

**ECONOMICS OF LIABILITY:
AN ISLAMIC VIEW**

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Abstract

This paper navigates through the civil liability legal theory for studying its economic effects. It aims at giving an insight of the Islamic system of liability. To do so, it begins with a brief introduction of what a liability system is through a glance at the experience of the United States in this regard. The American system of liability gives the courts a wide range of authority to assess the injury, which includes material, emotional, and loss of future income opportunity, and the compensation that aims at not only grant the injured a recuperating sum, but at deterring the injurer from such a behavior. The most serious economic outcome of the A system is two folds: the grandiose uncertainty and unpredictability, and the huge amount of grants that represents high cost, and sometimes prohibitive, of liability. This led to long and cumbersome litigation, consumer profiteering, forsake of innovative ideas, and shortage of certain products and services.

The Islamic system of liability centers on the materiality of the injury, both in its causality and in its outcome and provide a listing of compensations. Accordingly, recognizable emotional harm is only the actual one that can be materially checked, and recognizable loss of income covers only that actually forgone income during the off work period caused by the injury. As life and members of Human body are sacred and priceless, the I system leaves it only to revelation to define the amount of compensation for loss of life and bodily members. The main economic outcome of the I system is its predictability and conservative amounts of compensation. The system also assigns a role for the society both in payment of the grant and in benefiting form the compensation.

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Introduction

Risk exists everywhere and in all societies. Life itself, has many risks whether in a primitive desert or forest, or in an industrial city. Contemporary living has more risk of a certain special kind than living in the past, i.e., the risk that arises from materials, "friendly" as they may be, we always deal with material things and substances and they exist all around us.

A legal system of liability aims at compensating the injured as well as deterring potential injurer. The efficiency of such a legal system is measured by its effectiveness in achieving these two objectives subject to the cost incurred to concerned individuals and to the society as a whole. Additionally, liability by definition is an internalization of certain externalities of one's activities. This process of internalization results in the distribution of the cost of injury among the users of goods/services through the price mechanism.

This paper is an attempt to discover the tenants of the Islamic liability system and to examine its economic implications. This is done in the bulk of this paper, PP1-30. Yet to appreciate the importance of the subject, we shall introduce it through a brief overview of the development of the liability issues in the United States. Hence, Section One shows that the sources of liability problems which culminated in the liability crisis of the eighties reside in the essentials of the American legal system of liability which is basically derived from the Roman Heritage, it summarizes the economic implications of the American legal system of liability, the A system. Once we move to the Islamic legal system of liability we find ourselves with different approaches of achieving the objectives of deterrence and compensation and with a different set of results on the economic sphere. In Section Two, I will outline the essentials of the Islamic legal system of liability, the I system, while I will examine the economics of liability under the I system in Section Three.

Section I

The Economic Implications of the American System of Liability

A liability system in a society affects the behavior of producers as well as consumers from several aspects, especially in areas of production decision, which is influenced by the producer's ability to predict or anticipate his cost and return analysis and the attitude of consumers toward exposure to risk-bearing goods and services. Three economic phenomena, intrinsic to the American legal system of liability, will be studied in this section: 1) Difficulty to predict producer's liability, 2) High cost of liability, and 3) Ambiguous effect of liability on consumer behavior.

1. The difficulty to predict producer's liability:

The A liability system, in general, allows courts and juries vast authorities in determining the incidence of liability and the amount of award to an extent that the juries are de facto Lords in this regard (Shapiro, 1991: p.4). The dominance of the court and jury in the A system led to the reflection of prevailing ideas in the society in their judgements. Ideas such as helping the poorer and weaker party, corporations are more able to spread the risk than individuals, confidence in the efficiency of price system in distributing risks, etc., were reflected in the judgement of liabilities and in the amount of awards throughout the 60s and 70s (Viscusi, 199: p.73). This resulted in high level of uncertainty on the part of commodity producers for whom the estimation of this future cost element of present production has become very difficult.

Uncertainty about liability has several sources: (i) uncertainty about the legal standard which the jury and the judge would adopt with regard to commodity defect and/or negligence in behavior of the service provider, (ii) uncertainty about the determination by the judge and the jury of the extent of defect or negligence, (iii) uncertainty about the causality relationship between the defect and the injury, (Priest 1991: p.38), (iv) uncertainty about the cost of litigation and related administrative cost, (v) uncertainty about the possibility of administrative fines, and most important

(vi) uncertainty about the amount of the award which will be granted to the plaintiff (Calfee and Craswell 1984, pp.967-968), specially with the drastic increase in the amount of awards over the last 30 years (Priest 1991, pp.43-44).

By itself, uncertainty is cumbersome for economic behavior although it is at the same time the natural characteristic of future. But exaggeration in uncertainty renders economic decisions more confused and deviates the behavior of even risk neutral persons from optimal behavior (Calfee and Craswell, 1984, pp.975-79), as anticipation is always an integral of economic decisions.

Moreover, exaggerated uncertainty distorts the behavior by unnecessarily increasing the cost of precaution, which is manifested, for instance, in buying more car accident insurance than optimal from the point of view of social welfare. Producers' uncertainty about their future liability is even increased by the inclusion of remote risk in the juries' determination of liability. Remote risk is unpredictable at the time of sale of the commodity whose price is determined in complete isolation of the cost of remote risk liability (Viscusi, 1991, p.73). The difficulty in predictability on the part of producers of goods and services is a landmark in the failure of the A system in achieving the objective of internalizing liability risk as it ended up eliminating certain goods and services from the market, preventing new goods from entering it and reducing spending on research and development related to new goods (Viscusi, 1991, p.73 and Priest 46-47).

2. The Phenomena of High Cost of Liability

Rising cost of liability is a fact of life in the United States through the past several decades (Priest, 1991, p.35). This reached a crisis level in the 80s because of: (i) expansion in the application of the rule of strict liability (ii) evolution in the negligence rule in the practical application of courts toward securing compensation to the injured by charging the stronger party which has always been considered the producer of commodities and/or services, (iii) inclination of courts to give less attention to the motives of the injurer, (iv) increasing adoption of the contribution of the commodity defect to the injury rather than being its sole cause (Priest, 1991, pp.32-39). This resulted in drastic increase in the share of liability in total cost of commodities (Viscusi, 1991, p.71), and in sky rising

compensations. For instance, the average compensation in case of death of an adult male increased from US\$ 233259 in 1975 to \$ 946140 in 1985 although the average hourly wage increased by less than 100% (Broder, 1990, p.51), and average awards in medical liability cases increased more than twice as much as the rate of inflation during the period 1975 to 1985 (Danzon, 1990, p.51).¹

This increase in awards to plaintiff does not tell the whole story of the rising cost of liability as there are two other cost ingredients: (a) administrative and overhead cost borne by the producer in managing his/her liability. This cost reached in certain cases about 20% of the awarded amount (Danzon, 1991, p.52). (b) The social cost borne by the tax payer in administering the liability system. The rise in this cost is indicated by the tremendous increase in the number of law cases in State and Federal Courts. For instance, liability cases related to industrial commodities increased in federal courts more than six times in the period 1975 to 1987 (Viscusi, 1991, pp.73-74). Medical liability cases also increased at similar rates: tremendous increases of liability cases are also observed in Canada and United Kingdom (Danzon, 1991, pp.57-59).²

The rise of the cost of liability forced a decline in production of certain commodities (Priest 1991, p.44). It obscures the efficiency of the liability system and raises questions about the ability of the A system to realize the desired objectives of deterrence and compensation, whether these objectives can be achieved by a less costly liability system and whether the cost of the A system has a negative effect on the efficiency of the economic system itself?

The high cost of liability is apparently efficient if one looks at it from the point of view of internalizing commodity risks. This is obvious specially in those cases where commodities were

¹ Although the period of 1975 to 1985 was a high rate of inflation period, a reference to the increase in expenditures on medical services may be more appropriate. However, the comparison with inflation may be justified by the compensatory nature of the liability awards.

² Liability also has several indirect cost elements which include: the effect of the incidents and the court judgments on the reputation of the producers of goods/services which is reflected on future demand for the product, the effect of the incidence on the future cost of insurance, its effect on the prices of the corporation's shares in the stock market and on the producer's future ability to borrow, the effect of the incidence of future cost of new regulations imposed by the control authority on the whole industry as well as on the injurer and the tax payer's cost of supervising such expanded regulations, future administrative fines, etc.

forced out of the market because of the high liability cost element in their prices. On the other hand, this itself is an indication that consumers or their groups do not have the same evaluation or same information of the risk as the producers since the supply price tag of the commodity does not allow it to find a matching demand. The system is not however, efficient in the case of remote risk because it fails in spreading its cost among users since the cost in this case is either born by producers (bankruptcy cases) or by future consumers.

Moreover, the increasingly high cost of medical liability was not completely absorbed within the price of medical services. A result that may be explained by the structure of the medical services market (Danzon 1991, pp.61-63).

3. The Effect of Liability System on the Consumer Behavior

It may not be difficult to estimate the compensation of pecuniary harm as one may theoretically estimate the effect of the injury on the marginal utility of money of the consumer. However, non-pecuniary injuries are difficult to determine since the cost to the consumer depends on many factors that can only be determined by knowing the actual alternatives available to the consumer and his/her life style (Schwartz 1988, pp.363-370). To the misfortune of the A system, compensation for non-pecuniary harm represents half or more of total awards granted by courts (Viscusi 1991, p.80).

On the other hand there is an element of uncertainty in the behavior of the consumer with regard to submitting claims of liability to courts. This element of uncertainty is however reduced in the United States by the fact that a high percentage of liability suits are taken by attorneys on contingency basis! The thing that led Canada and the United Kingdom to ban contingent fees for liability suits (Danzon 1991, p.58).

On the other hand, the increased application of strict liability instead of the negligence rule may reduce the consumer's care to avoid injury (Schwartz 1988, p.370 and Priest 1991, pp.42-43).

Moreover, an exaggeration in the amount of awards may create a state of negligence on the part of consumer. In general, any deviation of the expected awards from the real cost of the injury injects in the system negative effects on the incentives of either the consumer or producer depending on what direction the deviation takes (Cooter 1991, p.13). Consequently, it is difficult to argue that a third party insurance is more efficient than first party insurance since the latter gives the consumers the right to select what risks they would like to insure and to evaluate expected cost of injury against the cost of insurance.

New Trends in the Liability System:

The liability crisis, which culminated in the 1980's, has been simmering for a long time. One of the early and most important changes in the A system came in the early 30s with the introduction of Workman Compensation (Viscusi 1991, pp.77-82). This system exchanges forsaking the right of suing the employer for a simplified administratively determined system of indemnity, although the workman compensation system is based on a strict liability notion as employers bear the whole cost of its financing. The workman compensation system, however, does not prevent employees from suing the producers of defected machinery and materials. The system's most visible success is in reducing litigation cost and improving the predictability of employers' liability to a great extent (Butler and Worrall 1983, pp.581-583).

The no fault system was also introduced in the car insurance business and there are demands for expanding it to the medical practice and other areas of liability (Danzon 1991, p.64-66). The main feature of no fault system is its putting a cap on the awards through a schedule of indemnity in exchange for simplifying the procedure and reducing litigation cost. The no fault system was also successful in improving the predictability of liability cost and in checking the rise of awards specially by excluding any awards for pain and suffering (Cummins, J.D. and Tennyson S. 1992, p.97). The resort to mutual insurance in the medical profession was another attempt to reform the A system of liability. The mutual medical insurance was more capable than the commercial insurance in obtaining information that allows successful application of experience rating and in reducing the

moral hazards (Danzon 1991, pp.59-60). Other ideas suggested to reform the A liability system include a contributory negligence defense and a distinction between the award to plaintiff and payment of injurer. The contributory negligence defense implies that if the consumer fails to take sufficient care in avoiding the injury, the producer's liability goes to zero if he/she forwarded sufficient design care, instructions and information about the risks of the commodity (Schwartz 1988). The distinction between awards to injured and charges on injurer is based on the separation between compensation objective and deterrence objective by means of a tax as done in the case of workman compensation. (Danzon 1984, specially pp.524-533).

