

Product Liability in Pakistani Law and Islamic Law: A Comparative Study

*Dr. Muhammad Akbar Khan **

*Dr. Mohyuddin Hashmi***

ABSTRACT

In Pakistan consumer protection legislation started in 1995 and is still in the development phase of its product liability jurisprudence. "Product Liability Law" is the area of law in which manufacturers, distributors, suppliers, retailers, and others who make products available to the public are held responsible for the injuries those products cause. The research paper is aimed to explore the existing product liability laws in Pakistan and provide a deep insight into the civil liability of producers, suppliers and retailers of defective and unsafe products under Pakistani legal system with special reference to Islamic law. It has analysed that whether or not the existing regime of product liability in the country is in conformity with Islamic law. Moreover, is it suitable for the ultimate consumers to rely upon the same or there can be betterment in the laws for ensuring protection of consumer rights. The research paper is based on the qualitative research method to describe, analyse, criticise and compare the basic notions of product liability laws in both Islamic and Pakistani laws. The paper has been concluded with that the Pakistani laws on product liability lacks consistency and adequate legislation should be enacted to overcome deficiencies in it. The help should be taken from Islamic law in this regard. The paper asserts the need for application of the strict product liability regime within the framework of Islamic law should be adopted to ensure adequate protection of the consumers.

Key Words: *Product, Liability, Regime, Pakistan, Islamic Law.*

* Assistant Professor (Law) International Islamic University, Islamabad.

** Professor/Dean, Faculty of Arabic and Islamic Studies, Allama Iqbal Open University, Islamabad.

Introduction

Product liability is the term used to identify the body of law that seeks to hold manufacturers and sellers financially responsible for their products' safety. Product liability is the area of law in which 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.⁽¹⁾ 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 was greatly felt. Product Liability law is the body of law which solves this problem and provides compensation for physical injuries and property damage resulting from defective and unreasonably dangerous products, and from the failure of a manufacturer or seller to warn the consumer of product dangers. 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 behavior 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.⁽²⁾ The basic purpose of the product liability law is to insure the consumers right to safety as emphasised in the United Nations Guidelines for Consumer Protection.⁽³⁾ Product liability is a modern phenomenon, 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.⁽⁴⁾ Solutions have sometimes been developed by the courts out of

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- (1) Restatement (Third) of Torts: Products Liability, § 19.
 - (2) 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.
 - (3) Department of Economic and Social Affairs, 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 23-07-2013).
 - (4) 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 (*Jhon Salmond*, Jurisprudence, Chapter on *Liability*).

existing legal principles, and at other times, solutions have been created by legislatures. Because preexisting 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. ⁽¹⁾ Product liability is actually the attempt to answer the question of 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
- _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. One has to decide. Good arguments exist for each of these solutions. ⁽²⁾

Product Liability Legal Regime 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. 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, or facilitating litigation etc. ⁽³⁾ Initially, the law of consumer protection is based on the “*Caveat Emptor*” (let the buyer beware), which

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- (1) 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.
 - (2) Hans Claadius Taschner, *Product Liability: Basic Problems in a comparative law perspective*, book chapter in *Product Liability in Comparative Perspective*, edited by Duncan Fairgrieve, Cambridge, 155.
 - (3) Peter Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK*, Cambridge University Press, 1.

imposes the burden of and responsibility regarding the addition to those laws whose basic concern is consumer protection such as prosecution of fraud, protecting property 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 consumer protection law 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.⁽¹⁾

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. 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. 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 Act, 1940 protected consumers from malpractices in the drugs industry.⁽²⁾ The basic purpose of these laws was to regulate the conduct of business or punish the one who violates the law. But it has never discussed how to compensate the ultimate consumer. Particularly in cases of product liability which developed in the famous English case *Donoghue v Stevenson* (1932). 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⁽³⁾, The Pakistan Hotels and Restaurants Act, 1976⁽⁴⁾, The Pakistan Standards and

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- (1) For a detail discourse on contract/tort dichotomy in product liability cases see Alister M. Clark, *Product Liability*, 25.
 - (2) 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.
 - (3) 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
 - (4) 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.

Quality Control Authority (PSQCA) Act, 1996⁽¹⁾ (the authority is concerning the product safety and not the issue at hand i.e. product liability), The Pharmacy Act was enacted in 1967⁽²⁾, The Drugs Act, 1976⁽³⁾ Pakistan Telecommunication Authority (PTA), Natural Gas Regulatory Authority, National Electric Power Regulatory Authority, Federal Ombudsman Order (1983), Price Control and Prevention of Profiteering and Hoarding Act, 1997 and Pakistan Penal Code (1860).⁽⁴⁾ The basic concern of all these laws was not to protect consumers. A debate on consumer rights legislation in National Assembly of Pakistan and the Senate was initiated in 1994. As a consequence of this debate firstly, The Islamabad Consumer Protection Act was promulgated in 1995.⁽⁵⁾ This law incorporates definitions of unfair trade practices as well as provides for a mechanism to handle consumer complaints.⁽⁶⁾ 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

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- (1) 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.
 - (2) 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.
 - (3) 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.
 - (4) Hafiz Aziz ur Rehman, *Consumer Protection Law and Policy*, paper presented at Seminar on Consumer Protection Laws in Pakistan, SERL, Marriot, Islamabad, 2005.
 - (5) Islamabad Consumer Protection Act, 1995 available at: www.bu.edu/bucflp/files/2012/01/Islamabad-Consumer-Protencion-Act.pdf, (last accessed on 20-07-2013).
 - (6) 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).

Khyber Pakhtunkhwa (K.P.K) and Balochistan passed the Consumers Protection Act in 1997 & 2003, respectively, but failed to establish mechanism for consumer protection. In 2004, Governor of Sindh promulgated the Sindh Consumer Protection Ordinance but it lapsed due to the lack of interest shown by the then Government and the situation is still the same.⁽¹⁾ 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.⁽²⁾ 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.⁽³⁾

The Punjab Government has taken a welfare oriented step for the protection and promotion of consumer rights and interests by enacting Punjab Consumer Protection Act (PCPA), 2005. As a first step, District Consumer Protection Councils and Consumer Courts have been established in eleven districts of the province (Lahore, Gujranwala, Sahiwal, D.G. Khan, Sargodha, Gujrat, Sialkot, Multan, Bahawalpur, Faisalabad and Rawalpindi), which also cover adjacent districts, to deliver justice to the consumers at their doorsteps.⁽⁴⁾ The Punjab Consumer Protection Act provides a complaint-driven system providing a Judicial, Quasi-Judicial, