī, Al-Hidāyah, vol.3, p.36; Al-Qawānin al-Fiqhiyyah, vol.1, p.176; Al-Muḥarrar fi al-Fiqh al madhhab Aḥmad b, Ḥanbal, vol.1, p.324.
[99] Qur'ān; 4:29.
[100] Al-Bukhārī, *Saḥīḥ, Kitāb al Buyū'*, tradition no. 2082, vol.3, p.59.
[101] Ibid.
[102] Ibid.

The Islamic law of options highly protects rights of the consumers in contracts and commercial transaction. The purpose of option is to give chance to a consumer who suffered some loss in transaction to revoke contract within stipulated time. This doctrine not only safeguards the purchaser from the implications of the sale of defective products before the agreement is being concluded, but it also guarantees similar protection after the conclusion of the sale and purchase agreement. The consumer then has the right, under this Islamic doctrine, to exercise his right of option (of either continuing with the contract of sale or not) upon the discovery takes place before or after the conclusion of the said agreement. The consumer has the implied right to inspect the goods prior to an agreement and confirm whether the goods to be purchased are free from unknown defects. After the delivery of the goods by the seller, if the consumer discovers any defect in the goods which existed while it was in the hands of the seller, the consumer has the right of option to reject the item purchased or to take it at the agreed price. If the seller put an exemption clause of no responsibility for any defect in the goods while the defects were known to him or concealed by him purposely, the exemption clause in the situation has no effect and, thus, the consumer is not bound by the exemption clause and has the right of option to reject the goods or to take them.

The liability arising from defective products is covered under Islamic law of tort i.e. *Fiqh al Ḍamān*. If the seller sells anything defective that cause harm to any one, he can be held liable for that under the general principles of Islamic law. A famous

principle of Islamic law *"al-kharāj bi al- Ḍamān"* i.e. every profit has a corresponding liability.[103]

7.6. The Notion of Producer in CPA, 1987 and Islamic Law

7.6.1. The Notion of Producer in CPA, 1987

The nucleus of Part I of the Consumer Protection Act is s.2 (1), it states:

> "Where any damage is caused wholly or partly by a defect in a product, every person to whom subsection (2) below applies shall be liable for the damage."[104]

Those primarily liable under the Consumer Protection Act, 1987 are: (1) the producer of the product; (2) any person putting his name on the product or using a distinguishing mark, or who has held himself out to be the producer of the product ('own brander'); (3) or any person who has imported the product into the EU/European Economic Area in the course of any business to supply it to another ('first importer') (section 2(1) and (2) CPA). 'Producer' is in turn defined as: (1) the person who manufactured it; (2) if not manufactured, the person who won or abstracted it; and (3) if essential characteristics of the product are attributable to an industrial or other process having been carried out, the person carrying out that process (section 1(2)). Suppliers of the product (to the person who suffered damage or to the producer in which the product is comprised) may also be liable (in the form of subsidiary liability) if: (1) the person who suffered the damage requests the supplier to identify the producer; (2) within a reasonable period after the damage

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[103] Ibn Qudāmah, *Al-mughnī*, vol.3, p.489; Shah Waliullāh Al-dihilwī, *Hujjat-ullāh al-bāligbah*, Dār al-jil, Beirut, Lebanon, vol.2, p.174; Al-maqdisī, Ziā' ul din, *Al-sunan wa al-aḥkām 'anil-muṣṭafā 'alaihi al-salām*, Dār Mājid Al siri, Sa'ūdī al 'Arabiyyah, 2005, vol.4, p.389.

[104] S.2 (1), Consumer Protection Act, 1987.

occurs; and (3) the supplier fails within a reasonable time to comply or identify the person who supplied the product to him (section 2(3) CPA). The rationale behind this provision is to protect the claimant from producers who conceal themselves behind a chain of suppliers. The supplier can avoid liability by informing the consumer of the identity of the producer/importer. Where two or more persons are liable for the same damage then they are jointly and severally liable (section 2(5) CPA).

7.6.2. The Notion of Producer in Islamic Law

Islam encourages all types of lawful commercial and business activities such as agriculture, manufacture, business, trade, and all the works and labour within the limits of *Sharī'ah* that produce any goods or services for the benefit of community is considered as worship.

Islām has emphasized on more and more production so human needs be fulfilled but it gives a comprehensive code for consumption. Islamic commercial law stress a lot on the fulfilment of human needs along with achieving a great spiritual satisfaction therefore it gives a balance system for earning and consumption of goods and services to stabilize the worldly life and life here after. The Prophet (pbuh) endorsed the importance of legitimate ways of earning in the following words: *"Asked 'what form of gain is the best? [The Prophet] said, 'A man's work with his hands, and every legitimate sale".*[105]

[105] Aḥmad b. Ḥanbal, *Musnad*, tradition no. 17265, vol.28, p. 502; Ibn e Abi Shaibah, *Muṣanaf*, tradition no.23083, vol.4, p.554; Al-bayhaqī, *Al-sunan al-kubrā*, tradition no.10397, vol.4, p.432.

Sharī'ah has stressed Muslims to produce beneficial things and avoid the production of harmful things to humanity. Thus many Muslim scholars are of the view that production of tobacco is not allowed and smoking is prohibited. Similarly the cultivation of opium is not allowed as it harms the society. For Muslims consumption of alcohol is not allowed either. The point here is that in *Sharī'ah* the producer is not defined in any specific words. Thus *Sharī'ah* has not focused on the definition of producer rather it has focused on the product that is produced that whether it is good for consumption or not. All those things harmful to human life, intellect, family and wealth are declared prohibited both its production and consumption. Here it is pertinent to mention that who is liable under Islamic law? As we have mentioned the principle of Islamic law that states: *"Every profit has a corresponding liability"*.[106] It covers all the stakeholders i.e. producer, manufacturer, retailers and suppliers etc. to be liable for any shortcoming on their part. Thus the notion of liability in Islamic law is wider and it covers all those who extract benefit from the product and it is in conformity with English product liability regime.

Though there is a debate among the Muslim scholars about the acknowledgment of corporate personality. Here producers and manufacturers include both natural as well as legal persons as the basic purpose of this thesis is to assess the liability of the manufacturers for producing defective products and their responsibility to compensate the victims of such products.

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[106] Ibn Qudāmah, *Al-mughnī*, vol.3, p.489; Shah Waliullāh Al-dihilawī, *Hujjat-ullāh al-bāligbah*, Dār al-jīl, Beirut, Lebanon, vol.2, p.174; Al-maqdisī, Ziyā' al dīn, *Al-sunan wa al-aḥkām 'anil-muṣṭafā 'alaihi al-salām*, Dār Mājid Al siri, Saudi Arabia, 2005, vol.4, p.389.

Anything that is explicitly prohibited by the Qur'ān and the Sunnah, such things are not considered *mal* (property) in *Sharī'ah*. The contract in which the subject-matter is something that is not considered '*mal*' by the *Sharī'ah* the Consumers should not become party in such a contract. Thus it is forbidden for the Muslim consumers to acquire or transfer through contract anything that the *Sharī'ah* has declared *haram* like wine, swine flesh, bristles of swine, *Najis* things, (that are considered filthy under the law and have no legal value), like Carrion, blood; *Mutanajjas* things (that have been affected by filth), like something dirty falling into the milk; Bone of dead animals and their hair and skin; Pork (Pig), beasts, and some other animals whose meat is not permitted. Anything that contains part of the *Ḥarām* animal is also *Ḥarām* e.g. lard, jello gelatin, animal shortening, blood of any animal or bird, Meat of dead animals or birds, Meat of animals or birds that has been sacrificed in the name of other than Allāh, Alcohol and (intoxicating) drugs. Sale of human blood today for the purpose of transfusion and donation and the sale of human eye can be covered by the principle of necessity. Since adultery, obscenity and immorality are prohibited by the *Sharī'ah*, any contract or transactions that entails these evils or promotes them in any way is also forbidden. In Islamic law, a Muslim producer would be held strictly liable when he produces prohibited (*ḥarām*) products.[107]

[107] See chapter 3 of the thesis for a detail discussion on requirements of Sharī'ah in a product.

7.7. Proof of defect and causation under CPA, 1987 and Islamic Law

7.7.1. Proof of defect and causation under CPA, 1987

The liability for compensation is imposed in all those particular situations is nothing more than the resulting harm or injury. The test is whether or not there is injury being in fact caused to or actually suffered by the victim. The matter is being looked at objectively from the side of the victim not from the side of the injury-causing party if a person`s conduct actually results in injury to another. This corresponds to Article 6.1(b) of the EU Directive and S. 3 (1) of CPA, 1987 of United Kingdom.

The claimant has to prove the causation link between the defect in the product and the damage he suffered. In Foster v Biosil,[108] a claimant sought compensation for injury caused by a ruptured breast implant. Her lawyers argued that the fact that the device had ruptured proved that the product was defective. The courts disagreed, holding that a claimant had to indicate a specific defect and identify how it had occurred, e.g. what is a design or a manufacturing fault.

7.7.2. Proof of defect and causation in Islamic Law

Under traditional Islamic law to prove that injury was caused by the manufacturer and not by somebody else in the chain of distribution, the injured consumer has to prove that the injury is attributable to a defect in the manufacture or construction of the product and not just that it was caused by

[108] Foster v Biosil (2000) 59 BMLR178.

it.[109] In the Majjalla it has been stated that the evidence is for him who affirms; the oath for him who denies.[110] This provision is based on the famous hadith of the Holy Prophet (pbuh): "the evidence is for him who affirms; the oath for him who denies."[111]

The Muslim jurists have settled the issue of proof of defect and causation in cases of material handed over to artisans and craftsmen. The original rule of deposit (*wadī'ah*) required this material being a deposit would not be compensated by the craftsman in case it was destroyed, and the burden of proving tort (*ta'addī*) or negligence would be upon the customer, the owner of the property.[112]

However, in cases of public interest that are to be preferred over the private interest, Islamic law has shifted the burden of proof to the craftsmen as they were misusing the facility. They had to show the absence of negligence. The *Hanafis* based this change on *istiḥsan.*[113] This rule demonstrates that how Islamic law provides security to the general body of consumers in transactions and contracts and gives preferences to their interest over the interest of the individuals, that is, the craftsman. The same can be applied in cases of defective products and the burden of proving the defect to be shifted to the manufacturer to show the absence of negligence on their part.

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[109] Munzir Kahf, *"Economics of Liabilities: An Islamic View"* (2000) 8(2) Journal of Economics and Management 85.
[110] Majjalla, Art.76.
[111] Al-Tirmidhī, *Sunan,* tradition no.1341, vol.3, p.19; Al-bayhaqī, *Ma'ārifat ul-sunan wa al-athar,* tradition no. 20248, vol. 14, p.349; Al-dār Quṭnī, *Sunan,* tradition no. 4311, vol.5, p.4311; Abu Yūsuf, *Al-athar,* tradition no.738, vol.1, p.161.
[112] Niyāzee, *Islamic Jurisprudence,* International Institute of Islamic Thought, IRI, p.211.
[113] Ibid.

7.8. The Notion of 'Damage' in CPA,1987 and Islamic Law

7.8.1. The Notion of 'Damage' in CPA,1987

Meaning of the *"damage"* is wide and covers death, personal injury that includes any disease and any other impairment of a person's physical or mental condition, nervous shock[114] and the loss of or any damage to property including land.[115] The following types of property damage are excluded:

a) Pure economic loss: it means the damage to the product itself or another product of which the defective component was a part;[116]

b) Non-consumer products: it is the damage to property not ordinarily intended for private use;[117]

c) Damage to property of £275 or less.[118]

Any loss or damage to property is to be regarded as having occurred at the earliest time at which a person with an interest in the property had knowledge about the loss or damage to the same.[119] According to S.5 (7)(b) "knowledge" includes which a person might reasonably have been expected to acquire from facts observable or ascertainable by him; or from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek. However, section 5(7) is clear in that a person is not taken to have knowledge of a fact ascertainable

[114] Sec. 45(1), Consumer Protection Act, 1987.
[115] Sec.5(1), Consumer Protection Act, 1987.
[116] Sec.5(2), Consumer Protection Act, 1987.
[117] Sec.5(3), Consumer Protection Act, 1987.
[118] Sec.5 (4), Consumer Protection Act, 1987.
[119] Sec.5 (5), Consumer Protection Act, 1987.

by him only with the help of expert advice unless he has failed to take all reasonable steps to obtain, and where appropriate to act on, that advice.[120]

7.8.2. The Notion of 'Damage' in Islamic Law

The product liability suits are a combination of contractual and tort liability. Contractual liability arises in case of breaching an obligation arising from a contract while the tort liability arises in case the breach is related to the public duty imposed by law on every one not to cause damage to others. This situation is similar between Islamic and English laws. The Islamic equivalent for damages is *Ḍamān*. It is defined as the responsibility to pay a financial compensation as a result of an injury inflicted on others. [121] It includes injuries to human life and body and economic loss. The Islamic law approach is not different from that of English law contained in CPA, 1987 and that is strict liability. Both give the right of indemnification to the person who sustained loss. Thus, in both Islamic and English law the basis for liability is the violation of a civil right. In Islamic law it is termed as (*ḍarar*) i.e. damage. The wrong doer has to pay the damages. Islamic law also adheres to privacy of contract requirements as it is known in English law. A contract subject to the rules of inheritance can give rise to rights and obligations only as between the contracting parties. For the manufacturer to be liable, a contract of sale must exist between the parties. In the case of harm suffered by a purchaser of a product, the seller`s liability would be based on the contract.

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[120] S. 5(7), Consumer Protection Act, 1987.

[121] Ibn Qudāmah, *Al-Mughnī*, vol.4, p.403; Zuhailī, *Al-Qawā'id al-Fiqhiyyah wa Taṭbīqātuhā fi al-Madhāhib al-Arba'ah*, Dār al-Fikr, Damascus, 2006, vol.1, p.547.

Contractual liability for compensation in Islamic law is known as *ḍamān-al-'uqūd* is applied only to damage or loss of the property that is the subject matter of the contract and does not extend to consequential personal injury or damage to the other property of the consumer. In this regard *Majallah* states:

> "A defect of long standing is a fault which existed while the thing sold was in the possession of the vendor; any defect which occurs in the thing sold after sale and before delivery, while in the possession of the vendor, is considered a defect of long standing and justifies rejection".[122]

Damage is one of the basic element of contractual liability in Islamic law. In order to satisfy this element the consumer is only required to prove the link between the product and the manufacturer i.e. that the product is produced by a particular manufacturer. If this link is established that is enough proof for the liability of the manufacturer.[123] In case there is no contractual relationship between a manufacturer and the consumer of a defective product, the manufacturer's liability to the consumer would be based on tort. This liability gives rise to an obligation to provide similar thing, the intention being to make good the damage. This liability has a religious basis in Islamic law. The Holy Prophet (pbuh) said that whoever engages in medical treating of another without being recognized as knowledgeable in medicine shall be liable to compensate for any harm he may cause.[124] He is also

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[122] Majallah, Articles: 39-40.

[123] Munzir Kahf, "*Economics of Liabilities: An Islamic View*" (2000) 8(2) Journal of Economics and Management 85.

[124] Ibn Mājah, *Sunan*, tradition no.3466, vol.2, p.1148; Al-nasai, *Sunan*, tradition no. 4830, vol.8, p.52; Al-dār al quṭnī, Sunan, tradition no.3438, vol.4, p.265.

reported to have said that if someone breaks something belonging to another he shall take it and give the owner its equal.[125]

Islamic law stress on compensation (*ta'wīḍ*) in cases of damage caused to any person or property. This is a well established maxim of fiqh that harm has to be removed and that is possible through compensation.[126] *Majallah* states that there shall be no damage and no counter damage.[127] It further states: "*injury must be removed*".[128] It is the direct consequence of the prohibition on causing damage.

7.9. Financial Limit to Liability under CPA, 1987 and Islamic Law

7.9.1. Financial Limit to Liability under CPA, 1987

The producer's potential liability is unrestricted; the UK Government chose not to provide for the financial limit to a producer's total liability. However, a limit of sorts is provided by the requirement in section 5(3) that the damaged property used by the victim was intended for private use, occupation or 'consumption'. Section 5(4) provides a lower financial limit of £275, below which the courts will not award damages. This figure does not include the liability for any interest which may have accrued.[129] Section 5(5) provides that the loss and damage shall be assessed 'at the earliest time at which a person with an interest in the property had knowledge of

[125] Al-bayhaqī, Al-sunan al-kubrā, tradition no.11521, vol.6, p.159.
[126] Ibn Nujaim, *Al-ashbāh wa al-naẓā'ir*, vol.1, p.72; Muḥammad Siddiq b. Aḥmad al-Burnu, *al-Wajīz fi Idah Qawā'id al-Fighiyyah al-Kulliyyah*, p.192.
[127] Majallah, Art. 19.
[128] Majallah, Art. 20.
[129] Duncan G. Smith, *The European Community Directive on Product Liability: A Comparative Study of its Implementation in the UK, France and West Germany*, Kluwer Law International, 2007.

the material facts about the loss and damage' if necessary with the help of expert advice, if it was reasonable to expect the acquisition of such knowledge.[130]

7.9.2. Financial Limit to Liability in Islamic Law

As we know that so far Islamic law has not been applied in any case of defective products manufactured through modern production process, however, as it has been analyzed that Islamic law has adopted the strict liability in the service industry i.e. *ajir mushtarak* on the basis of public interest. Hence, Islamic law, keeping in view the larger interest and utility of the consumers, can adopt the notion of strict product liability. As far as financial limit to liability is concerned the ruler are fully authorized to legislate upon such issues and it is up to their discretion to describe a threshold of financial limit keeping in view the larger interest of the whole community. However, Islamic law strictly condemns the giving and taking of interest.

7.10. Defences to the Defendants under CPA, 1987 and Islamic Law

7.10.1. Defences to the Manufacturer/Producer under CPA, 1987

Under the CPA, 1987 several defences have been given to the defendants in cases of product liability. These are as follows:

a) Where the product is defective because of a standard imposed by statute/EC law;

b) Where the defendant did not at any time supply the product e.g. where the defective product was stolen;

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[130] S. 5(7), CPA, 1987. D. Owles, 'Damage to Property', (1988) NLJ 771.

c) Where the supplier was not acting as a business supplier is the gist of this defence;

d) The defect occurred after the time of supply;

e) Development Risks: this defence centres on defects that scientific knowledge at the time of production would not have enabled one to detect.[131] The state of scientific and technical knowledge at the time of supply was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control.[132]

f) Installation defects in a 'Subsequent' Product: this kind of defence can be invoked when the product in question amounts to a fault in a complex/subsequent product, and it does so either because of the design of the subsequent product or because the producer of the second product had dictated certain features in the first product.[133] The defect constituted a defect in a product ('subsequent product') in which the product in question had been comprised and was wholly attributable to the design of the subsequent product or to compliance by the producer of the product in question with instructions given by the producer of the subsequent product (the 'component supplier's defence').

g) Contributory negligence is only a partial defence that reduces the defendant's liability in accordance with the principles in the Law Reform (Contributory Negligence) Act 1945.[134]

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[131] Richardson v LRC Products Ltd [2000] Lloyd's rep Med 280.
[132] Sect. 4 (1), Consumer Protection Act, 1987.
[133] Ibid.
[134] Ibid.

Development risks defence is one that was not discoverable when the product was supplied. There was a tension between the development risks defence as articulated in section 4(1)(e) CPA and that in Article 7(e) Directive and the Commission has alleged (unsuccessfully) that the UK had failed properly to implement the development risks defence and brought infringement proceedings under Article 169. The CPA was meant to implement the terms of the EC Directive. The European Commission was concerned that the terminology of section 4(1)(e) of the CPA (the development risks defence) deviated from the wording of the defence under Article 7 of the Directive, creating what could be called a subjective test, as it focused on the conduct and abilities of the reasonable manufacturer. Article 7 (1)(e) was worded differently and required an objective assessment of the state of scientific and technical knowledge at the time the product was put into circulation. It said that the defence would apply when:

> *[t]he state of scientific and technical at the time when the producer put the product into circulation was not such as to enable the existence of the defect to be discovered.*[135]

In EC v UK, the European Court of Justice said that the relevant test was to ask whether the information (that would make the product defective) was accessible to the producer of the product concerned at the relevant time.

The Commission argued that section 4(1)(e) CPA called for a subjective assessment in that the phrase "...might be expected to have discovered the defect" placed an

[135] Art.7 (1) (e), EU Directive on Product Liability, 1985.

emphasis on the conduct of a reasonable producer, having regard to the standard precautions in use in the industry in question.[136]

According to S.1(1) of the Consumer Protection Act, 1987 the provisions are to be construed in conformity with the EU Directive on product liability. About the development risk defence in A v National Blood Authority, the court held that such defence can only be invoked when the producer can show that there was no objectively accessible scientific or technical knowledge existing anywhere in the world which would have helped in discovering the existence defect.

7.10.2. Defences to the Manufacturer/Producer under Islamic Law

According to Munzir Kahf the liability in tort can only be avoided in case of: force majeure or act of God; act of a third party; the act of the victim itself.[137] However there are five exceptions to this rule (a) when the direct action is founded on the cause, (b) when the indirect injurer misleads or forces the direct injurer, (c) when there is an ill intention on the part of the direct injurer but not on the part of the indirect injurer, (d) when the indirect action is most effective in creating injury, and (e) when it is impossible to make direct injurer liable for the injury.[138]

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[136] Kirsty Horsey and Erika Rackley, Tort Law, 2nd Edition, Oxford University Press, p.366.

[137] Munzir Khaf, *"Economics of Liabilities: An Islamic View"* (2000) 8(2) Journal of Economics and Management 92.

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

7.11. Limitation Period under CPA, 1987 and Islamic Law

7.11.1. Limitation Period under CPA, 1987

The right to bring an action under the CPA 1987 is lost 10 years from the date that the defendant supplied the product. [139]The claimant must begin proceedings within three years of becoming aware of the defect, the damage or the identity of the defendant, or if the damage is latent, the date of knowledge of the plaintiff, provided that it is within the 10-year limit (s11A(4) Limitation Act 1980). In the case of personal injuries there is a discretion vested in the court to override the three-year limitation period (s33 Limitation Act 1980).

The liability will expire after a certain period. An injured person has three years to seek compensation from the date on which they first become aware of the damage, the defect and the identity of the producer.[140] In addition, the producer`s liability expires after "long-stop" period of ten years from the date on which the product was put into circulation.[141] The basic limitation period may be extended by the courts.[142] In Horne-Roberts v SmithKline Beecham[143], a claimant, seeking compensation for injury alleged to have been caused by the MMR (measles, mumps, rubella) vaccination, brought an action against Merck, based on an error in identifying the batch number for the relevant product. After proceedings had commenced, the claimant realized the error and attempted to sue the correct manufacturer, SmithKline Beecham. However, this was after the ten year long-stop

[139] Schedule 1 CPA 1987 and s11 A(3) Limitation Act 1980.
[140] Sec.11A(4) and S.14(3), Limitation Act, 1980.
[141] Sec.11A(3), Limitation Act, 1980.
[142] Sec.33, Limitation Act, 1980.
[143] Horne-Roberts v SmithKline Beecham [2002]1 WLR 1662.

period. The English courts were obliged to consider whether or not to allow substitution of the defendant. The court held that the claimant should be given a 'reasonable length of time' to commence proceedings and exercised its discretion to allow the defendant to be substituted after the ten year period had expired.[144]

7.11.2. Limitation Period under Islamic Law

Muslim scholars have difference of opinions regarding the limitation period for claim. One group of Muslim scholars is of the view that there is no limitation period in Islamic Law. The rejection of such a notion is based on a well established principle in Islamic law that rights cannot be abolished even if it is remote in the past.[145]

Hence if the injured party does not file a suit to claim compensation for the damage, caused by the other party, for a period of fifteen years, his right becomes imperfect in the eyes of law. However, morally he will remain liable for all the damages one causes to another. This rule is subject to exception i.e. when the plaintiff was a minor, insane, or abroad in the period collapsed then he can bring the suit when such causes are removed.[146]

Similarly, keeping in view public interest a reasonable time should be specified for bringing suits. The *Ḥanafi* school permit a claim to be barred if a certain period of time has passed. The Ottoman Civil Code that is based on *Ḥanafi* school has provided for statutes of limitations in the following articles states: "a debt, or

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[144] Anne Ware and Grant Castle, *Product Liability for Medical Devices*, available on http://www.cov.com/files/Publication/7a4b6264-9174-4c14-9a25-b0e75e099c03/Presentation/PublicationAttachment/94aacf8f-dec8-46a2-a879-bc89ae81fb82/oid61432.pdf, last visited on 28-08-2013.

[145] Ibn Ābidīn, *Rad al-muhtār*, vol.5, p.420.

[146] *Al-mau'suah' al-fiqhiyyah al-kuwatiyyah*, vol.28, p.271; Al-Zuhailī, *Al-fiqh al-Islāmi wa adillatuhū*, vol.4, p.3269.

property deposited for safe-keeping, or real property held in absolute ownership, or inheritance, or actions not relating to the fundamental constitution of a property dedicated to pious purposes leased for a single or double rent, or to pious foundations with the revenue of a pious foundation, or actions not relating to the public, shall not be heard after the expiration of a period of fifteen years since action was last taken in connection therewith."[147]

In the same sequence, Article 1661 states that "actions brought by a trustee of a pious foundation ... may be heard up to a period of thirty- six years. In any event these actions shall not be heard after the thirty-six years has elapsed."[148]

The above discussion denotes that the general view in Islamic law is that the claims should not be barred after a certain period of time has passed but keeping in view public interest a reasonable time should be specified for bringing suits. The time limitation in the product liability cases in English law is reasonable and much more flexible. The English regime of product liability on the time limitation appears to be in conformity with Islamic law although it restricts the freedom of the plaintiff by not allowing him to claim after a basic limitation period of 3 years from the accrual of the cause of action[149] or from the date the plaintiff had knowledge of the damage[150] and the "long stop" period of ten years from the date at which the product was last supplied by the producer, apparent producer or importer.[151]

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[147] Majalla. Art.1660.
[148] Majalla, Art.1661.
[149] Sec.11A(4), Limitation Act, 1980.
[150] Sec.14 (3), Limitation Act, 1980.
[151] Sec.11 A (3), Limitation Act, 1980.

According to S.33 of the Limitation Act the basic limitation period may be extended by the courts but the long-stop period may not be extended.[152]

7.12. Application of Strict Product Liability regime in Muslim Jurisdictions

It is pertinent to answer here the question that whether or not Islamic law recognize the adoption of English product liability regime in Islamic jurisdictions. As far as the application of English product liability regime in Islamic jurisdictions is concerned Islamic *Sharī'ah* does not restrict the freedom of Muslim community to pursue their way through experimentation, trial and error and scientific study and research. Provided such practices do not violate any fundamental norm of Islamic *Sharī'ah*. With regard to taking benefit from the natural resources within the ambit of Islam is the duty enjoined by it on all the Muslims. Islamic law is of the view of general rule of permissibility in everything including trade and business.[153]

In this context S.M. Yusuf writes:

> "In regard to the resources of nature Islam only warned man that certain items are devoid of utility value, being harmful to his physical and moral welfare. This is just like the manufacturer's warning super inscribed on the labels of dangerous medicines. Such items are like wine, pork and carcass. These particular items are divested of economic value for the Muslims. The non-Muslims

[152] Sec.33 (1A) (a), Limitation Act, 1980.

[153] Ibn Nujaim, (d.970 A.H.), Al-Ashbāh wa al-Naẓā'ir, Dār al-Kutub al-'Elmiyyah, Beirut, Lebonan, 1999, p.56. The principle {الأصْلُ فِي الأَشْيَاءِ الإِبَاحَةُ حَتَّى يَدُلَّ الدَّلِيلُ عَلَى عَدَمِ الإِبَاحَةِ } is based on a number of verses of the Holy Qur'ān and traditions of the Holy Prophet (pbuh). See chapter 4 for further details about the principle.

> remain free to look upon, and deal in, them like any other commodity. With these few exceptions, the vast inexhaustible resources of the entire world are free as a gift from the Creator to mankind as a whole. The conception of a free gift of the resources of Nature from the Creator to the bests of creation in basic to the economic system of Islam. In view of its far-reaching moral import we may as well call it the corner-stone of economics justice."[154]

S.M. Yūsuf further writes:

> On the exploitation and utilization of the resources of nature Islām sets no limits. At the same time the development of economy, the sophistication of the means production, the growth of quantity and improvement of quality of all kinds of products are recognized to belong to the domain of science and technology and not of religion. Hence Islam only gives the green signal and technology, which, however, is left to the initiative and enterprise of man.[155]

Most importantly Qur'ān says:

> "Say: Who hath forbidden the beautiful (gifts) of God, which He hath produced for His servants, and the things, clean and pure, (which He hath provided) for sustenance? Say: They are, in the life of this world, for those who believe, (and) purely for them on the Day of Judgment. Thus do We explain the signs in detail for those who understand."[156]

> "O ye who believe! Eat of the good things that We have provided for you, and be grateful to Allāh, if it is Him ye worship."[157]

> "O ye who believe! Make not unlawful the good things which Allāh hath made lawful for you, but commit no excess: for Allāh loveth not those given to excess. Eat of

[154] SM Yūsuf, *Economic Justice in Islām*, p.4.
[155] Ibid. p.4.
[156] Qur'ān: 7:32.
[157] Qur'ān: 2:172.

> the things which Allāh hath provided for you, lawful and good, but fear Allāh, in whom ye believe".[158]

In this context it is pertinent to mention that the Holy Prophet (pbuh) failed to see any point in fecundation .i.e grafting part of the male upon the female date tree. So the people of Madīnah gave up the practice. As the yield declined because of non-fertilization, the Prophet (pbuh) deposed revelation. I am but a human being. When I command you in regard to something of your religion, adhere strictly to it. But when I direct you about something in exercise of my own opinion, then I am just a human being. "You know best the matters concerning the affairs of this world of yours."[159]

Moreover, there is no objection on the development of human life and adoptions of any good thing rather highly appreciate the adoption of such rules as they are furthering the goal of Islamic *Sharī'ah*. The Holy Prophet (pbuh) approved many practices of the other nations and declared valid. All the practices, not violating injunction of *Sharī'ah*, of pre-Islamic era were adopted by the Holy Prophet (pbuh) as Imām Sarakhsī has stated:

> "The contract and dealings practiced before Islām are valid practices for us also in the absence of any text disapproving them. The Holy Prophet was sent as Prophet and he saw the people practicing Ijārah and he disapproved that practice.[160]

Hence, Islamic law has always allowed the adoption of rules of other nations that helps in adaptation to the requirements of a particular age. It may also be

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[158] Qur'ān: 5: 90-91.
[159] Al-Muslim, *Saḥīḥ*, tradition no.2363, vol.4, p.1836.
[160] Al-Sarkhasī, *Al-Mabsūṭ*, vol. 15, p.74.

considered as a part of the *Maṣaliḥ Mursalah* i.e. delegated benefits and the community itself may decide about its application in Islamic jurisdictions. This is a well established rule of Islamic law that the dispositions of a Muslim ruler towards his subjects are contingent on public interest (*maṣlaha*).[161]

Society is an ever-changing and ever-developing phenomenon so is the structure of legal rules. With the passage of time, many of disapproved things became valid and limited has become unlimited. Therefore, it is necessary to produce corresponding legal orders to justify the changed circumstances.[162] The Muslim jurists have formulated the rule: "it is undeniable that rules of law vary with change in time". It is based on the presumption that the laws are designed to fulfil needs of a particular situation occurs due to changes in time and needs of people. On the basis of changed circumstances changes in the structure of existing law is required to meet the pressure of such changes.[163]

In case of product liability and its transposition in Muslim Jurisdiction as it has been discussed earlier that it is a well known maxim of Islamic law that there are well established principles of Islamic law such as '*al-khirāj bi al-ḍamān*' i.e. every profit has a corresponding liability, *al-dararu yuzāl*' i.e. 'harm has to be removed and to avoid the public injury a private injury may be suffered. Moreover, Muslim jurists have recognised the notion of '*al-mas'uliyyah al-taqṣīriyyah*' i.e. strict liability in certain cases to avoid harm.

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[161] Ibn Nujaim, *Al-ashbāh wa al-naẓā'ir*, vol.1, p.93.
[162] Ibn al Qayyim, *I'lām al-Mawāqi'in*, Vol.1, p.355, (Ibn al Qayyim, 'Abdul Allāh Muḥammad b. Abī Bakr, *I'lām al-Mawāqi'in 'an rabbi al 'ālamīn*, ed. Muḥayy ul-Dīn, 4 vol. Miṣr: Maṭba'ah al-Sa'ādah, 1955).
[163] *The Majjalah*, Art.43.

Moreover, Muslim jurists also acknowledge the right of state to interfere in the economic activity of the people if such interference is required and motivated by the public interest.[164] It is worthy to note that a public interest as opposed to private interest is acknowledged in Islamic Jurisprudence only when it fulfils certain conditions: it should be genuine and real interest i.e. *maṣlahah* as opposed to a plausible interest i.e. there must be a reasonable probability that the benefits of enacting a *ḥukm* in the pursuance of *maṣlahah* outweighs the harm that might emerge from it.[165] The *maṣlahah* must be general (*kulliyyah*) in that it secures benefit or prevents harm to the people as whole and not to a particular person or group of person; and the *maṣlahah* is not in conflict with a principle or value which is upheld by the text (*naṣ*) or consensus (*ijmā'*).[166] The Muslim jurists have laid down certain rules wherein public interest as opposed to private interest, has been taken care of. Hence, keeping in view all the previous discussion and that it has become a dire need to adopt strict product liability in the modern era of science and technology when many products are production mystery, and that it has been proved that Islamic law has no objection on its application in Muslim jurisdiction, thus it is highly recommended that a strict product liability regime based on traditional Islamic law must be adopted in Muslim countries. In case that is not possible, Muslim jurists can also take benefit from the UK's strict product liability regime in order to save larger interests of the consumers.

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[164] Al-Mubarak, *'Niẓām al-Islām al-Iqtiṣadī: Mabādī wa Qawā'id 'Ammah'*, Dār al-Fikr, Beirut, 1972, p.106.

[165] See chapter 3 of the thesis for a detailed discourse on *Maṣlahah* and its relevance with consumer protection.

[166] Kamālī, *Principles of Islamic Jurisprudence*, pp. 346-347.

CHAPTER 8

CONCLUSIONS, RECOMMENDATIONS AND FUTURE RESEARCH

CHAPTER 8

CONCLUSIONS, RECOMMENDATIONS AND FUTURE RESEARCH

8.1. CONCLUSION

Consumer protection is an emerging area of law in modern age that is devoted to the cause of protection of consumers' rights from various unfair trade practices. The purpose of such protection is to avoid exploitation and check various business malpractices. Today, there are various aspects of consumer protection in which 'product liability' is of prime importance. Product liability deals with the responsibility of the producers/manufacturers, retailers, suppliers and sellers for their defective products that may cause damage to a consumer's life and assets. The study in hand is one of first to undertake the comparison of Islamic and English legal systems on the subject of consumer protection in the context of product liability.

In this regard, the classical as well as contemporary literature of Islamic law has been thoroughly explored, reviewed and analyzed. On the other hand, currently applicable legislation in UK along with its historical emergence, relevant case law and reports etc have been thoroughly explored, reviewed and analyzed. Both the legal systems have been compared on the subject.

The data presented in this research viewed Islamic law as a potential solution of modern day key consumers' problems in general and product liability in particular. Islamic law is the divine law. It emanates authority from revelation by Allāh (S.W.T.), communicated to His Messenger Muḥammad (pbuh) through the Holy *Qur'ān* and

Sunnah, interpreted by the jurists and applied by *Sharī'ah* courts. Islamic law evolved in the 7th century of the Christian era in the Arabian Peninsula. The primary sources of Islamic law are Qur'ān, *Sunnah, Ijmā'* and *Qiyās*. In *Sharī'ah* sovereignty belongs to Allāh (S.W.T.) and it is universal in nature and application.

Islamic law covers all areas of life, from religion, hygiene and dietary laws, to dress code, family and social life, and from finance and politics to the unity of religion with the state. *Sharī'ah* does not distinguish between state and religion, between sacred and secular. It regulates every aspect of life. The *Sharī'ah* regards "*moral virtues*" as defined by Islām as the principal base of society. For this reason *Sharī'ah* declares all acts which are inimical to its morality as culpable.

On the other hand, the English common law began in the 11th century as the municipal law of Norman England. The English legal system is based on laws made by human beings. It emanates authority from the "*Queen in Parliament*" and the "*European authorities*" as interpreted by the Supreme Court (House of Lords) and Court of Appeals. There is an established Church with its own separate Canon Law that applies only to clergy and churchwardens and does not contradict the law of England and Wales, either in its provisions or in the principles upon which it is based; largely secular administration of the State. In English law sovereignty is the prerogative of British Parliament. English law is subject to change and rules are frequently changed. English Law governs all areas of life within England, although citizens are allowed their human rights and fundamental freedoms, so that areas of life such as religion, relationships

between consenting adults, dress code, dietary choices, political views and economic choices are left to the preferences of individuals.

Despite the above mentioned variations in Islamic and English legal systems both have given due importance to protection of the consumers.

In this context, the entire legal philosophy of Islamic law, as it has been analyzed, advocates the protection and promotion of consumer rights which is further reflected in various rules of Islamic commercial law. There are various aspects of consumer protection under Islamic law such as the foremost is the protection of consumer against himself and his irrational attitude, secondly by establishing a fair and just market system that ensures the protection of all legitimate interests of the consumers in which all the fair means of earning are encouraged while the illegitimate ways of earnings are discouraged; thirdly, by educating the businessmen not to eat up wealth in vanity and strictly follow the Islamic business ethics; fourthly, the very nature and requirements for the formation of contracts under Islamic law and by recognizing the implied warranties in favour of the consumers such as *Khiyār ul 'Ayb* (option of defect) etc.; fifthly by providing a proper enforcement mechanism to the Islamic state in the shape of giving jurisdiction to the institution of *Hisbah* etc. The work of Muslim jurists over consumer protection in market mechanism span over a period of 14 centuries. Islamic law has always played an important role in providing justice to the general body of consumers. Its scope in providing prompt relief to the common man (without procedural delays) cannot be under-estimated. Islamic law of consumer protection is flexible and capable to meet the needs of a changing society.

Similarly, the English legal system has gone through different phases and developed into a modern consumer friendly legal system. In England, though some writers trace the roots of consumer protection to the Bible as numerous verses exist relevant to it. However, officially it was the rule of '*caveat emptor*' that has guaranteed protection to the rights of the consumers for the first time in the pre-industrial era.

In seventeenth century, manorial courts known as '*courts leet*' had a persistent role in safeguarding the trading standards and suppression of local nuisance, and in persistent role in safeguarding the trading standards and suppression of local nuisance, and in supervision of all other functions that are associated with consumer protection and public health. Court of '*leet*' appointed an officer styled an '*aleconner*', more like a modern weight and measure inspector, to examine pricing, weight and quality of bread, ale and beer for sale. Similarly, the weight of bread was controlled by 'Bread Act 1836' which required bread to be unadulterated and sold by weight. The reference to the uniformity in weight can be traced back to '*Magna Carta*' in 1225. However, it was the famous case of *Donoghue vs. Stevenson*[1] in the English House of Lords that has changed the course of English legal history. Today, there are many laws dealing with the protection of consumer rights in England dealing with consumer protection issues. Being a member of the EU, the UK must also implement legislation passed by the EU. The organizations like Office of Fair Trading (OFT) and Department of Trade and Industry (DTI) have been established for the enforcement of these laws.

[1] *Donoghue (or McAlister) v Stevenson*, [1932] All ER Rep 1; [1932] AC 562.

Islamic *Sharī'ah* since the time of its inception established concrete principles regarding consumer protection that can fit well in the contemporary age. The Office of Fair Trading (OFT) in England which is a modern institution established for the protection of consumer interests is quite similar to the classical institution of *Ḥisbah* (Ombudsman) of Islamic law that used to exist in the golden age of Islam. However, the powers that were given to the *Ḥisbah* were much more as compare to Office of Fair Trading (OFT) in England enjoys today as the former had been worked as a unit of maintaining socio-economic justice among the people while the latter is concerned merely with the notion of fair trading.

Islamic law has prescribed physical as well as moral sanctions for harming the consumer interests while the English legal system is relying only on fines as punishment for the violation of consumer rights. In Islamic law a wrongdoer is punished not only in this world but also in the hereafter for the violation of moral duties. Therefore, it is more effective to protect consumer rights in Muslims jurisdictions provided the laws are in accordance with their faith. However, with religious sanction alone the consumer rights cannot be protected and it will always require some concrete legislation and policy to safeguard the consumers' interests in modern time.

The thesis in hand as mentioned earlier has focused on the area of consumer protection in the context of product liability which is an extremely important area of law in contemporary times and in the age of advance technology. The term "*Product liability*" is used to identify the body of law that seeks to hold manufacturers and sellers financially responsible for their products not meeting safety standards. Developments in

science and technology constantly exert new pressures on existing legal concepts. The speed and accuracy with which those concepts are able to adapt to such challenges have important social and economic consequences.[2] It has become indispensible for all the nations to promulgate concrete and solid legislations on product liability in the era of the rise of industrial capitalism, with the consequent proliferation of dangerous machinery, railways, road traffic, production of mass products, and polluting activities and multiplicity of deaths and sever harms due to use of defective products and services.

In this context, one of the most significant milestones achieved in the history of consumer protection law on 25 July 1985 with the promulgation of the Council Directive on the Approximation of the Laws, Regulations, and Administrative Provisions of the Member States concerning Liability for Defective Products' (hereafter the Directive).[3] The Green Paper on liability for defective products makes clear that the goal of the Directive is to provide a balanced approach giving, on the one hand, a protection to victims but avoiding, on the other hand, a crushing liability, e.g. by requiring the victim to prove the defective nature of the product and by providing limitations in time.[4] The EU Directive, 1985 (85/374/EEC) is intended to address dangerous products after they are sold and used, in addition to providing redress to an injured consumer.

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[2] Jane Stapleton, *Software, Information and the Concept of Product,* Tel Aviv University Studies in Law, Vol.9, 1989.

[3] Helen Delaney and Rene van de Zande, A Guide to the EU Directive Concerning Liability for Defective Products (Product Liability Directive), U.S. Department of Commerce, National Institute of Standards and Technology, available at: http://gsi.nist.gov/global/docs/EUGuide_ProductLiability.pdf.

[4] Michael G. Faure. "Product Liability and Product Safety in Europe: Harmonization or Differentitation", Kyklos, 11/2000.

No doubt that the *Thalidomide* disaster in Europe was clearly the catalyst for the reforms processes that culminated in the 1985 Council Directive "on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. It provides a telling benchmark by which to evaluate the impact of the latter."[5] The Directive has attempted to reduce distortions in competitive trade between Member States whilst providing a common level of protection to consumers throughout the Community against defective products.[6]

In UK the EU Directive on Product Liability, 1985 (85/374/EEC) was adopted through enactment of the Consumer Protection Act, 1987. Before the European Directive on products liability was implemented in the United Kingdom the principal pillars of products liability were the common law principles of the statutory warranties in the Sale of Goods Act 1979 and the common law action in the tort of negligence. Today, there are three regimes that deal with the issues of consumer protection in the context of product liability i.e. contract regime, tort regime and strict product liability regime (CPA, 1987).

The modern notion of 'product liability' is based on the well-established legal theory of '*strict moral enterprise liability*' advocated by Tony Honore. This theory simply means taking of risks in pursuit of financial profit.[7] If, in seeking to secure financial profit, an enterprise causes certain types of loss, it should be legally obliged to pay compensation to the victim. This is based on moral grounds as well. Hence, it is termed as the *'strict*

[5] Jane Stapleton, *Product Liability in United Kingdom: Myths of Reforms*, Texas International Law Journal, Vol. 34:45 http://dev.oldsquaredns.net/pdf_articles/3100126.pdf, last accessed on 12.01.2015.

[6] Duncan G. Smith, *The European Community Directive on Product Liability: A Comparative Study Of Its Implementation in the UK, France And West Germany*, Kluwer Law International, 2007.

[7] Jane Staplton, *Product Liability*, Butterworth and Co. Publishers, UK, 1994, p.186.

moral enterprise liability'. It has been argued by many jurists that the strict moral enterprise liability as compare to other theories provides a considerably better fit for the issues of product liability. The theory is, therefore, considered as the basis for the modern US and EC product liability laws.[8]

On the other hand, in Islamic Law, the term 'product liability' specifically does not appear in these exact terms in the classical books of *fiqh*. Also, the *fuqahā'* did not mention this term in their writings and manuals. Similarly, in classical Islamic law no specific definition of the term 'product' exist; instead the term '*mabī* 'subject-matter' has been used by *fuqahā'* that means subject matter to indicate all sold 'valuable' things including 'product' in its contemporary meaning. Islamic law has given specific criteria to consider something as '*mabī* 'subject-matter'. The range of products for which the liability is attracted under *Sharī'ah* is narrow as only those products are considered that are valuable *(mutaqavvam)* in the eyes of *Sharī'ah* .

However, product liability is not a strange rule in Islamic law and the roots of liability for defective products can be traced in many rulings, principles and maxims of *Sharī'ah*. The rules of Islamic law exist in the Qur'an, the *Sunnah, Ijma'* and are derived from other sources through *ijtihad*. Islamic law is designed to cater for public interest or *maslaha*, therefore, any legislation that benefit the community can be promulgated through legislation.[9] In Islamic law, the producer, retailer and seller etc can be held

[8] Ibid.

[9] Legislation regarding consumer protection in general and product liability comes under this domain. Such legislation is considered as positive Islamic law.

liable for defective products and compensate the victim of such products under the Islamic law of contract and that of torts.

The Islamic legal theory for civil liability in cases of defective products can be established on the basis of two fundamental principles of Islamic law. These are: *'Al-Kharāj bi al-ḍhamān'* i.e. 'every profit has a corresponding liability', and *'Al-Darar Yuzāl'* i.e. 'harm has to be removed'. The first principle will apply in transactions in order to put liability on a distributor, dealer, wholesaler, retailer agent or vendor for selling any sub-standard, defective or adulterated product. The liability under this rule can be extended to the importer, manufacturer and producer etc whosoever comes in the chain of business. Their liability will be according to their proportionate in the profit. The liability under the Islamic principle of *'Al-Khirāj bi al-ḍamān'* is same to that of *'strict moral enterprise liability'* discussed earlier. Hence, the theoretical foundations for 'product liability' have been given much earlier under *Sharī'ah* than its counter-part in western legal thought. In both the legal systems the manufacturers owe a duty of care to the ultimate consumer.

However, this is a matter of fact that today the English law on the subject is codified and follows the strict liability rule in cases of defective products. It is an adequate and solid law to a great extent and ensures protection to UK's consumers against defective products. On the other side so far no Muslim state has codified an adequate and concrete legislation on product liability that is purely based on the principles of Islamic law.[10]

[10] Some of the Muslim countries have recently promulgated laws on the subject e.g. UAE, Pakistan, Egypt and Jordan etc. However, these are inadequate in their current form. See chapter 1 of the thesis for further details.

Hence, it has been recommended that the Muslim jurisdictions should work on substantive law developments on the issue of product liability based on the principles of Islamic jurisprudence.

Islamic law has embodied principles dealing with all aspects of human life hence consumer protection in general and product liability in particular are no exceptions. However, there is an immense need to contextualize Islamic law in such important modern legal issues.

The first regime under which a consumer can claim damages against the manufacturer, retailer and seller of defective product is the 'contract regime of product liability'. Contract law in any system ensures the parties to private agreements that any promises they make will be enforceable through the machinery of the legal system. English law of contract and Islamic law of contract both equally ensure the protection of consumers' rights in the context of defective products. Islamic law of contract, based on the divine law and ethics, highly emphasis on the protection and preservation of consumers' interests before the making of a contract, while formation of the contract and even after its conclusion. It has prohibited all the unfair transactions in order to insure protection of consumers against mal-practices in trade such as hoarding, adulteration, usury, misrepresentation, exorbitant profiteering, dealing in prohibited goods and services, gambling and games of chance, arbitrarily fixing prices of the commodities, cheating and fraud, trickery, false representation, swearing to sell a product and exaggeration in description of the goods and services etc. all are strictly prohibited by *Sharī'ah* . The general principles of Islamic law of contract provide the principles of policy for good

consumer legislation. In Islamic law of contract a large number of transactions are declared unfair only because they harm the consumers. Moreover, it has given consumers right to rescind the contract when they feel that their rights are at stake. Hence, they can utilise the Islamic law of options (*Khiyarāt*).

On the other hand, in England the traditional law of contract was one of the main sources of liability for defective products. The English law of contract, applies to agreements for the performance of any obligation, including agreements to sell or hire goods, implies terms into the contract in order to protect the consumer. The Sale of Goods Act, 1983 was amended by the Supply of Goods (Implied Terms) Act 1973, and these and other changes were consolidated in the Sale of Goods Act 1979. This in turn has been amended by the Sale and Supply of Goods Act 1994 and most recently the Sale and Supply of Goods to Consumers Regulations 2002. Hence, the English law of contract is well articulated and codified and it has highlighted rights and duties of both the parties in a contract.

In United Kingdom, some of the basic doctrines that are integral parts of the evolution process of the contract regime consumer rights in the context of product liability include: the doctrine of *privity, doctrine of strict liability and the doctrine of caveat emptor.* There is an immense need to analyze these doctrines in the light of Islamic law to know about their status in view of Sharī'ah . One of these fundamental rules is the English law doctrine of *Privity* under which no one other than the parties to a contract can sue for a breach of it. Contract regime of product liability is inherently limited in its scope. It covers parties to the contract, but it neither protects nor imposes legal liabilities on

anyone else. This situation is not even altered in practice by the enactment of Contract (Rights of Third Parties) Act, 1999.[11] As far as Islamic law on *privity rule* is concerned it also adheres to privacy of contract requirements as it is known in English law. A contract subject to the rules of inheritance can give rise to rights and obligations only as between the contracting parties. Contractual arrangements of the parties will be binding on the parties alone according the Islamic rule of "*Al'aqdu sharī'at ul muta'aqqidūn*"[12] (the contract is the law of the contracting parties).[13] In this regard, the Holy Qur'ān can be quoted that says: "O ye that believe! betray not the trust of Allāh and the Messenger, nor misappropriate knowingly things entrusted to you."[14]

Sharī'ah has also put great stress on the fulfilment of contracts and promises. It requires from a Muslim trader to be honest, truthful and keep his integrity and fulfill all his promises and contracts. The Qur'ān and the Sunnah have explicitly mentioned this: "O *ye who believe! fulfil (all) obligations."*[15]

Strict liability is another important doctrine in English law of contract that holds a person responsible for the damages or loss caused by his or her acts or omissions. This doctrine holds a person liable regardless of culpability. As far as strict liability under Islamic law is concerned there are many instances on its legitimacy in the primary and

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[11] See chapter 5 of the thesis for a detailed discourse on the subject of *privity*.

[12] Al-zuhaili, *Al-fiqh al-Islami wa adillatuhu*, vol.1, p.117.

[13] For a detail discussion see *Fatima Akaddaf, Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to 'Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles? Available on* http://www.cisg.law.pace.edu/cisg/biblio/akaddaf.html#276,*last accessed on 23/08/2013.*

[14]Qur'ān: 8:27.

[15] Qur'ān: 5:1. The tradition of the Holy Prophet states: *The Muslims are bound by their stipulations.* Another tradition condemns promise-breaking as the hallmark or trait of a hypocrite: *If he makes a promise, he breaks it, and if he makes a compact, he acts treacherously.*

secondary sources of Islamic law. In the sphere of contract law, the strict liability has been adopted in *Al-Majallāh*.[16]

In the United Kingdom, consumer legislation has developed from the traditional 'caveat *emptor*' model and it has played a vital role in the protection of consumers against defective products as prior to the sale and purchase agreement, the buyer has the right to inspect the goods in order to ensure that it is free from any unknown defect. On the other hand, Islamic law of contract has accepted the right of a consumer to inspect the goods prior to the contract in ordinary sale and after the delivery has been made in sale by description.

In this context, the *hadith* of the Holy Prophet (pbuh) is to be mentioned. Narrated 'Abdullāh b. Umar: Allāh's Messenger (pbuh) said: *"He who buys foodstuff should not sell it till he is satisfied with the measure with which he has bought it".*[17]

However, Islamic law has stressed on the seller to ensure that the product is free from defects and the consumer has to ascertain the quality and quantity of goods. Hence, the liability in Islamic law is not on one side like that of *caveat emptor* that many Western courts have considered valid in several shadowy cases. Islamic law has put the responsibility on the part of seller to disclose all the defects of the product to the consumer. In this regard, Anas b. Malik reports the following ḥadīth: Allāh's Messenger (peace be upon him) forbade the sale of fruits till they are almost ripe. Anas was asked what is meant by "are almost ripe. He replied, "Till they become red." Allāh's

[16] For a detailed discourse on strict liability in Islamic law read chapter 6 of this thesis.
[17] Al-Bukhārī, *Ṣaḥīḥ*, Dār Tuq al-Najāt, 1422 A.H. vol.3, p.67.

Messenger (peace be upon him) further said, "If Allāh spoiled the fruits, what right would one have to take the money of one's brother (i. e., other people)?[18]

Hence, if the vendor sells property as possessing a certain desirable quality and such property proves to be devoid of such quality, the consumer has the option of either cancelling the sale, or of accepting the thing sold for the whole of the fixed price. This is called option for mis-description.[19] The Islamic concept of option of defect (Khiyār al-'ayb) is more extensive than the English law's doctrine of *caveat emptor* (let the buyer beware). The approach of Islamic law seems to be more consumer-oriented and consumer-friendly as it places an obligation on the seller to disclose all known defects in the goods sold before agreement is concluded. In addition, it allows the buyer the right of option both before and after the conclusion of the contract. This is to be contrasted with the rigid doctrine of *caveat emptor*, which, although allowing the buyer the right to inspect the goods before the contract, places no obligation of disclosure of the same on the seller.[20]

Islamic *Sharī'ah*, on the other hand, from the time of its inception prescribed detailed rights of the consumers in contractual agreements. These are termed as *Khiyārāt* i.e. options. These options have been designed to ensure balance in transactions and to protect the weaker party from being harmed and exploited. Hence, the notion of *caveat emptor* in English law is only achieves one aspect according to the spirit of justice recognized in Islamic law i.e. giving opportunity to the consumer to have a look into the subject matter. While on the other side *Khiyārāt* in Islamic law put responsibility

[18] Al-Bukhārī, *Ṣaḥīḥ*, Dār Tuq al-Najāt, 1422 A.H. vol.3, p.77.
[19] *Al Majallah* (The Ottoman Courts Manual [Ḥanafī]), Section II. Option for Mis-description, 310.
[20] Billāh, '*Caveat Emptor Versus Khiyār Al-'Ayb: A Dichotomy*', 288.

on the sellers to disclose all the defects in a product plus recognized the consumer's right to inspect. These are the reasons that led to the abolishment of *caveat emptor* in consumer sales in recent legal development in UK as discussed thoroughly in the chapter. They have shifted now from the 'caveat emptor' model to *'caveat venditor'* model in which the seller is required to take care of the consumers' interest.[21]

The express terms in English law of contract ensure the protection of consumers' rights and therefore the quality of goods has been highly celebrated in this context. It means that if the seller promises to provide specific results either in terms of performance of the product or its suitability to the consumer, the existence of an express warranty will be recognized. The promise may have been made within the agreement itself or outside of it.[22] Islamic law, Ḥanbalī School, acknowledges complete autonomy of will in contracts and transactions in regard to inserting of express terms provided these are not against the purposes of *Sharī'ah*. Hence, when the manufacturer provides such express terms in contract or ancillary to that, he will be made liable for its violation even under the Islamic law.

In English law, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods fitness for all the purposes for which goods of the kind in question are commonly supplied, appearance and finish, freedom from minor defects, safety, and durability. These statutory rights

[21] These reasons led to restrict the application of caveat emptor in consumer sales. See chapter 5 in detail for further explanation.

[22] Stephen E. Blythe, Contractual Liability of Suppliers of Defective Software: A Comparison of the Law of United Kingdom and United States, North-western Journal of International Law and Business, Vol.26, Issue 1 Fall, available at: http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1617&context=njilb.

cannot be limited or excluded in consumer contracts.[23] Unfair Contract Terms Act, 1977 and the Unfair Terms in Consumer Contracts Regulations 1999 now offer extensive statutory protection to the consumers against unfair terms in contract that restrict consumer's right.

Similarly, in an Islamic sales contract, the seller bears all the risks of loss of the subject matter until it is transferred to the buyer, who in turn takes on the full risks, including the risks of defect, damage and depreciation arising thereafter.[24] With this taken into account, any exemption clause in the sale of contract means the consumer bears the risk of loss before the delivery of the subject matter will be considered a void condition. The principle *al-kharāj bi-ḍamān*—which can be roughly translated as 'every profit has a corresponding liability'—means that, if the subject matter is destroyed, such as by an Act of God, prior to delivery, the seller will bear the loss—even if there is a condition that means the buyer should bear the loss.

The criterion for considering a product to be defective under English law of contract and that of Islamic law is different as those goods that contain any element of *ḥarām* things is not considered legitimate products under *Sharī'ah* especially for the Muslim consumers. Hence, when any ingredient of a product is harm, the product will be treated as defective one.[25]

English law has recognised various remedies in favour of the consumers when their rights are violated these are also termed as 'three Rs': Repair; Refund or Replacement.

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[23] S.6 (2) The Unfair Contract Terms Act , 1977.

[24] Ḥusām al-Khaṭīb, *'Islamic Economic and Islamic Ethico-Legal Perspectives on the Current Financial Crisis'* (Harvard LSE Workshop London School of Economics February 26, 2009) http://ifp.law.harvard.edu/login/view_pdf/?file=Riskmangement.pdf, accessed 2/10/2012.

[25] See for chapter 3 of the thesis for further details on the subject.

Islamic law of contract gives the buyer rights of option to rescind the contract and save themselves against defects in the products and faulty services. They can exercise this right after conclusion of the contract, if the reason exists. The Islamic doctrine of *Khiyār al-'ayb* gives an implied right to the consumer to carry out an inspection on the fitness and quality of the goods to be bought. It reserves the right of inspection of the goods to the buyer both before and after the conclusion of any sale and purchase agreement and as such, the right of option either to continue the contract or rescind it is also reserved to the buyer both before and after the agreement of sale and purchase. The Islamic doctrine of *Khiyār al-'ayb*, however, does allow the buyer to seek compensation only (without any right of option) if the buyer who has created a defect of the good after the agreement, later realizes that there was another defect which had occurred while the goods were in the hands of the seller.

In English law there are various kinds of damages that may be awarded to the party seeking remedy i.e. compensatory damages, consequential damages, punitive damages and nominal damages. Islamic law too has no problem about these kinds of remedies in general and compensatory damages in particular. Compensatory damages are called *ḍamān* which literally means compensation. The value depends on the amount of performance promised in the contract. This may be the value of the commodity sold or services rendered or other consideration. Consequential damages occur as a result of the breach and are usually lost profits. These are also termed as *ḍamān al- 'Uqūd*. If it is known to the consumer that the product is defective and may cause damage to him or his other property, he can rescind the contract. Rescission is an equitable right to put an

end to a contract and have the status quo restored. Contractual liability for compensation in Islamic law is well known as *ḍamān al- 'Uqūd*. The contract liability is applied only to damage or loss of the property that is the subject matter of the contract and does not extend to consequential personal injury or damage to the other property of the consumer in Islamic law. This has to be further investigated by Muslim jurists that whether or not these kinds of remedies can be awarded under Islamic law.

The UK's contract regime of product liability on the time limitation appears to be compatible with Islamic law although it limits the freedom of the plaintiff by not allowing him to claim after a basic limitation period of 3 years from the accrual of the cause of action[26] or from the date the plaintiff had knowledge of the damage[27] and the "long stop" period of ten years from the date at which the product was last supplied by the producer, apparent producer or importer.[28] According to S.33 of the Limitation Act the basic limitation period may be extended by the courts but the long-stop period may not be extended (S.33 (1A) (a), Limitation Act, 1980). Initially, Islamic law did not recognize the principle of limitation as rights and duties cannot be lost or gained because of time. However, keeping in view the judicial policy, Muslim jurists and scholars have given the ruler the right to limit the time after which a person cannot sue.

Islamic law of contract and that of English law both have limitations in the context of product liability in a sense that *privity of contract* prevents third parties to bring their claims under the contract regime. This necessitated that there should be a statute that

[26] S.11A(4), Limitation Act, 1980.
[27] S.14 (3), Limitation Act, 1980.
[28] S.11 A (3), Limitation Act, 1980.

impose strict product liability for defective products that are potential threats to the consumers and their families i.e. end consumer who is not a *privity* to the contract. This problem was overcome through other regimes of the product liability e.g. tort and strict product liability.

If there is no contractual relationship between producer of a defective product and the ultimate consumer, the manufacturer's liability to the consumer would be based on tort for damages and injuries caused by defective products. The 'tort regime of product liability' is the second most important method through which the manufacturers of defective products can be held responsible and provides remedies to the consumer of a defective product. In this regard, the English law of torts as well as Islamic law of torts has been analyzed in the area of product liability. [29]Similarities and differences between the important notions of the present English law of torts and that of Islamic law have been thoroughly discussed and compared in the context of product liability. Both the legal systems ensure compensation of the consumers in cases of defective products.

The primary purpose of Islamic law of tort as well as English law of tort is to define the circumstances in which a person whose interests are harmed by another may seek compensation and to impose responsibility or duty on a *tortfeasor* to compensate the damage he caused to another. [30]

In the English law of tort, in cases related to product liability, the liability is fault-based. Hence, it demands the establishment of negligence on the part of producer in order to

[29] See chapter 6 of the thesis for a detailed comparison of Islamic and English law of torts in context of product liability.
[30] Ibn Qudāmah, *Al-Mughnī*, vol.4, p.403; Winfield and Jolowicz, *Tort*, p.1.

get compensated in cases of defective products. While in Islamic law the dominant view is also that liability is fault-based, however some scholars such as Muslih-al-din etc. are of the view that it is a damaged-based liability which means that it is absolute liability and it does not require establishing negligence on the part of the defendant that is the producer in the context of product liability.

The leading English case of *Donoghue v Stevenson* has introduced the famous neighbour principle that implies that one must take responsible care to avoid acts or omissions which one can reasonably foresee would be likely to harm one's neighbour. Neighbour in the eyes of law is any such person who is so closely and directly affected by one's acts or omissions.[31] Islamic law has also given due importance to the rights of neighbours and numerous moral obligations have been stressed by *Sharī'ah* towards neighbours. In this regard, the Holy Qur'ān says:

> "Serve God, and join not any partners with Him; and do good- to parents, kinsfolk, orphans, those in need, neighbours who are near, neighbours who are strangers, the companion by your side, the wayfarer (ye meet), and what your right hands possess: For God loveth not the arrogant, the vainglorious...."[32]

In this verse the words *Saḥib bil-Janb* and the friend by your side include all those companions who sit beside someone, fellow-travellers, fellow customers in a shop etc. This is temporary neighbourhood. It is the obligation of every noble and civilized person that he must take care of his temporary neighbours and ought not to harm

[31] *Donoghue (or McAlister) v Stevenson*, [1932] All ER Rep 1; [1932] AC 562.
[32] Qur'ān: 4:36.

them".[33] Moreover, Islamic *Sharī'ah* has recognized the right to *Shuf'ah (right of pre-emption)* in favour of neighbour.[34]

However, in legal context there are various well established principles in Islamic jurisprudence to deal with situations like *Donoghue v Stevenson.* These principles as discussed earlier are: *harm has to be avoided, no harm and no counter harm, greater harm should be avoided with lesser harm* etc. Hence, situations like *Donoghue v Stevenson* could have easily been handled under such principles. Such legal principles were not known to English legal system. Thus, Lord Atkin resorted to the neighbouring principle. While on the other hand, to establish liability of the manufacturer there is no need for such principles under Islamic law as it has already contained legal principles in the basic sources. A thorough analysis of both the legal systems reveal that the manufacturers owe a duty of care to the ultimate consumer for the violation of which he will be held liable under the neighbouring principle in English law and transgression *(ta'ddī)* under Islamic law.

In the English law of torts the list of potentially liable defendants in product liability cases is wide. It includes repairers, assemblers and erectors, installers, importers and distributors, retailers, designers, testing agencies, distributors marketing defective products without adequate instructions etc. This list is not exhaustive. Under Islamic law, the list of potential defendants is even wider than English law. It means that

[33] Al-maudūdī, Syed Abul A'lā, *Tafhīm ul Qur'ān*, vol.I, pp. 351-2.

[34] The word *Shuf'āh* means merging, adding strengthening. Technically it is the right to compel the buyer of immovable, property to transfer the ownership to the claimant on the terms and conditions on which he bought it. As many things are shared in common by co-owners as well as neighbours, like the right of way and water, they have been given the first right to buy the property if it is sold.

everyone who causes damage to another will be held liable. It is because of this that some Muslim writers named the liability under the Islamic law of torts as damage-based liability.

The scope of potential claimants is wide under both the legal systems and it includes every person who is so closely and directly affected by the acts of the defendant.

The notion of product under both the English law and Islamic law is same. However, Islamic law considers only valuable (*mutaqawwam*) products and those which are manufactured through human effort. Hence, the agricultural crops that may cause harm to anyone will not be considered as product to hold the farmer liable unless some pesticide or adulteration has been proved on the part of the seller. Islamic law has recognized the *khiyarāt* for guaranteeing rights of the consumers against defect in products. Moreover, Islamic law is flexible to recognize various kinds of emerging defects e.g. instruction defect and there is nothing repugnant to *Sharī'ah* in this regard. In both the legal systems, the consumer may sue for damages in tort when his civil right is violated by the use of a defective product.

However, under the present English law of tort it is hard for the consumers to establish evidence against the manufacturer. It is therefore required to develop the substantive law to meet the requirements of modern day consumers. Similarly, under the Islamic law the burden of proof lies on the consumer whose allegation is not in accordance with the normal state of affairs because people are ordinarily free from liability.

In English law of tort the breach of a statutory duty is also considered as tort. It is committed by breaking a duty imposed by an Act or Regulations including EC legislation. The damage must be of a type that the statute was intended to prevent. In this regard Islamic law has also put responsibility on the manufacturer not to commit *ta'addī* or *taqṣīr* is a continuous one. Therefore, if after marketing, the product is discovered to be defective and possibly dangerous, the manufacturer has to withdraw the product from the market and do whatever possible to prevent harm; otherwise he will be held liable for it. The duty imposed on manufacturers not to cause harm to consumers emerges from the general rules of tort, but is also a statutory obligation imposed by the ruler out of his right to *Ta'zīr*. In imposing this duty upon the manufacturer there is no distinction between chattels dangerous per se and others; in both cases, manufacturers have to give adequate warning of danger and proper direction for use. The fulfillment of this duty may not always free the producer from liability. It is not important under Islamic law that whether or not the manufacturer has anticipated the damage or ought to have reasonably foreseen it. A manufacturer will be held liable even if he could not have reasonably foreseen the damage. Hence, the stance of both the legal systems is same regarding breach of statutory duty.

Under Islamic law manufacturer's defences will not be effective unless they extinguish the *ta'addī* and *taqṣīr* on the part of the manufacturer. Also, if more than one person contributed to causing the damage, each will incur a proportionate share of responsibility based on the principle of '*al-khirāj bil-ḍamān*'. This rule applies even if the

ta'addi contributing to the manufacturer's liability is that of the consumer or a third party.

The notions of losses and damages are also same under both the laws. In English law of torts the idea behind damages in negligence is to restore the original position of the claimant. It is also the purpose of Islamic law of tort however compensation under Islamic law does not only aim to replace pecuniary damages but also emotional losses.

It is pertinent to raise here the issue that what if Islamic law is applied to *Donoghue v. Stevenson*, whether or not Mrs. *Donoghue* would have recovered any compensation for emotional losses as she also claimed to have emotional distress as a result of the incident. But the dominant view in Islamic law is that the compensation for emotional losses e.g. nervous shocks and other purely psychological illnesses are not compensable under Islamic law. The famous Ḥanbalī jurist, Ibn e Qudāmah, has stated:

> "....if a person slaps another on his face causing him no damage, then he is not liable because he has not ruined his beauty, besides the usage of the face was not affected. The same applies to scalding".[35]

However, Islamic law has well established rules of removing any kind of harm i.e. no harm and no counter harm and harm has to be removed etc. It is pertinent to mention here the view of Imām Muḥammad b. al-Ḥasan, who is reported to have said:
"....even if the injury is of the kind that heals leaving no mark, still damages should be paid to compensate the pain suffered by the injured person".[36]

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[35] Ibn Qudāmah, *Al-Mughnī*, Maktabah Al-Qāhirah (n.d.), 1968, vol.8, p.484.
[36] Al-Sarakhsī, *Al-mabṣūt*, Dār al-Ma'ārifah, Bayrūt, 1993, vol.26, p.81; Ibn al 'Âbidīn (d.1252 A.H.), *Radd al-Muhtār*, Dār al-Fikr, Bayrūt, 1992, vol.6, p.582; Ibn Nujaym (d.970 A.H.), *Al-baḥr al-Rā'iq*, Dār al-Kitāb al-Islāmi, vol.8, p.388.

The English law in torts related to product liability has given two defences i.e. contributory negligence and the *volunti non fit injuria* (i.e. one who consents to injury cannot be heard to complain of it thereafter).[37] On the other hand under Islamic law, the liability in tort can be avoided in case of: force majeure or act of God; act of a third party; the act of the victim itself.[38] Islamic law has also recognised the defence of contributory negligence. In cases where both the parties have acted, the principles of contributory would apply by attributing damage to the act of both and the loss is divided. The person, who does an act, even if he does not act intentionally, is held liable. In this context, it is pertinent to quote Al-hidāyah that states:

> "If a person knowingly and wilfully passes over a road in which water has been spelt and perishes in consequences of falling in it, nothing whatever is incurred by the person who spilt the water, since here the deceased has perished from his own wilfulness or obstinacy".[39]

Therefore, Islamic law has treated contributory negligence as a valid defence in favour of the defendant.

As far as the limitation period as a defence is concerned it is a well settled defence in English law while the Muslim jurists have different opinions but the dominant view is that it is up to the state which can prescribe time limit for each and every kind case. However, the disadvantage of Islamic law on the subject is that there is no codification of this law in the modern context. In fact, Islamic law of tort is not a static and

[37] Rodney Nelson, Jones and Peter Stewart, *Product Liability: The New Law under the Consumer Protection Act, 1987*, p.77.
[38] Munzir Khaf, "*Economics of Liabilities: An Islamic View*" (2000) 8(2) Journal of Economics and Management 92.
[39] Al-Marghīnānī, *Al-Hidāyah*, vol.4, p.474.

immutable body of rules, but is capable to meet needs of a changing society. It can equally contribute in providing justice to the people in accordance with the contemporary needs. But it needs to be contextualized.

The strict liability for defective products that is based on EU Directive has been incorporated in UK through enactment of the Consumer Protection Act, 1987. This regime has been thoroughly analysed in the light of Islamic law in order to asses that whether or not the current strict product liability regime in England is in compliance with the principles of justice in Islamic law. The chapter has evaluated each and every notion on which the English strict product liability regime is based such as strict liability, product, producer, damages, defences, and time limitation etc. The same were also analysed in the light of Islamic jurisprudence. It has been concluded that the English product liability regime in its current form is in conformity with the injunctions of Islamic law.

Islamic law, as it has already been discussed, ensures the maximum protection to the consumers and guarantees compensation against harms caused to the victims and held liable those who are entitled to profit. Islamic law has provided general principles for the protection of consumers however so far there exists no solid law of product liability in any Muslim country that is purely based on the principles of Islamic *Sharī'ah* . The English regime of product liability, as analyzed above, does not violate any fundamental norm of *Sharī'ah* rather it insures protection of the consumers in cases of product liability which conforms to the very objective of *Sharī'ah* .

The researcher has also reached to the conclusion that that from there is no problem in adopting laws of other nations provided it does not violate any fundamental norm of Islamic Law. Hence, *Sharī'ah* should not be considered as an obstacle in the way of application of English product liability regime in Islamic jurisdictions. These and similar measures can be followed since it facilitates the consumers against unsafe products and services. Moreover, it is in the interest of the public which is highly encouraged by Islamic *Sharī'ah* . Some even say that realizing public interest is one of the objectives of *Sharī'ah* . Such measures may also be accommodated under the rule: *"Hardship causes giving of facility"*[40] and the rule: *"what is not prohibited is permitted"*.[41] However, it is highly recommended that the Muslim countries should start work on developing an Islamic model of consumer protection in general and product liability in particular that is purely based on the injunctions of Islamic law in Muslim jurisdiction.[42]

8.2. RECOMMENDATIONS

The area of consumer protection in the context of product liability has not been discussed by Muslim scholars in a solid and comprehensive form. Due to the scientific and technological developments, it has become need of the hour to analyse this emerging legal concept within the framework of Islamic law and offer suggestions to the Muslim jurisdictions for substantive law developments on product liability based on the principles of Islamic jurisprudence. As Islamic law has embodied principles dealing with

[40] Al-burnu, Muḥammad Ṣiddiqī, *al-wajīz fī-'idat Qawāīd al-Kulliyyah*, Beyrūt: Mu'ssasah al-Risālah, 1st Edition 1404/1983, p.129.
[41] Ibid., p.109.
[42] See chapter 7 of the thesis for a thorough analysis of UK' strict product liability regime in the light of Islamic law.

all aspects of human life hence consumer protection in general and product liability in particular are no exceptions. The roots of consumer protection and product liability can be traced in the classical Islamic legal tradition; however, there are various factors such as socio-economic and politico-legal for not prospering in these areas. However, it has become indispensible to review Islamic law in the era of the rise of industrial capitalism and serious efforts should be made for codification and contextualization of the Islamic principles concerning consumer protection in general and product liability in particular. In contemporary times the Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI) has issued various *Sharī'ah* standards regarding Islamic modes of finance for the proper regulation of Islamic Banks and financial institutions.[43] This happened to be a very fruitful and successful effort in order to harmonise and standardise Islamic commercial law and almost all the Islamic banks and financial institutions around the world are following these standards today. However such efforts are greatly required in other fields as well especially in matters of *ḥalāl* (permissible) and *ḥarām* (prohibited) i.e. provide concrete rules for *ḥalāl* consumer products. There is great need felt by Muslim consumers in every corner of the globe to know the exact parameters of *ḥalāl* and *ḥarām* in consumer products especially in this age of advance technology. It is, therefore hoped that an adequate *Sharī'ah* standard should be promulgated by AAOIFI or any other body of the Organization of Islamic Conference

[43] Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) is a Bahrain based not-for-profit organization that was established to maintain and promote *Shariah* standards for Islamic financial institutions, participants and the overall industry. The Commission also organizes a number of professional development programs (especially the Islamic legal accountant program and the observer program and forensic auditor) in their effort to upgrade the human resources working in the industry and the development of governance structures controls the institutions (http://www.aaoifi.com/).

(OIC) to guide the relevant authorities and Muslim consumers in ascertaining *ḥalāl* and *haram* products for the benefit of *Ummah* as a whole. This will not only help to uniform Islamic law of *ḥalāl* and *ḥarām* especially in modern age when many products are process mysteries and consumers know nothing about them. On the other hand, many Muslim and non-Muslim countries have established *ḥalāl* regulatory bodies and authorities but the basic concern of these bodies is to expand the business portfolio and maximum export of the products rather than protection and preservation of faith which is the basic concern of the notions of *ḥalāl* and *ḥarām* in Islam. Indeed it is allowed to earn profit and export *ḥalāl* products but such gain should not be at the stake of faith of the Muslim consumers.

Moreover, absence of a uniform *Sharī'ah* standard on *ḥalāl* products makes them doubtful not only for the relevant authorities but also for the Muslim consumers and easily escapable for the perpetrators. If any such standard is worked out it must incorporate provisions related to the liability of manufacturers for the harms caused by their defective products i.e. safety of the products should be ensured. The notion of *ayb* should be interpreted to cover the lack of safety in a product as a defect based on the Islamic principle that custom is arbitrary.

The Muslim jurists should also adopt the notion of 'Product Recall' once the product is proved to be a defective one. These can be covered under the notion of *Sadd al-dharāi'* i.e. block the ways leading to unlawful results.[44] Hence, *Sharī'ah* standards on various subjects can help in the revival of Islamic law in modern era and contextualize the same

[44] Ibn al-Qayyam, *I'lām ul-muwaqi'īn*, Dār al-kutub al-'elmiyyah', Beirut, vol.3, p.108.

especially in the field of consumer protection in general and product liability in particular.