Lastly the most drastic reform in the A liability system came from within through attitude changes on the part of courts and juries. This change in attitudes is called by Henderson and Eisenberg, the counter-revolution. It actually started in the mid 70s as a result of the huge increase in awards that caused the beginning of a rolling back of earlier positions that led to the liability crisis (Danzon 1984, p.517). Changes in attitudes of judges and juries were manifest in a "retreat from prior pro-plaintiff stances", "refusal to extend doctrine" of strict liability and other pro-plaintiff rules. Changes were carried out by both judicial decisions and legal professional studies (Henderson and Eisenburg 1988, pp.489-516). Inter alia, they include "the state of art defense", "state of limitations", "collateral source rules" and "damage rules" (Viscusi 1991, pp.75-76).

Section II

Essentials of the Islamic Legal System of Liability

Liability is discussed by Muslim jurists under the title "*daman*". It is defined as responsibility to pay a financial compensation as a result of an injury inflicted on others (Zarqa 1958, V.I, para 648 and Zuhaili 1982, p.15). *Daman* covers liability in civil as well as criminal cases. Compensated injuries in *daman* include injuries inflicted on the human being as well as property injuries (Zuhaili 1982, pp.15-17 and Faidullah 1983, p.41). In this section we will restrict

our discussions to that part of the *daman* that falls under the conventional meaning of liability i.e. criminal *daman* is excluded.

The I system of liability (*daman*) is applied today in several countries including Saudi Arabia, Jordan, Sudan and Iran. However, there are minor differences among the various legal systems in these countries. Therefore, this study will depend mainly on the Proposed Arab Unified Financial Transactions Law (PAUFT LAW) and the classical jurisprudence works. Articles 264 to 290 of PAUFT LAW³ deal with liability.

The main characteristics of the I system of liability which distinguish it from the A system can be summarized in the following five points:

1. The amount of compensation in body injuries:

In all human injuries, I system provides for a compensation that consists of three components: (i) blood money or wergild, (ii) treatment expenses and (iii) lost income allowance. Human injuries are divided in three categories: (i) loss of life, (ii) major injuries in the head and/or the body and (iii) minor injuries. For the first two categories, the amount of wergild is determined by the Prophet Muhammad. This is unanimously agreed upon in the various schools of jurisprudence and is referred to in Article 277 of the PAUFT LAW. In case of death, the amount of wergild is 100 female camels or its equivalent.⁴ Compensation for major injuries is fixed as percentages of the wergild for the loss of life. These include loss of an organ such as an eye or hand, a sense such as hearing or tasting, or major wounds in the head and/or body.⁵ Minor wounds are left

³ The Proposed Arab Unified Financial Transaction Law (PAUFT LAW) is derived from the Islamic jurisprudence (*Shari'ah*). It was approved by the General Committee to Unify Legislation in the Arab League's Countries, Tunis, 1984.

⁴ The money equivalent of 100 female camels stated by jurists of all Islamic schools of jurisprudence is 1000 golden *dinars* which equals 4250 grams of gold (Faidullah 1983, pp. 129-130 and 139-140). At the gold price of March 31, 2000 (US\$ 295 an ounce), this amount equals US\$ 43,474.

⁵ Major injuries whose wergild is fixed in Islamic law are the following:

<u>Injury</u>	<u>Amount of wergild</u>
1. Loss of life	100% (100 female camels)

to be determined by the court on the discretion of expert juries as percentages of a unit of full compensation for loss of life (Faidullah 1983, pp.146-155).

All human injuries, regardless of the injured's economic and social status, ethnicity, color, religion, age, etc., are treated equally, i.e., the amount of wergild is the same regardless of present, past and future wealth and income of the injured or any changes in the injured's marginal utility of money. This is an essential tenant of the I liability system, which derives its rationale from the fact that all human beings are equal and all differentiations are either artificial, judgmental, or speculative.

However, contemporary Muslim jurists did not define a contemporary equivalent of 100 female camels. Whether this equivalent should be calculated on the basis of prices of camels in our days and if so in what country? Is it in the same area where the Prophet lived, i.e., Makkah and Madinah? Or else in what other area? Or should an equation be derived on the basis of, say, the cost-of-living equivalent of 100 female camels at the time of the Prophet? Or the labor-wage equivalent of the same quantity of camels at that era? Settlement of these questions is still awaited for. However, determination of the 100 camel's equivalent is not left to the court to decide on a

2.	Loss of a sense (such as seeing, hearing, mind, taste, etc.)	100% (100 female camels)
3.	Loss of a single organ (such as tongue, nose, hair, etc.)	100% (100 female camels)
4.	Loss of an organ of whom there are two In the body (such as an eye or a hand)	50% (50 female camels)
5.	Loss of an organ of whom there are four in the body (such as an eyelid)	25% (25 female camels)
6.	Loss of a finger in hand or foot	10% (10 female camels)
7.	Loss of a tooth	5% (5 female camels)
8.	Hand wounds:	
	- if it reaches the bone	5% (5 female camels)
	- if it breaks the bone	10% (10 female camels)
	- if it displaces the bone	15% (15 female camels)
	- if it reached the membrane of the brain	1/3 (33 and 1/3 rd female camels)
	- if it reaches the brain	1/3 (33 and 1/3 rd female camels)
9.	Bodily wounds:	
	- if it reaches the inside of the abdomen	1/3 (33 and 1/3 rd female camels)
10.	Other injuries' compensation is to be determined by the court on the basis of experts' opinion within the guidance of the above.	
11.	Compensations of bodily injuries are accumulative, i.e., if more than one organ is injured, you add together the compensation of each and all injuries. For instance, loss of the nose plus one ear and two eyelids gives 200% of the wergild.	

(See: Zuhaili 1982, pp. 344-348).

case-by-case basis. It must be decided on a grandiose basis for the whole society by means of legislative action, based on the givings of the Sunnah (the Prophet's tradition) and involvement of the Ummah).⁶

The expenses of medical treatment are the second part of the compensation mentioned in article 277 of the PAUFT LAW. It is defined as the expenses required to reach the state of full cure (Zarqa 1988, pp.137-140). This compensation element is based on actual payment or accrual and subject to court verification and discretion.

The third component of injuries' compensation is lost income. It is mentioned in articles 270 and 277 of the PAUFT LAW. Lost income that is subject to compensation is that which was known and secured at the time of injury, it does not include probable future income (Zarqa 1988, p.118).

Keeping in mind that property damages are easily estimated, the area left to judiciary discretion is very limited in the I system as compared with the A system.

2. Factual rather than intentional basis:

The I system of liability is based, to a large extent, on the material incidence of harm rather than looking into the motives and aptitude of the injurer. Therefore, liability in the I system is related to a factual incidence that a harm is done to someone (PAUFT LAW: 264).

For instance drowning of a child who is entrusted to a professional swimming instructor to teach him how to swim is a fact sufficient for determining the instructor's liability. Also, a car driver is responsible for the injury inflicted by the car even if it went completely out for the driver's control (Zarqa 1988, pp.73-88). The defense of *force majeure* is acceptable only if the injurer is completely deprived of own will that he/she becomes like a plain tool that moves without any will (PAUFT LAW: 266). This implies the adoption of a form of strict liability with regard to the injurer by direct

⁶ In Saudi Arabia, the Supreme Judicial Council sets the equivalent of a hundred camel in Saudi Arabian Currency, Rial, at SR 100,000 (US\$ 27,000).

action (see No. 3 below). It is rationalized on the ground that an injury requires compensation and whoever made the injury should be liable for it.

3. Direct versus indirect injurers:

The I system distinguishes between two kinds of liabilities. The liability of the direct injurer whereby the action effects the injury directly, such as a car driver hitting a pedestrian; and liability of indirect injurer whereby the action of the injurer causes but not directly effects the injury, such as a defect in the break system of a car. Whenever there is a cause and a direct action together the injurer by direct action is the one who is liable for the injury (PAUFT LAW: 265). Exceptions to this rule are five cases, determined in the law as follows: (1) When the direct action is founded on the cause, (2) when the indirect injurer misleads or forces the direct injurer, (3) when there is an ill intention on the part of the indirect injurer, but not on the part of the direct injurer, (4) when the indirect action is the most effective in creating the injury and (5) when it is impossible to make the direct injurer liable for the injury (PAUFT LAW: 265). Jurists provide examples and rationale for each of these exceptions.

The distinction between injury by causation and injury by direct action has its impact on commodity liability since in most cases of commodity injuries the direct injurer is the consumer while the indirect injurer is the producer/seller, and unless one of the above mentioned five circumstances is proven the liability of the direct injurer is maintained. This distinction is reflected in a negligence -rather than strict- basis for commodity liability. This requires the producer to take necessary safety measures in accordance with the prevailing state of art. Therefore remote risk is completely disregarded unless it is known to the producer (Zarqa, 1988, pp. 75-76).

4. Creating a Social Insurance System for payment of compensation

Recognizing that the injurer did not intend to make the harm and that the amount of compensation may be beyond the injurer's means and ability to pay the Islamic liability system created certain form of insurance that assures the payment of the compensation to the injured.

This insurance system is called *al 'aqilah*. It is mentioned in Article 273 of the Jordanian Civil Law. It aims at guaranteeing payment of compensation to the injured (Zarqa 1988, p.133). It requires that whenever a wergild for loss of life or major human injuries is charged, the responsibility for its payment is distributed over the members of family and/or tribe of the injurer. This system is based on an ancient tradition of Arabian tribal solidarity. However, the I law maintained the financial aspect of the *'aqilah* system. It redefined this kind of social solidarity and restricted it to financial support only in the case of payment of wergild in liability cases, i.e., it excludes financial liability resulting from a criminal act, as well as non-financial liability such as taking human ransoms. Many jurists also include in *al 'aqilah* neighbors and professional associates and colleagues of the injurer. *Al 'aqilah* is the only exception of the known rule in Islam that "no one is responsible for others' deed or creed" which is stated in the verse 6:164 of the Qur'an "no bearer of burden shall bear the burden of another" (Zarqa 1988, p.133).

The contemporary application of the system of *al 'aqilah* is not yet agreed upon by the Muslim scholars. Some of them suggest that professional associations and trade unions should take this responsibility while others suggest that the injurer alone should be charged with it, and if he/she fails because of insufficient resources the Government treasury should step in and ensure that complete payment of compensation is made to the injured. Apparently, *al 'aqilah* approach is a form of insurance based on a certain social bondage between the injurer and his/her family, tribe, neighbors or fellow professionals. It seems that the most appropriate modern form of this approach would be a cooperative insurance based on a bondage of exposure to liability. Potential injurers who are exposed to similar liability would be members in this cooperative insurance body.

5. Obligatory Philanthropic contribution in case of loss of life:

If the injury results in a loss of life, the I system of liability requires a kind of social compensation because "loss of life is exceptionally significant" (Faidullah 1984, p.141).

This compensation is called *kaffarah*. It is mentioned in verse 4:92 of the Qur'an that requires the injurer to liberate a slave in case of loss of life. Muslim jurists stipulate that if there were no slaves, then a charitable donation of an amount equivalent to the value of one slave should be given to the poor and needy (Faidullah 1983, pp.37-38 and 142-143). If this amount is also beyond the means of the injurer the Qur'anic verse referred to above provides for a substitute of two consecutive months fasting on the part of the injurer as a spiritual rehabilitation for the purpose of making him or her more cautious and careful in the future (Faidullah 1983, p.143).