The religious scholars (*'Ulamāh*), legislatures and jurists should benefit from the practices of the other nations including UK in this particular area of law and it is highly recommended to adopt the strict product liability regime based on the injunctions of Islamic law in Muslim jurisdiction. The legislatures as well as the courts of an Islamic state can benefit from these laws. Moreover, if it is in the vital interest of the citizens of an Islamic state such laws can be transposed without any alteration provided they are not violating any settled rule of *Sharī'ah*.

8.3. FUTURE RESEARCH

The jurisprudence of consumer protection is growing day by day. Today, it covers various areas such as consumer redress, holiday laws, consumer insurance, consumer finance, unfair terms in consumer contracts, food law, regulation of marketing, advertising and sales promotion practices, trade descriptions in relation to goods, mis-descriptions of services and property, misleading price indications, service liability, sales promotion and institutions and policies of consumer protection etc. There is an immense need to look into each and every of these aspects of consumer protection from the perspective of Islamic law and jurisprudence.

The scholars can also work on comparison of these aspects among different regimes. Similarly, there is dearth of researches on the development of models of consumer

protection legislation based on the solid principles of Islamic law that also fulfil the needs of a modern day consumer. Moreover, there is also need to work on the review, examination and analysis of the already applicable consumer laws in Muslim countries in the light of United Nations Guidelines for consumer protection and Islamic law.

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APPENDIX I

COUNCIL DIRECTIVE CONCERNING LIABILITY FOR DEFECTIVE PRODUCTS (85/374/EEC)

Consumer Protection Act 1987

1987 CHAPTER 43

An Act to make provision with respect to the liability of persons for damage caused by defective products; to consolidate with amendments the Consumer Safety Act 1978 and the Consumer Safety (Amendment) Act 1986; to make provision with respect to the giving of price indications; to amend Part I of the Health and Safety at Work etc. Act 1974 and sections 31 and 80 of the Explosives Act 1875; to repeal the Trade Descriptions Act 1972 and the Fabrics (Misdescription) Act 1913; and for connected purposes. [15th May 1987]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

PRODUCT LIABILITY

Purpose and construction of Part I.

1.—(1) This Part shall have effect for the purpose of making such provision as is necessary in order to comply with the product liability Directive and shall be construed accordingly.

(2) In this Part, except in so far as the context otherwise requires—

"agricultural produce" means any produce of the soil, of stock-farming or of fisheries;

"dependant" and "relative" have the same meaning as they have in, respectively, the Fatal Accidents Act 1976 and the Damages (Scotland) Act 1976; 1976 c. 30. 1976 c. 13.

"producer", in relation to a product, means—

(a) the person who manufactured it;

(b) in the case of a substance which has not been manufactured but has been won or abstracted, the person who won or abstracted it;

PART I

(c) in the case of a product which has not been manufactured, won or abstracted but essential characteristics of which are attributable to an industrial or other process having been carried out (for example, in relation to agricultural produce), the person who carried out that process;

"product" means any goods or electricity and (subject to subsection (3) below) includes a product which is comprised in another product, whether by virtue of being a component part or raw material or otherwise; and

"the product liability Directive" means the Directive of the Council of the European Communities, dated 25th July 1985, (No. 85/374/EEC) on the approximation of the laws, regulations and administrative provisions of the member States concerning liability for defective products.

(3) For the purposes of this Part a person who supplies any product in which products are comprised, whether by virtue of being component parts or raw materials or otherwise, shall not be treated by reason only of his supply of that product as supplying any of the products so comprised.

Liability for defective products.

2.—(1) Subject to the following provisions of this Part, where any damage is caused wholly or partly by a defect in a product, every person to whom subsection (2) below applies shall be liable for the damage.

(2) This subsection applies to—

(a) the producer of the product;

(b) any person who, by putting his name on the product or using a trade mark or other distinguishing mark in relation to the product, has held himself out to be the producer of the product;

(c) any person who has imported the product into a member State from a place outside the member States in order, in the course of any business of his, to supply it to another.

(3) Subject as aforesaid, where any damage is caused wholly or partly by a defect in a product, any person who supplied the product (whether to the person who suffered the damage, to the producer of any product in which the product in question is comprised or to any other person) shall be liable for the damage if—

(a) the person who suffered the damage requests the supplier to identify one or more of the persons (whether still in existence or not) to whom subsection (2) above applies in relation to the product;

(b) that request is made within a reasonable period after the damage occurs and at a time when it is not reasonably practicable for the person making the request to identify all those persons; and

(c) the supplier fails, within a reasonable period after receiving the request, either to comply with the request or to identify the person who supplied the product to him.

(4) Neither subsection (2) nor subsection (3) above shall apply to a person in respect of any defect in any game or agricultural produce if the only supply of the game or produce by that person to another was at a time when it had not undergone an industrial process.

PART I

(5) Where two or more persons are liable by virtue of this Part for the same damage, their liability shall be joint and several.

(6) This section shall be without prejudice to any liability arising otherwise than by virtue of this Part.

Meaning of "defect".

3.—(1) Subject to the following provisions of this section, there is a defect in a product for the purposes of this Part if the safety of the product is not such as persons generally are entitled to expect; and for those purposes "safety", in relation to a product, shall include safety with respect to products comprised in that product and safety in the context of risks of damage to property, as well as in the context of risks of death or personal injury.

(2) In determining for the purposes of subsection (1) above what persons generally are entitled to expect in relation to a product all the circumstances shall be taken into account, including—

(a) the manner in which, and purposes for which, the product has been marketed, its get-up, the use of any mark in relation to the product and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product;

(b) what might reasonably be expected to be done with or in relation to the product; and

(c) the time when the product was supplied by its producer to another;

and nothing in this section shall require a defect to be inferred from the fact alone that the safety of a product which is supplied after that time is greater than the safety of the product in question.

Defences.

4.—(1) In any civil proceedings by virtue of this Part against any person ("the person proceeded against") in respect of a defect in a product it shall be a defence for him to show—

(a) that the defect is attributable to compliance with any requirement imposed by or under any enactment or with any Community obligation; or

(b) that the person proceeded against did not at any time supply the product to another; or

(c) that the following conditions are satisfied, that is to say—

(i) that the only supply of the product to another by the person proceeded against was otherwise than in the course of a business of that person's; and

(ii) that section 2(2) above does not apply to that person or applies to him by virtue only of things done otherwise than with a view to profit; or

(d) that the defect did not exist in the product at the relevant time; or

(e) that the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control; or

PART I

(f) that the defect—

(i) constituted a defect in a product ("the subsequent product") in which the product in question had been comprised; and

(ii) was wholly attributable to the design of the subsequent product or to compliance by the producer of the product in question with instructions given by the producer of the subsequent product.

(2) In this section "the relevant time", in relation to electricity, means the time at which it was generated, being a time before it was transmitted or distributed, and in relation to any other product, means—

(a) if the person proceeded against is a person to whom subsection (2) of section 2 above applies in relation to the product, the time when he supplied the product to another;

(b) if that subsection does not apply to that person in relation to the product, the time when the product was last supplied by a person to whom that subsection does apply in relation to the product.

Damage giving rise to liability.

5.—(1) Subject to the following provisions of this section, in this Part "damage" means death or personal injury or any loss of or damage to any property (including land).

(2) A person shall not be liable under section 2 above in respect of any defect in a product for the loss of or any damage to the product itself or for the loss of or any damage to the whole or any part of any product which has been supplied with the product in question comprised in it.

(3) A person shall not be liable under section 2 above for any loss of or damage to any property which, at the time it is lost or damaged, is not—

(a) of a description of property ordinarily intended for private use, occupation or consumption; and

(b) intended by the person suffering the loss or damage mainly for his own private use, occupation or consumption.

(4) No damages shall be awarded to any person by virtue of this Part in respect of any loss of or damage to any property if the amount which would fall to be so awarded to that person, apart from this subsection and any liability for interest, does not exceed £275.

(5) In determining for the purposes of this Part who has suffered any loss of or damage to property and when any such loss or damage occurred, the loss or damage shall be regarded as having occurred at the earliest time at which a person with an interest in the property had knowledge of the material facts about the loss or damage.

(6) For the purposes of subsection (5) above the material facts about any loss of or damage to any property are such facts about the loss or damage as would lead a reasonable person with an interest in the property to consider the loss or damage sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(7) For the purposes of subsection (5) above a person's knowledge includes knowledge which he might reasonably have been expected to acquire—

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;

but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable by him only with the help of expert advice unless he has failed to take all reasonable steps to obtain (and, where appropriate, to act on) that advice.

(8) Subsections (5) to (7) above shall not extend to Scotland.

Application of certain enactments etc.

6.—(1) Any damage for which a person is liable under section 2 above shall be deemed to have been caused—

(a) for the purposes of the Fatal Accidents Act 1976, by that person's wrongful act, neglect or default; 1976 c. 30.

(b) for the purposes of section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 (contribution among joint wrongdoers), by that person's wrongful act or negligent act or omission; 1940 c. 42.

(c) for the purposes of section 1 of the Damages (Scotland) Act 1976 (rights of relatives of a deceased), by that person's act or omission; and 1976 c. 13.

(d) for the purposes of Part II of the Administration of Justice Act 1982 (damages for personal injuries, etc.—Scotland), by an act or omission giving rise to liability in that person to pay damages. 1982 c. 53.

(2) Where—

(a) a person's death is caused wholly or partly by a defect in a product, or a person dies after suffering damage which has been so caused;

(b) a request such as mentioned in paragraph (a) of subsection (3) of section 2 above is made to a supplier of the product by that person's personal representatives or, in the case of a person whose death is caused wholly or partly by the defect, by any dependant or relative of that person; and

(c) the conditions specified in paragraphs (b) and (c) of that subsection are satisfied in relation to that request,

this Part shall have effect for the purposes of the Law Reform (Miscellaneous Provisions) Act 1934, the Fatal Accidents Act 1976 and the Damages (Scotland) Act 1976 as if liability of the supplier to that person under that subsection did not depend on that person having requested the supplier to identify certain persons or on the said conditions having been satisified in relation to a request made by that person. 1934 c. 41.

(3) Section 1 of the Congenital Disabilities (Civil Liability) Act 1976 shall have effect for the purposes of this Part as if— 1976 c. 28.

(a) a person were answerable to a child in respect of an occurrence caused wholly or partly by a defect in a product if he is or has been liable under section 2 above in respect of any effect of the occurrence on a parent of the child, or would be so liable if the occurrence caused a parent of the child to suffer damage;

(b) the provisions of this Part relating to liability under section 2 above applied in relation to liability by virtue of paragraph (a) above under the said section 1; and

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(c) subsection (6) of the said section 1 (exclusion of liability) were omitted.

(4) Where any damage is caused partly by a defect in a product and partly by the fault of the person suffering the damage, the Law Reform (Contributory Negligence) Act 1945 and section 5 of the Fatal Accidents Act 1976 (contributory negligence) shall have effect as if the defect were the fault of every person liable by virtue of this Part for the damage caused by the defect.

1945 c. 28.
1976 c. 30.

(5) In subsection (4) above "fault" has the same meaning as in the said Act of 1945.

(6) Schedule 1 to this Act shall have effect for the purpose of amending the Limitation Act 1980 and the Prescription and Limitation (Scotland) Act 1973 in their application in relation to the bringing of actions by virtue of this Part.

1980 c. 58.
1973 c. 52.

(7) It is hereby declared that liability by virtue of this Part is to be treated as liability in tort for the purposes of any enactment conferring jurisdiction on any court with respect to any matter.

(8) Nothing in this Part shall prejudice the operation of section 12 of the Nuclear Installations Act 1965 (rights to compensation for certain breaches of duties confined to rights under that Act).

1965 c. 57.

Prohibition on exclusions from liability.

7. The liability of a person by virtue of this Part to a person who has suffered damage caused wholly or partly by a defect in a product, or to a dependant or relative of such a person, shall not be limited or excluded by any contract term, by any notice or by any other provision.

Power to modify Part I.

8.—(1) Her Majesty may by Order in Council make such modifications of this Part and of any other enactment (including an enactment contained in the following Parts of this Act, or in an Act passed after this Act) as appear to Her Majesty in Council to be necessary or expedient in consequence of any modification of the product liability Directive which is made at any time after the passing of this Act.

(2) An Order in Council under subsection (1) above shall not be submitted to Her Majesty in Council unless a draft of the Order has been laid before, and approved by a resolution of, each House of Parliament.

Application of Part I to Crown.

9.—(1) Subject to subsection (2) below, this Part shall bind the Crown.

(2) The Crown shall not, as regards the Crown's liability by virtue of this Part, be bound by this Part further than the Crown is made liable in tort or in reparation under the Crown Proceedings Act 1947, as that Act has effect from time to time.

1947 c. 44.

PART II

CONSUMER SAFETY

The general safety requirement.

10.—(1) A person shall be guilty of an offence if he—

(a) supplies any consumer goods which fail to comply with the general safety requirement;

(b) offers or agrees to supply any such goods; or

(c) exposes or possesses any such goods for supply.

(2) For the purposes of this section consumer goods fail to comply with the general safety requirement if they are not reasonably safe having regard to all the circumstances, including—

(a) the manner in which, and purposes for which, the goods are being or would be marketed, the get-up of the goods, the use of any mark in relation to the goods and any instructions or warnings which are given or would be given with respect to the keeping, use or consumption of the goods;

(b) any standards of safety published by any person either for goods of a description which applies to the goods in question or for matters relating to goods of that description; and

(c) the existence of any means by which it would have been reasonable (taking into account the cost, likelihood and extent of any improvement) for the goods to have been made safer.

(3) For the purposes of this section consumer goods shall not be regarded as failing to comply with the general safety requirement in respect of—

(a) anything which is shown to be attributable to compliance with any requirement imposed by or under any enactment or with any Community obligation;

(b) any failure to do more in relation to any matter than is required by—

(i) any safety regulations imposing requirements with respect to that matter;

(ii) any standards of safety approved for the purposes of this subsection by or under any such regulations and imposing requirements with respect to that matter;

(iii) any provision of any enactment or subordinate legislation imposing such requirements with respect to that matter as are designated for the purposes of this subsection by any such regulations.

(4) In any proceedings against any person for an offence under this section in respect of any goods it shall be a defence for that person to show—

(a) that he reasonably believed that the goods would not be used or consumed in the United Kingdom; or

(b) that the following conditions are satisfied, that is to say–

(i) that he supplied the goods, offered or agreed to supply them or, as the case may be, exposed or possessed them for supply in the course of carrying on a retail business; and

(ii) that, at the time he supplied the goods or offered or agreed to supply them or exposed or possessed them for supply, he neither knew nor had reasonable grounds for believing that the goods failed to comply with the general safety requirement; or

(c) that the terms on which he supplied the goods or agreed or offered to supply them or, in the case of goods which he exposed or possessed for supply, the terms on which he intended to supply them—

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(i) indicated that the goods were not supplied or to be supplied as new goods; and

(ii) provided for, or contemplated, the acquisition of an interest in the goods by the persons supplied or to be supplied.

(5) For the purposes of subsection (4)(b) above goods are supplied in the course of carrying on a retail business if—

(a) whether or not they are themselves acquired for a person's private use or consumption, they are supplied in the course of carrying on a business of making a supply of consumer goods available to persons who generally acquire them for private use or consumption; and

(b) the descriptions of goods the supply of which is made available in the course of that business do not, to a significant extent, include manufactured or imported goods which have not previously been supplied in the United Kingdom.

(6) A person guilty of an offence under this section shall be liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale or to both.