Section III

Economics of Liability under the Islamic System

In this section we will study the effect of the I liability system on (1) producer's predictability, (2) The objective of compensation, (3) The objective of deterrence, (4) The role of the Government, (5) The economic and social effect of *kaffarah*, and (6) producer and consumer equilibria under the I system of liability.

1. Producer's Predictability

It goes without saying that predictability of liability is the key to its internalization, as producer's equilibrium cannot be revised to include the burden of liability without the ability to anticipate certain dollar amount of this burden. Under the assumption of profit maximization,

predictability of liability is essential in determining the amount of investment the producer would make to avoid the injury while maintaining producer's equilibrium.

Several factors influence the predictability of producer's liability. These include producer's expectations of the behavior of consumer with regard to the safety of the commodity, degree of risk aversion of the producer, producer's expectations about behavior of the judicial system and the amount of award granted, etc. The effect of the I system of liability on predictability will be looked at from three angles: the court's authorities, the determination of the amount of award and the compensation of lost income.

(a) The authority of the judiciary

Three principles in the I liability system reduces the area of court authority. First, the I system of liability opted to put a fixed list of wergild (a price list) for human injuries. This is itself a major limitation on the authority of the courts, since property damage does not usually represent high proportion of the total award in most liability cases. Besides property damage is more predictable than human injury. Second, the I system of liability does not provide for compensation of certain non-pecuniary harms such as libel cases in which no financial disadvantage is inflicted on the injured (Khafif 1971, V.I, pp. 55-57 and Zarqa 1988, p. 85). This is based on the stipulation that such damages are above compensation and any financial compensation does not render the injured to pre-injury state. Third, the two principles of priority of injurer by direct action over injurer by causation and of material ground of injury further reduce litigation procedure and limit the area left to the court's discretion.

The limitation of court's authority and the detailed legal treatment of liability increase producer's predictability and allow him/her better anticipation of monetary value of risks involved. Moreover, the strict conditions required for proving liability of injurer by causation further improve the predictability of producer's liability under the I system.

(b) Fixed wergild

The price list of body injuries allows commodity producers to determine the amount of awards in advance once the expected risk is determined. This works in a manner similar to an indemnity system as it reduces uncertainty about future. Additionally, the distribution of liability burden through *al 'aqilah* system not only reduces the amount of the burden of an injury but also allows the producer better expectation of his/her share of the compensation.

(c) Compensation for Lost Income

On the other hand, PAUFT LAW: 270, and Jordan Civil Law: 266 introduced a compensation for lost income. This undoubtedly adds an uncertainty element into producer's liability, as the amount of lost income is not easy to predict. However, Islamic jurisprudence emphasizes that whenever lost income is recognized in liability cases, it is only that income which has already been secured or contracted that is subject to compensation. Anticipated future income or any loss of income that involves a probability element is not covered (Zarqa 1988, p. 118 and Khafif 1971, V. II, pp. 60-66 and 112-113).

2. Objective of Compensation

It would be interesting to consider whether the amount of awards in the I liability system achieves the objective of compensation or not. In this regard it will be useful to restrict our discussion to human injuries since compensation of property damage is usually small relative to human injuries.

Islamic scholars distinguish between three kinds of injuries inflicted on human beings: (1) injuries on the body, (2) injuries of sentiments, feelings social status and financial reputation,⁷ and

⁷ This kind of injury is considered subject to compensation only to the extent that it entails an actual financial loss or a material harm that is inflicted on the injured, keeping in mind that pain and suffering are considered a form of material harm (Zarqa 1988, pp.121-127).

(3) abstract injuries which are defined as injuries without financial implications (Khafif 1971, V. I, pp. 54-56).

Injuries of social status, moral injuries and abstract injuries are considered above compensation in material or financial terms. They are a kind of social and moral crimes, i.e., they are punishable through the Islamic penal code, but no financial compensation can be given to the injured. The status of the injured can be rendered to pre-injury state by declaring the falsehood of the injurer and punishing him/her. The punishment of the injurer in those kinds of injuries renders reconsideration to the injured. Removal of these categories of harms from the list of injuries that can be compensated reduces the amount of compensation.

Let us now look at the price list of injuries and see whether prices quoted fulfill the objective of compensation. This requires a quick glance at the economic conditions of the society of Madinah during the lifetime of the Prophet Muhammad (622 to 633 CE) when the price list was ordained. There are several historical indications that labor compensation was in the neighborhood of one *dirham* a day.⁸ There are also indications that one *dirham* would be sufficient to buy food items for a family of four to five persons including meat, bread and date (Kahf 1991, pp. 32-38). This implies that the amount of wergild for the loss of life equaled more than the total earnings of one person for eleven years. Moreover, camels for the Arabs of Prophet's era were almost the sole capital item, they were a standard measure of wealth, source of food and clothing, source of residence for the nomads and the only means of transportation in the Arabian desert (Kahf 1991, pp.24-27). One hundred female camels made a huge fortune that only tribal chieftain and most wealthy traders can afford to keep.⁹ The amount of wergild equaled twenty times the amount of standard richness with regard to the payment of *Zakah* (the Islamic alms) that is the financial duty on the rich to help the

⁸ *Dirham* was the unit of silver currency at that time. One *dirham* equals one tenth of the golden *dinar* that is the golden unit of currency. The amount of compensation for loss of life that is one hundred female camels equaled ten thousand *dirham* at the time of the Prophet Muhammad in Madinah.

⁹ See for instance the bibliography of the Prophet by Ibn Hisham (in Arabic), V. IV, pp. 139-140 and Al Kamil by Al Mubarrad (in Arabic) V. II, p.267.

poor.¹⁰ A family who owns one or two female camels would have sufficient capital to provide for the family's living in terms of milk, meat, cloth, transportation and source of monetary income too.¹¹

This may imply that giving one hundred female camels in that society was tantamount to making the injured (or his/her family) very rich and to provide them with a capital sufficient to make them on the top of the scale in terms of economic status in the society. This also implies that the amount of compensation is determined as a means of providing not only compensation but also reconciliation and condolences that aim at pleasing the injured and making him/her forget all about the injury. This may, perhaps, be the only explanation of what the jurists talk about that compensation does not only cover the benefit of the lost organ but its beauty too [Ibn Qudamah (circa 1223), *al Mughni* [in Arabic], V. 5, pp. 383-385) and that wergild is set very high to the extent that makes it difficult or even impossible for the injurer to pay it. This emphasizes that the objective of compensation and condolences is the most important aim of the award. This indication is strengthened by the following two points:

(a) *Al 'aqilah* system aims at attenuating the financial burden of the injurer. Hence the amount of award is not essentially utilized as a means to force revision in the injurer behavior. This is consistent with the stipulation that liability is a result of an error rather than intention on the part of the injurer. It is also consistent with the separation between the objective of compensation and condolences and the objective of deterrence. Moreover, jurists often mention that *al 'aqilah* system is invoked in order to guarantee that a compensation is paid because the injurer alone may not be able to handle its payment (Zarqa 1988, p.131). Hence *al 'aqilah* implicitly recognizes that the amount of compensation is usually beyond the capacity of injurer, i.e., it is aimed for compensation and reconciliation of the injured.¹²

¹⁰ In *Zakah*, that who owns five camels is considered rich and requires to pay *Zakah* annually. On the other hand, that who owns 1 female camel is considered satisfied enough so that he/she should not be given charity from *Zakah*.

¹¹ See for instance the bibliography of the Prophet by Ibn Hisham (in Arabic) V. I, p. 173 and the bibliography of Umar Ibn Al Khattab by Ali and Naji Tantawi, p. 110.

¹² This unlike criminal liability where the financial compensation is charged to the injurer. Hence the award is used as a deterrence in criminal liability (Zarqa 1988, p. 132 and Khafif 1971, V. II, pp. 176-181.)

(b) The I system invoked other means rather than the award for deterring potential injurers as will be seen in the next subsection.

3. Objective of Deterrence

The I system utilized tools of deterrence that preserve the separation between the objective of compensation and the objective of deterrence. The first and most effective tool for deterring potential injurers is a supervisory authority that controls the markets and supervises the observation of legal, ethical, health and safety principles and procedures. This is a form of market ombudsman (*Muhtasib* or *Hisbah*) which was established as an independent state agency as early as 637 during the reign of 'Umar, the Second Successor of the Prophet.¹³ This *Hisbah* agency developed safety regulations for all crafts and trades that were observed throughout Muslim cities in the Middle Ages.¹⁴ Other tools consist of fines imposed by the authority and/or judiciary in the form of tax on injurers (Zuhaili 1982, pp. 311-313) and regulatory instructions by the control authority of industries and commodities that may involve risks to users and consumers. Violation of these regulatory instructions may be punishable by imprisonment and/or fines. Additionally the members of the *al 'aqilah* would have self-interest in imposing social and moral means of deterrence on the injurer. And finally the responsibility of the injurer to pay the part of the compensation that could not be collected from *al 'aqilah* and the injurer's responsibility for philanthropic contribution, *kaffarah*, are also deterrence tools since they represent direct financial cost to the injurer.

¹³ There are several reports that the Prophet, himself, used to inspect the markets.

¹⁴ See for instance:

- Ma'tuq, Abbas R., *al Hisbah in Iraq until the era of Ma'mun* (Arabic) (# 830 CE), Tihama Publishers, Jeddah, Saudi Arabia 1982.
- Al Shizari, Abdulrahman, Circa 1372, *Al Hisbah* (Arabic), 2nd ed., Dar al Thaqafah, Beirut, Lebanon 1981.
- Abuzaid, Siham *Al Hisbah in Egypt until the Mamluk era* (Arabic) (# 1540 CE).
- As Sakati de Malaga, Abu Abdallah, circa 1125, *Adab Al Hisbah* in Muslim Spain, translated and published in French under the title *the Manuel Historique de Hisba* by Librarie Ernest Laroux, Paris, France 1931.

Deterrence of the Consumer

Two means are used in the I system for the objective of inducing consumer to avoid injury and reducing moral hazards: 1) The exclusion of certain injuries from compensation, 2) The distinction between liabilities of direct injurer and indirect injurer along with the difficulty of proving negligence in case of indirect injurer. This is in addition to the contributory negligence defense that requires that the consumer bears partial responsibility for the injury in proportion to the effect of negligence on his/her part (PAUFT LAW: 269, Khafif 1971, pp. 90-101 and Zarqa 1988, pp.116-117).

Incentives for Safety Measures in Commodity/Service Liability

The PAUFT LAW did not provide a definition of the safety measures required by producers. Apparently leaving it to the control authority as these measures differ according to industry and circumstances. However, looking into our rich heritage of jurisprudence, we can derive the kind of safety measures required from the actual examples given by jurists. Muslim jurists gave many examples, some of which are the following:

1. If a judge sentences a man to death on adultery charges, then it was found out that the man's organ was in fact cut off (i.e. he was sexually impotent), the judge is liable because being cut off should have been known to the judge (Ibn Rajab, circa 1393, p. 308).
2. If a judge sentences a person to death on the basis of witnesses' testimony then it was found out later that the witnesses were reputed liars, the judge is also liable because such a reputation should have been known to the judge (Ibn Rajab, p. 309).
3. If a lady had a miscarriage because she was frightened by a call from the Governor, the Governor is liable because he should have checked whether she was pregnant or not (Quoting Ibn Al Najjar, circa 1654, in his book Muntaha al Iradat, Zarqa 1988, p. 76).
4. A person who digs a hole in a public lot without proper permission from the authority

is liable for a person who falls in it, but the digger is not liable if the other person was pushed in the hole by a third party. However, if the digger has a permission and took sufficient measures for safety and warning he would not be liable for the person who falls in the hole (Ibn Rajab, p. 307).