(7) In this section "consumer goods" means any goods which are ordinarily intended for private use or consumption, not being—

(a) growing crops or things comprised in land by virtue of being attached to it;

(b) water, food, feeding stuff or fertiliser;

(c) gas which is, is to be or has been supplied by a person authorised to supply it by or under section 6, 7 or 8 of the Gas Act 1986 (authorisation of supply of gas through pipes);

1986 c. 44.

(d) aircraft (other than hang-gliders) or motor vehicles;

(e) controlled drugs or licensed medicinal products;

(f) tobacco.

Safety regulations.

11.—(1) The Secretary of State may by regulations under this section ("safety regulations") make such provision as he considers appropriate for the purposes of section 10(3) above and for the purpose of securing—

(a) that goods to which this section applies are safe;

(b) that goods to which this section applies which are unsafe, or would be unsafe in the hands of persons of a particular description, are not made available to persons generally or, as the case may be, to persons of that description; and

(c) that appropriate information is, and inappropriate information is not, provided in relation to goods to which this section applies.

(2) Without prejudice to the generality of subsection (1) above, safety regulations may contain provision—

(a) with respect to the composition or contents, design, construction, finish or packing of goods to which this section applies, with respect to standards for such goods and with respect to other matters relating to such goods;

(b) with respect to the giving, refusal, alteration or cancellation of approvals of such goods, of descriptions of such goods or of standards for such goods;

(c) with respect to the conditions that may be attached to any approval given under the regulations;

(d) for requiring such fees as may be determined by or under the regulations to be paid on the giving or alteration of any approval under the regulations and on the making of an application for such an approval or alteration;

(e) with respect to appeals against refusals, alterations and cancellations of approvals given under the regulations and against the conditions contained in such approvals;

(f) for requiring goods to which this section applies to be approved under the regulations or to conform to the requirements of the regulations or to descriptions or standards specified in or approved by or under the regulations;

(g) with respect to the testing or inspection of goods to which this section applies (including provision for determining the standards to be applied in carrying out any test or inspection);

(h) with respect to the ways of dealing with goods of which some or all do not satisfy a test required by or under the regulations or a standard connected with a procedure so required;

(i) for requiring a mark, warning or instruction or any other information relating to goods to be put on or to accompany the goods or to be used or provided in some other manner in relation to the goods, and for securing that inappropriate information is not given in relation to goods either by means of misleading marks or otherwise;

(j) for prohibiting persons from supplying, or from offering to supply, agreeing to supply, exposing for supply or possessing for supply, goods to which this section applies and component parts and raw materials for such goods;

(k) for requiring information to be given to any such person as may be determined by or under the regulations for the purpose of enabling that person to exercise any function conferred on him by the regulations.

(3) Without prejudice as aforesaid, safety regulations may contain provision—

(a) for requiring persons on whom functions are conferred by or under section 27 below to have regard, in exercising their functions so far as relating to any provision of safety regulations, to matters specified in a direction issued by the Secretary of State with respect to that provision;

(b) for securing that a person shall not be guilty of an offence under section 12 below unless it is shown that the goods in question do not conform to a particular standard;

(c) for securing that proceedings for such an offence are not brought in England and Wales except by or with the consent of the Secretary of State or the Director of Public Prosecutions;

(d) for securing that proceedings for such an offence are not brought in Northern Ireland except by or with the consent of the Secretary of State or the Director of Public Prosecutions for Northern Ireland;

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(e) for enabling a magistrates' court in England and Wales or Northern Ireland to try an information or, in Northern Ireland, a complaint in respect of such an offence if the information was laid or the complaint made within twelve months from the time when the offence was committed;

(f) for enabling summary proceedings for such an offence to be brought in Scotland at any time within twelve months from the time when the offence was committed; and

(g) for determining the persons by whom, and the manner in which, anything required to be done by or under the regulations is to be done.

(4) Safety regulations shall not provide for any contravention of the regulations to be an offence.

(5) Where the Secretary of State proposes to make safety regulations it shall be his duty before he makes them—

(a) to consult such organisations as appear to him to be representative of interests substantially affected by the proposal;

(b) to consult such other persons as he considers appropriate; and

(c) in the case of proposed regulations relating to goods suitable for use at work, to consult the Health and Safety Commission in relation to the application of the proposed regulations to Great Britain;

but the preceding provisions of this subsection shall not apply in the case of regulations which provide for the regulations to cease to have effect at the end of a period of not more than twelve months beginning with the day on which they come into force and which contain a statement that it appears to the Secretary of State that the need to protect the public requires that the regulations should be made without delay.

(6) The power to make safety regulations shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament and shall include power—

(a) to make different provision for different cases; and

(b) to make such supplemental, consequential and transitional provision as the Secretary of State considers appropriate.

(7) This section applies to any goods other than—

(a) growing crops and things comprised in land by virtue of being attached to it;

(b) water, food, feeding stuff and fertiliser;

(c) gas which is, is to be or has been supplied by a person authorised to supply it by or under section 6, 7 or 8 of the Gas Act 1986 (authorisation of supply of gas through pipes);

1986 c. 44.

(d) controlled drugs and licensed medicinal products.

Offences against the safety regulations.

12.—(1) Where safety regulations prohibit a person from supplying or offering or agreeing to supply any goods or from exposing or possessing any goods for supply, that person shall be guilty of an offence if he contravenes the prohibition.

(2) Where safety regulations require a person who makes or processes any goods in the course of carrying on a business—

(a) to carry out a particular test or use a particular procedure in connection with the making or processing of the goods with a view to ascertaining whether the goods satisfy any requirements of such regulations; or

(b) to deal or not to deal in a particular way with a quantity of the goods of which the whole or part does not satisfy such a test or does not satisfy standards connected with such a procedure,

that person shall be guilty of an offence if he does not comply with the requirement.

(3) If a person contravenes a provision of safety regulations which prohibits or requires the provision, by means of a mark or otherwise, of information of a particular kind in relation to goods, he shall be guilty of an offence.

(4) Where safety regulations require any person to give information to another for the purpose of enabling that other to exercise any function, that person shall be guilty of an offence if—

(a) he fails without reasonable cause to comply with the requirement; or

(b) in giving the information which is required of him—

(i) he makes any statement which he knows is false in a material particular; or

(ii) he recklessly makes any statement which is false in a material particular.

(5) A person guilty of an offence under this section shall be liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale or to both.

Prohibition notices and notices to warn.

13.—(1) The Secretary of State may—

(a) serve on any person a notice ("a prohibition notice") prohibiting that person, except with the consent of the Secretary of State, from supplying, or from offering to supply, agreeing to supply, exposing for supply or possessing for supply, any relevant goods which the Secretary of State considers are unsafe and which are described in the notice;

(b) serve on any person a notice ("a notice to warn") requiring that person at his own expense to publish, in a form and manner and on occasions specified in the notice, a warning about any relevant goods which the Secretary of State considers are unsafe, which that person supplies or has supplied and which are described in the notice.

(2) Schedule 2 to this Act shall have effect with respect to prohibition notices and notices to warn; and the Secretary of State may by regulations make provision specifying the manner in which information is to be given to any person under that Schedule.

(3) A consent given by the Secretary of State for the purposes of a prohibition notice may impose such conditions on the doing of anything for which the consent is required as the Secretary of State considers appropriate.

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(4) A person who contravenes a prohibition notice or a notice to warn shall be guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale or to both.

(5) The power to make regulations under subsection (2) above shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament and shall include power—

(a) to make different provision for different cases; and

(b) to make such supplemental, consequential and transitional provision as the Secretary of State considers appropriate.

(6) In this section "relevant goods" means—

(a) in relation to a prohibition notice, any goods to which section 11 above applies; and

(b) in relation to a notice to warn, any goods to which that section applies or any growing crops or things comprised in land by virtue of being attached to it.

Suspension notices.

14.—(1) Where an enforcement authority has reasonable grounds for suspecting that any safety provision has been contravened in relation to any goods, the authority may serve a notice ("a suspension notice") prohibiting the person on whom it is served, for such period ending not more than six months after the date of the notice as is specified therein, from doing any of the following things without the consent of the authority, that is to say, supplying the goods, offering to supply them, agreeing to supply them or exposing them for supply.

(2) A suspension notice served by an enforcement authority in respect of any goods shall—

(a) describe the goods in a manner sufficient to identify them;

(b) set out the grounds on which the authority suspects that a safety provision has been contravened in relation to the goods; and

(c) state that, and the manner in which, the person on whom the notice is served may appeal against the notice under section 15 below.

(3) A suspension notice served by an enforcement authority for the purpose of prohibiting a person for any period from doing the things mentioned in subsection (1) above in relation to any goods may also require that person to keep the authority informed of the whereabouts throughout that period of any of those goods in which he has an interest.

(4) Where a suspension notice has been served on any person in respect of any goods, no further such notice shall be served on that person in respect of the same goods unless—

(a) proceedings against that person for an offence in respect of a contravention in relation to the goods of a safety provision (not being an offence under this section); or

(b) proceedings for the forfeiture of the goods under section 16 or 17 below,

are pending at the end of the period specified in the first-mentioned notice.

(5) A consent given by an enforcement authority for the purposes of subsection (1) above may impose such conditions on the doing of anything for which the consent is required as the authority considers appropriate.

(6) Any person who contravenes a suspension notice shall be guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale or to both.

(7) Where an enforcement authority serves a suspension notice in respect of any goods, the authority shall be liable to pay compensation to any person having an interest in the goods in respect of any loss or damage caused by reason of the service of the notice if—

(a) there has been no contravention in relation to the goods of any safety provision; and

(b) the exercise of the power is not attributable to any neglect or default by that person.

(8) Any disputed question as to the right to or the amount of any compensation payable under this section shall be determined by arbitration or, in Scotland, by a single arbiter appointed, failing agreement between the parties, by the sheriff.

Appeals against suspension notices.

15.—(1) Any person having an interest in any goods in respect of which a suspension notice is for the time being in force may apply for an order setting aside the notice.

(2) An application under this section may be made—

(a) to any magistrates' court in which proceedings have been brought in England and Wales or Northern Ireland—

(i) for an offence in respect of a contravention in relation to the goods of any safety provision; or

(ii) for the forfeiture of the goods under section 16 below;

(b) where no such proceedings have been so brought, by way of complaint to a magistrates' court; or

(c) in Scotland, by summary application to the sheriff.

(3) On an application under this section to a magistrates' court in England and Wales or Northern Ireland the court shall make an order setting aside the suspension notice only if the court is satisfied that there has been no contravention in relation to the goods of any safety provision.

(4) On an application under this section to the sheriff he shall make an order setting aside the suspension notice only if he is satisfied that at the date of making the order—

(a) proceedings for an offence in respect of a contravention in relation to the goods of any safety provision; or

(b) proceedings for the forfeiture of the goods under section 17 below,

have not been brought or, having been brought, have been concluded.

(5) Any person aggrieved by an order made under this section by a magistrates' court in England and Wales or Northern Ireland, or by a decision of such a court not to make such an order, may appeal against that order or decision—

(a) in England and Wales, to the Crown Court;

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(b) in Northern Ireland, to the county court;

and an order so made may contain such provision as appears to the court to be appropriate for delaying the coming into force of the order pending the making and determination of any appeal (including any application under section 111 of the Magistrates' Courts Act 1980 or Article 146 of the Magistrates' Courts (Northern Ireland) Order 1981 (statement of case)).

1980 c.43. S.I. 1981/1675 (N.I. 26).

Forfeiture: England and Wales and Northern Ireland.

16.—(1) An enforcement authority in England and Wales or Northern Ireland may apply under this section for an order for the forfeiture of any goods on the grounds that there has been a contravention in relation to the goods of a safety provision.

(2) An application under this section may be made—

(a) where proceedings have been brought in a magistrates' court for an offence in respect of a contravention in relation to some or all of the goods of any safety provision, to that court;

(b) where an application with respect to some or all of the goods has been made to a magistrates' court under section 15 above or section 33 below, to that court; and

(c) where no application for the forfeiture of the goods has been made under paragraph (a) or (b) above, by way of complaint to a magistrates' court.

(3) On an application under this section the court shall make an order for the forfeiture of any goods only if it is satisfied that there has been a contravention in relation to the goods of a safety provision.

(4) For the avoidance of doubt it is declared that a court may infer for the purposes of this section that there has been a contravention in relation to any goods of a safety provision if it is satisfied that any such provision has been contravened in relation to goods which are representative of those goods (whether by reason of being of the same design or part of the same consignment or batch or otherwise).

(5) Any person aggrieved by an order made under this section by a magistrates' court, or by a decision of such a court not to make such an order, may appeal against that order or decision—

(a) in England and Wales, to the Crown Court;

(b) in Northern Ireland, to the county court;

and an order so made may contain such provision as appears to the court to be appropriate for delaying the coming into force of the order pending the making and determination of any appeal (including any application under section 111 of the Magistrates' Courts Act 1980 or Article 146 of the Magistrates' Courts (Northern Ireland) Order 1981 (statement of case)).

(6) Subject to subsection (7) below, where any goods are forfeited under this section they shall be destroyed in accordance with such directions as the court may give.

(7) On making an order under this section a magistrates' court may, if it considers it appropriate to do so, direct that the goods to which the order relates shall (instead of being destroyed) be released, to such person as the court may specify, on condition that that person—

(a) does not supply those goods to any person otherwise than as mentioned in section 46(7)(a) or (b) below; and

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(b) complies with any order to pay costs or expenses (including any order under section 35 below) which has been made against that person in the proceedings for the order for forfeiture.

Forfeiture: Scotland.

17.—(1) In Scotland a sheriff may make an order for forfeiture of any goods in relation to which there has been a contravention of a safety provision—

(a) on an application by the procurator-fiscal made in the manner specified in section 310 of the Criminal Procedure (Scotland) Act 1975; or 1975 c. 21.

(b) where a person is convicted of any offence in respect of any such contravention, in addition to any other penalty which the sheriff may impose.

(2) The procurator-fiscal making an application under subsection (1)(a) above shall serve on any person appearing to him to be the owner of, or otherwise to have an interest in, the goods to which the application relates a copy of the application, together with a notice giving him the opportunity to appear at the hearing of the application to show cause why the goods should not be forfeited.

(3) Service under subsection (2) above shall be carried out, and such service may be proved, in the manner specified for citation of an accused in summary proceedings under the Criminal Procedure (Scotland) Act 1975.

(4) Any person upon whom notice is served under subsection (2) above and any other person claiming to be the owner of, or otherwise to have an interest in, goods to which an application under this section relates shall be entitled to appear at the hearing of the application to show cause why the goods should not be forfeited.

(5) The sheriff shall not make an order following an application under subsection (1)(a) above—

(a) if any person on whom notice is served under subsection (2) above does not appear, unless service of the notice on that person is proved; or

(b) if no notice under subsection (2) above has been served, unless the court is satisfied that in the circumstances it was reasonable not to serve notice on any person.

(6) The sheriff shall make an order under this section only if he is satisfied that there has been a contravention in relation to those goods of a safety provision.

(7) For the avoidance of doubt it is declared that the sheriff may infer for the purposes of this section that there has been a contravention in relation to any goods of a safety provision if he is satisfied that any such provision has been contravened in relation to any goods which are representative of those goods (whether by reason of being of the same design or part of the same consignment or batch or otherwise).

(8) Where an order for the forfeiture of any goods is made following an application by the procurator-fiscal under subsection (1)(a) above, any person who appeared, or was entitled to appear, to show cause why goods should not be forfeited may, within twenty-one days of the making of the

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order, appeal to the High Court by Bill of Suspension on the ground of an alleged miscarriage of justice; and section 452(4)(a) to (e) of the Criminal Procedure (Scotland) Act 1975 shall apply to an appeal under this subsection as it applies to a stated case under Part II of that Act.