5. A person who passes in a market while holding a dangerous material such as sword or an arrow is required to keep its edge within the person's fist so that it does not endanger other people. In all places of common use such as streets and markets there is always an implicit condition of "common-sense safety without negligence" for users of these places (Khafif 1971, V. I, p. 39 and Zarqa 1988, p. 172). Safety measures and pre-cautions are more emphasized when dangerous materials are handled. In handling dangerous materials, excess of one's limit is presumed if an injury happens, i.e., in handling dangerous materials such as an untamed animal, a weapon or an ox, the mere injury is considered an indication of negligence (Faidullah 1983, pp. 186-187).
6. A person who performs circumcision on infant boys is liable if he cuts more than he should (Zarqa 1988, p. 45) citing an action of charging such a person for his medical errors by 'Umar, the Second Successor after the Prophet).
7. A person who practices medicines without being known of having studied medicine or without proper licensing is liable for any injury regardless of negligence whereas a licensed physician is only liable for negligence, error and lack of necessary care (Zarqa 1988, pp. 29-30).
8. Swimming instructor is liable for the drowning of a child while he/she is teaching the child how to swim, as the mere fact that the child drowned is an evidence of negligence (Zarqa 1988, p. 82).
9. Mistakes by witnesses in courts even without intention or negligence make them liable because a witness is supposed to have maximum care and precaution to tell the plain truth only (Zarqa 1988, p. 40).
10. Remote or exceptional harm of a material or a service results in the liability of the injurer if he/she knew about the possibility of the injury (Zarqa 1988, pp. 75-76).

11. One's action within one's own property or exercise of one's own legitimate right relieves one from any liability except in the case of abuse of one's own right such as doing the action only for hurting other people (Khafif 1971, V. I, pp. 96-101 and Zarqa 1988, pp. 71-72).

From these examples one may deduct five rules related to precautions and safety measures as follows:

- (a) More safety measures are required for actions outside one's own property and rights than for actions within one's own property and rights.
- (b) The nature of the commodity and service affects the level of precautions and safety measures required. Dangerous materials and services call for larger investments in safety measures and precautions than normal goods and services.
- (c) The degree of safety measures also differs in accordance with the qualifications of potential injurers. Unqualified or unlicensed practitioners are required to invest more in safety than qualified practitioners.
- (d) The state of art and the professional opinions are major determinants of negligence.
- (e) The number of people exposed to potential injuries is also important in determining the required level of safety measures, i.e., extra safety measures are required for walking with dangerous materials in a crowded market¹⁵ than for holding such materials in empty areas.

4. Role of Government with regard to Liability in the I System

This subsection will study the role of the government in compensating the injured, deterring potential injurers and protecting the environment. A digression is added on compensating the injured in crimes because of its relevance.

¹⁵ This has, in a sense, analogy to verse No. 24:19 of the *Qur'an* that distinguishes between an act of misdeed and the spread among many people of an act of misdeed.

(a) The role of the Government in compensating the injured

The I system of liability considers the Government a last resort for payment of compensation of the injured if *al 'aqilah* could not afford payment (Ibn Hazm, circa 1064, V. 9, p. 402). This payment is financed by the taxpayers' money unless some other arrangement is made.

Some jurists suggest that in a contemporary society, where family and tribal bondage are either loose or non-existing at all, professional associations and trade unions should play the role of *al 'aqilah* (Faidullah 1983, p. 136 and Zarqa 1988, pp. 132-136). However, this proposal may not be consistent with the conventional role of these organizations, and it may reduce their membership and over burden them with responsibilities they may not be prepared to take.

One may argue that since *al 'aqilah* is a system of mutual insurance why not having the Government impose membership in a mutual or cooperative insurance body as one of the conditions for indulging in the production of goods and services that involve liability. In other words establishing a new *al 'aqilah* on the basis of a common bondage which is the exposure to certain kind of liability such as medical practice liability, passenger transportation liability, commodity production liability, etc.

(b) The Role of Government in deterring potential injurers

According to the I system, the Government is charged with providing a regulatory system for safety measures related to the production and distribution of goods and services. This is one of the objectives of *Hisbah*. *Hisbah* in Islam means the supervision over the market with regard to abiding by commodity safety rules, fair play of the market forces, and general compliance of ethical values and legal regulations on the part of the actors in the market. A system of licensing for medical practice was introduced as early as the 9th century CE in Baghdad, Cairo, Damascus, Isfahan, Cordova and other major Islamic cities. *Hisbah* authority used to depend on professional experts in each profession in determining standards of safety rules. Regulatory fines may also be imposed in

case of violation of safety standards provided that these fines are not paid to the injured. However, fines' proceeds may be used to support the mutual insurance organization and/or research in safety measures. Physical punishment and imprisonment may also be used as a deterrence tool in certain cases. (Consult *Hisbah* chapter in any Fiqh book.)

(c) Role of Government in Environment protection

The I system also charges the Government with the responsibility of protecting future generations. In addition to the general Islamic guidance which is derived from the basic role of Government in Islam as defined in the Islamic political system,¹⁶ the practice of 'Umar, the Second Successor of the Prophet, may be quoted when he specifically considered the Islamic Government responsible for the well being of the future generations (Abu 'Ubaid, circa 839, pp. 57-59).

The welfare of future generations will remain a public good subject basically to collective decision and a value judgement matter that is determined through the social objectives of a nation (Howarth and Norgaard 1992, pp. 473-477). This implies that internalization of environment protection can only be achieved through Government regulations. In this regard one should recall that the I system calls for more precautions when potential injury affects larger number of people and property. Additionally, the Islamic price list of human injuries helps reducing uncertainty about evaluating future injuries.

(d) Digression: Compensating the Injured in Crimes

The state responsibility as a final resort for compensating the injured in liability is very close to its responsibility in compensating injured in criminal actions. Although this issue is not, usually,

¹⁶ Ibn Khaldun, circa 1406, defines the role of Islamic government as managing the affairs of people in accordance with implications of Islamic rationale in procuring their hereafter's interests and worldly interests related to the former *Muqaddimah* [the Introduction] Sha'b ed., Cairo, no date, pp. 169-170. See also Kahf, Monzer "The Islamic State and the Welfare State", in Tariq Quraishi, Contemporary Islamic Movement, American Trust Publications, Indianapolis, Indiana 1985.

included under liability studies, it has vivid similarity and its brief investigation sheds light on the issue at hand. The I system maintains the following points: (1) The main instruments to prevent crime are education, safety protection and a strong penal code with minimum loopholes. (2) The criminal is responsible for property damage and personal injuries inflicted on those affected by crimes. (3) No blood is wasted. This is an important rule in Islamic law. It means that blood may not be shed except as a result of a court judgement according to the law. Any blood shed otherwise must be compensated either in terms of punishment of the blood shedder or in terms of a financial wergild. (4) The Government is responsible to compensate those affected by crimes in which criminals are not captured (Showkani, circa 1835, V. 7, pp. 37-41).¹⁷

Government responsibility for compensation of persons injured in crime gives additional strength to the argument for its responsibility for the injured in liability cases, especially that the I system of liability is more geared towards the objective of compensation.

(5) The economic and social effect of *Kaffarah*

As an obligation on the injurer in the case of loss of life, the *kaffarah* represents a social support to the philanthropic activities in the society. It aims at compensating the society for the loss of one of its members. The I system does not attach any conditions to the *kaffarah* payment except that it should go to the poor and needy as a charity.

(6) Producer and consumer equilibria under the I system

(a) Producers equilibrium

The introduction of liability in the cost of production has two implications: (i) Introduction of new cost element to pay for the externalities (liability), and (ii) An increase in the degree of

¹⁷ Showkani quoted an instance during the time of the Prophet where a person was slaughtered and the criminals could not be identified. The Prophet paid from the public treasury a blood money, one hundred female camels to the family of the deceased.

uncertainty because the cost of future liability has more uncertainty than other items of cost. The I system provides better predictability of liability cost than the A system as we have seen earlier. This means that the distribution of probability attached to the expected amount of awards as well as to the realization of incidence of liability by court, has less variance in the I system than in the A system. Additionally, the cost of philanthropic contribution (*kaffarah*) is also known in advance. Add to it that the distribution of the cost of bodily injuries among the members of *al 'aqilah* does not only reduce the cost of individual injuries but also reduces its uncertainty because it spreads risks.

Al 'aqilah system incorporates an altruistic element in the producer's behavior as it makes each producer's cost dependent on commodity risks of other fellow producers. This requires a keen attention on the part of each producer to reduce liability exposure of other producers, thus effecting a social effort to reduce the commodity risk in the society as a whole. But, if *al 'aqilah* takes a form of cooperative insurance in which premiums are based on experience rating of individual producers this altruistic element would be reduced, and with perfection of the experience rating charge system, it converges to having each producer carry only the cost of his/her liability alone as in the A system.

(b) Consumer Equilibrium

The consumer under the I system also has better predictability of the awards in case of injuries. The price list of bodily injuries negates any differentiation on the basis of marginal utility of the money of the consumer. Therefore, it will be difficult to show the effect of incorporating the compensation element in consumer equilibrium without knowing more about the pre-injury marginal utility of consumer's money. Hence, under the I system, compensation payment may create consumer surplus or deficit depending on the pre-injury marginal utility of money of the injured.

On the other hand, the causality rules of the I system discourage the consumer from suing producers for liability. This implies an increased personal incentive to avoid the risk involved in using the product. In other words, the consumer would like to invest in protecting other utilities

from loss as a result of the injury which may not be compensated under the I system. This effect is emphasized by excluding certain injuries from the compensation.

Conclusion

This paper did not intend to claim any superiority for the Islamic system of liability, although the writer believes in this superiority.

Civil liability centers on loss of life and body injuries. Life is priceless and the human body is sacred. Allah says, “ We have truly honored the children of Adam.” (17:70). No human being can claim an ability to put a price on life or human body parts and any such attempt is not only arbitrary but also immoral. Did Shari’ah provide a price list of life and members of the body? Allah says, “If any one slew a person- unless it be for murder or for spreading mischief in the land- it would be as if he slew the whole human race” (5:35). Yet since day one, on this earth, there are cases where a person is killed by mistake, without any ill or evil intention by the killer, there are also body injuries done the same way. This is more so in the age of machines rolling on the streets and in factories, and of almost every thing we eat or use at home, in the office, on land or on the sea, has gone through a manufacturing process that may harm some of us one way or another. There is always a need for a system that compensates the harmed and deters the injurer by forcing her/him to be more careful, and more considerate to the men and women who will use his products or services...

Would we be better off if we leave the basic functions of compensation and deterrence of such a system to courts and judges, who are all environmentally affected and brain-framed? Or if life has to go on anyway, we would be better off if we have a system that allows both non-cheating consumer and non-intending nor negligent producer to predict the outcome of injuries and life loss.

This paper studied the tenants of the Islamic civil liability system and analyzed its economics. Essentially the Islamic system depends on direct causality of a harmful action, regardless of the actor (whose inner is basically a matter of criminal, not civil justice). It also finds in the damage an objective harm that must not go inside the injured person, keeping in mind that all children of Adam are equal. A compensation must not fluctuate from a court to another, from a

judge to another, from a city to another, or according to wealth, color, education, age, religion, sex, race or any other circumstances of the harmed or the injurer. Where can we find such an objective list of compensation except in the Divine revelation?

Predictability is one of the main characteristics of the Islamic system of civil liability. This provides the producer with better chance of planning and pricing, and while it compensates the injured it deters consumers from exaggerating their demand for compensation.

By involving the community (or society) on the side of the injurer, through the aqilah principle, as well as on the side of the injured, through the Kaffarah principle, the Islamic system recognizes the role of the society in the injury and its right to be compensated too.

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