1975 c. 21.

(9) An order following an application under subsection (1)(a) above shall not take effect—

(a) until the end of the period of twenty-one days beginning with the day after the day on which the order is made; or

(b) if an appeal is made under subsection (8) above within that period, until the appeal is determined or abandoned.

(10) An order under subsection (1)(b) above shall not take effect—

(a) until the end of the period within which an appeal against the order could be brought under the Criminal Procedure (Scotland) Act 1975; or

(b) if an appeal is made within that period, until the appeal is determined or abandoned.

(11) Subject to subsection (12) below, goods forfeited under this section shall be destroyed in accordance with such directions as the sheriff may give.

(12) If he thinks fit, the sheriff may direct that the goods be released, to such person as he may specify, on condition that that person does not supply those goods to any other person otherwise than as mentioned in section 46(7)(a) or (b) below.

Power to obtain information.

18.—(1) If the Secretary of State considers that, for the purpose of deciding whether—

(a) to make, vary or revoke any safety regulations; or

(b) to serve, vary or revoke a prohibition notice; or

(c) to serve or revoke a notice to warn,

he requires information which another person is likely to be able to furnish, the Secretary of State may serve on the other person a notice under this section.

(2) A notice served on any person under this section may require that person—

(a) to furnish to the Secretary of State, within a period specified in the notice, such information as is so specified;

(b) to produce such records as are specified in the notice at a time and place so specified and to permit a person appointed by the Secretary of State for the purpose to take copies of the records at that time and place.

(3) A person shall be guilty of an offence if he—

(a) fails, without reasonable cause, to comply with a notice served on him under this section; or

(b) in purporting to comply with a requirement which by virtue of paragraph (a) of subsection (2) above is contained in such a notice—

(i) furnishes information which he knows is false in a material particular; or

(ii) recklessly furnishes information which is false in a material particular.

(4) A person guilty of an offence under subsection (3) above shall—

(a) in the case of an offence under paragraph (a) of that subsection, be liable on summary conviction to a fine not exceeding level 5 on the standard scale; and

(b) in the case of an offence under paragraph (b) of that subsection be liable—

(i) on conviction on indictment, to a fine;

(ii) on summary conviction, to a fine not exceeding the statutory maximum.

Interpretation of Part II.

19.—(1) In this Part—

"controlled drug" means a controlled drug within the meaning of the Misuse of Drugs Act 1971; 1971 c. 38.

"feeding stuff" and "fertiliser" have the same meanings as in Part IV of the Agriculture Act 1970; 1970 c. 40.

"food" does not include anything containing tobacco but, subject to that, has the same meaning as in the Food Act 1984 or, in relation to Northern Ireland, the same meaning as in the Food and Drugs Act (Northern Ireland) 1958; 1984 c. 30. 1958 c. 27 (N.I.).

"licensed medicinal product" means—

(a) any medicinal product within the meaning of the Medicines Act 1968 in respect of which a product licence within the meaning of that Act is for the time being in force; or 1968 c. 67.

(b) any other article or substance in respect of which any such licence is for the time being in force in pursuance of an order under section 104 or 105 of that Act (application of Act to other articles and substances);

"safe", in relation to any goods, means such that there is no risk, or no risk apart from one reduced to a minimum, that any of the following will (whether immediately or after a definite or indefinite period) cause the death of, or any personal injury to, any person whatsoever, that is to say—

(a) the goods;

(b) the keeping, use or consumption of the goods;

(c) the assembly of any of the goods which are, or are to be, supplied unassembled;

(d) any emission or leakage from the goods or, as a result of the keeping, use or consumption of the goods, from anything else; or

(e) reliance on the accuracy of any measurement, calculation or other reading made by or by means of the goods,

and "safer" and "unsafe" shall be construed accordingly;

"tobacco" includes any tobacco product within the meaning of the Tobacco Products Duty Act 1979 and any article or substance containing tobacco and intended for oral or nasal use. 1979 c. 7.

(2) In the definition of "safe" in subsection (1) above, references to the keeping, use or consumption of any goods are references to—

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(a) the keeping, use or consumption of the goods by the persons by whom, and in all or any of the ways or circumstances in which, they might reasonably be expected to be kept, used or consumed; and

(b) the keeping, use or consumption of the goods either alone or in conjunction with other goods in conjunction with which they might reasonably be expected to be kept, used or consumed.

APPENDIX II

PART I (PRODUCT LIABILITY),

CONSUMER PROTECTION ACT, 1987

COUNCIL DIRECTIVE

of 25 July 1985

on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products

(85/374/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

Whereas approximation of the laws of the Member States concerning the liability of the producer for damage caused by the defectiveness of his products is necessary because the existing divergences may distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property;

Whereas liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production;

Whereas libility without fault should apply only to movables which have been industrially produced; whereas, as a result, it is appropriate to exclude liability for agricultural products and game, except where they have undergone a processing of an industrial nature which could cause a defect in these products; whereas the liability provided for in this Directive should also apply to movables which are used in the construction of immovables or are installed in immovables;

Whereas protection of the consumer requires that all producers involved in the production process should be made liable, in so far as their finished product, component part or any raw material supplied by them was defective; whereas, for the same reason, liability should extend to importers of products into the Community and to persons who present themselves as producers by affixing their name, trade mark or other distinguishing feature or who supply a product the producer of which cannot be identified;

Whereas, in situations where several persons are liable for the same damage, the protection of the consumer requires that the injured person should be able to claim full compensation for the damage from any one of them;

whereas, to protect the physical well-being and property of the consumer, the defectiveness of the product should be determined by reference not to its fitness for use but to the lack of the safety which the public at large is entitled to expect; whereas the safety is assessed by excluding any misuse of the product not reasonable under the circumstances;

Whereas a fair apportionment of risk between the injured person and the producer implies that the producer should be able to free himself from liability if he furnishes proof as to the existence of certain exonerating circumstances;

Whereas the protection of the consumer requires that the liability of the producer remains unaffacted by acts or omissions of other persons having contributed to cause the damage; whereas, however, the contributory negligence of the injured person may be taken into account to reduce or disallow such liability;

Whereas the protection of the consumer requires compensation for death and personal injury as well as compensation for damage to property; whereas the latter should nevertheless be limited to goods for private use or consumption and be subject to a deduction of a lower threshold of a fixed amount in order to avoid litigation in an excessive number of cases; whereas this Directive should not prejudice compensation for pain and suffering and other non-material damages payable, where appropriate, under the law applicable to the case;

Whereas a uniform period of limitation for the bringing of action for compensation is in the interests both of the injured person and of the producer;

(1) OJ No C 241, 14. 10. 1976, p. 9 and OJ No C 271, 26. 10. 1979, p. 3.
(2) OJ No C 127, 21. 5. 1979, p. 61.
(3) OJ No C 114, 7. 5. 1979, p. 15.

Whereas products age in the course of time, higher safety standards are developed and the state of science and technology progresses; whereas, therefore, it would not be reasonable to make the producer liable for an unlimited period for the defectiveness of his product; whereas, therefore, liability should expire after a reasonable length of time, without prejudice to claims pending at law;

Whereas, to achieve effective protection of consumers, no contractual derogation should be permitted as regards the liability of the producer in relation to the injured person;

Whereas under the legal systems of the Member States an injured party may have a claim for damages based on grounds of contractual liability or on grounds of non-contractual liability other than that provided for in this Directive; in so far as these provisions also serve to attain the objective of effective protection of consumers, they should remain unaffected by this Directive; whereas, in so far as effective protection of consumers in the sector of pharmaceutical products is already also attained in a Member State under a special liability system, claims based on this system should similarly remain possible;

Whereas, to the extent that liability for nuclear injury or damage is already covered in all Member States by adequate special rules, it has been possible to exclude damage of this type from the scope of this Directive;

Whereas, since the exclusion of primary agricultural products and game from the scope of this Directive may be felt, in certain Member States, in view of what is expected for the protection of consumers, to restrict unduly such protection, it should be possible for a Member State to extend liability to such products;

Whereas, for similar reasons, the possibility offered to a producer to free himself from liability if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of a defect to be discovered may be felt in certain Member States to restrict unduly the protection of the consumer; whereas it should therefore be possible for a Member State to maintain in its legislation or to provide by new legislation that this exonerating circumstance is not admitted; whereas, in the case of new legislation, making use of this derogation should, however, be subject to a Community stand-still procedure, in order to raise, if possible, the level of protection in a uniform manner throughout the Community;

Whereas, taking into account the legal traditions in most of the Member States, it is inappropriate to set any financial ceiling on the producer's liability without fault; whereas, in so far as there are, however, differing traditions, it seems possible to admit that a Member State may derogate from the principle of unlimited liability by providing a limit for the total liability of the producer for damage resulting from a death or personal injury and caused by identical items with the same defect, provided that this limit is established at a level sufficiently high to guarantee adequate protection of the consumer and the correct functioning of the common market;

Whereas the harmonization resulting from this cannot be total at the present stage, but opens the way towards greater harmonization; whereas it is therefore necessary that the Council receive at regular intervals, reports from the Commission on the application of this Directive, accompanied, as the case may be, by appropriate proposals;

Whereas it is particularly important in this respect that a re-examination be carried out of those parts of the Directive relating to the derogations open to the Member States, at the expiry of a period of sufficient length to gather practical experience on the effects of these derogations on the protection of consumers and on the functioning of the common market,

HAS ADOPTED THIS DIRECTIVE:

Article 1

The producer shall be liable for damage caused by a defect in his product.

Article 2

For the purpose of this Directive 'product' means all movables, with the exception of primary agricultural products and game, even though incorporated into another movable or into an immovable. 'Primary agricultural products' means the products of the soil, of stock-farming and of fisheries, excluding products which have undergone initial processing. 'Product' includes electricity.

Article 3

1. 'Producer' means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer.

2. Without prejudice to the liability of the producer, any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business shall be deemed to be a producer within the meaning of this Directive and shall be responsible as a producer.

3. Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product. The same shall apply, in the case of an imported product, if this product does not indicate the identity of the importer referred to in paragraph 2, even if the name of the producer is indicated.

Article 4

The injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage.

Article 5

Where, as a result of the provisions of this Directive, two or more persons are liable for the same damage, they shall be liable jointly and severally, without prejudice to the provisions of national law concerning the rights of contribution or recourse.

Article 6

1. A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:

(a) the presentation of the product;

(b) the use to which it could reasonably be expected that the product would be put;

(c) the time when the product was put into circulation.

2. A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.

Article 7

The producer shall not be liable as a result of this Directive if he proves:

(a) that he did not put the product into circulation; or

(b) that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards; or

(c) that the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business; or

(d) that the defect is due to compliance of the product with mandatory regulations issued by the public authorities; or

(e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered; or

(f) in the case of a manufacturer of a component, that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product.

Article 8

1. Without prejudice to the provisions of national law concerning the right of contribution or recourse, the liability of the producer shall not be reduced when the damage is caused both by a defect in product and by the act or omission of a third party.

2. The liability of the producer may be reduced or disallowed when, having regard to all the circumstances, the damage is caused both by a defect in the product and by the fault of the injured person or any person for whom the injured person is responsible.

Article 9

For the purpose of Article 1, 'damage' means:

(a) damage caused by death or by personal injuries;

(b) damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of 500 ECU, provided that the item of property:

(i) is of a type ordinarily intended for private use or consumption, and

(ii) was used by the injured person mainly for his own private use or consumption.

This Article shall be without prejudice to national provisions relating to non-material damage.

Article 10

1. Member States shall provide in their legislation that a limitation period of three years shall apply to proceedings for the recovery of damages as provided for in this Directive. The limitation period shall begin to run from the day on which the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer.

2. The laws of Member States regulating suspension or interruption of the limitation period shall not be affected by this Directive.

Article 11

Member States shall provide in their legislation that the rights conferred upon the injured person pursuant to this Directive shall be extinguished upon the expiry of a period of 10 years from the date on which the producer put into circulation the actual product which caused the damage, unless the injured person has in the meantime instituted proceedings against the producer.

Article 12

The liability of the producer arising from this Directive may not, in relation to the injured person, be limited or excluded by a provision limiting his liability or exempting him from liability.

Article 13

This Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified.

Article 14

This Directive shall not apply to injury or damage arising from nuclear accidents and covered by international conventions ratified by the Member States.

Article 15

1. Each Member State may:

(a) by way of derogation from Article 2, provide in its legislation that within the meaning of Article 1 of this Directive 'product' also means primary agricultural products and game;

(b) by way of derogation from Article 7 (e), maintain or, subject to the procedure set out in paragraph 2 of this Article, provide in this legislation that the producer shall be liable even if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of a defect to be discovered.

2. A Member State wishing to introduce the measure specified in paragraph 1 (b) shall communicate the text of the proposed measure to the Commission. The Commission shall inform the other Member States thereof.

The Member State concerned shall hold the proposed measure in abeyance for nine months after the Commission is informed and provided that in the meantime the Commission has not submitted to the Council a proposal amending this Directive on the relevant matter. However, if within three months of receiving the said information, the Commission does not advise the Member State concerned that it intends submitting such a proposal to the Council, the Member State may take the proposed measure immediately.

If the Commission does submit to the Council such a proposal amending this Directive within the aforementioned nine months, the Member State concerned shall hold the proposed measure in abeyance for a further period of 18 months from the date on which the proposal is submitted.

3. Ten years after the date of notification of this Directive, the Commission shall submit to the Council a report on the effect that rulings by the courts as to the application of Article 7 (e) and of paragraph 1 (b) of this Article have on consumer protection and the functioning of the common market. In the light of this report the Council, acting on a proposal from the Commission and pursuant to the terms of Article 100 of the Treaty, shall decide whether to repeal Article 7 (e).

Article 16

1. Any Member State may provide that a producer's total liability for damage resulting from a death or personal injury and caused by identical items with the same defect shall be limited to an amount which may not be less than 70 million ECU.

2. Ten years after the date of notification of this Directive, the Commission shall submit to the Council a report on the effect on consumer protection and the functioning of the common market of the implementation of the financial limit on liability by those Member States which have used the option provided for in paragraph 1. In the light of this report the Council, acting on a proposal from the Commission and pursuant to the terms of Article 100 of the Treaty, shall decide whether to repeal paragraph 1.

Article 17

This Directive shall not apply to products put into circulation before the date on which the provisions referred to in Article 19 enter into force.

Article 18

1. For the purposes of this Directive, the ECU shall be that defined by Regulation (EEC) No 3180/78 [1], as amended by Regulation (EEC) No 2626/84 [2]. The equivalent in national currency shall initially be calculated at the rate obtaining on the date of adoption of this Directive.

2. Every five years the Council, acting on a proposal from the Commission, shall examine and, if need be, revise the amounts in this Directive, in the light of economic and monetary trends in the Community.

[1] OJ No L 379, 30. 12. 1978, p. 1.
[2] OJ No L 247, 16. 9. 1984, p. 1.

Article 19

1. Member States shall bring into force, not later than three years from the date of notification of this Directive, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith inform the Commission thereof (1).

2. The procedure set out in Article 15 (2) shall apply from the date of notification of this Directive.

Article 20

Member States shall communicate to the Commission the texts of the main provisions of national law which they subsequently adopt in the field governed by this Directive.

Article 21

Every five years the Commission shall present a report to the Council on the application of this Directive and, if necessary, shall submit appropriate proposals to it.

Article 22

This Directive is addressed to the Member States.

Done at Brussels, 25 July 1985.

For the Council

The President

J. POOS

(1) This Directive was notified to the Member States on 30 July 1985.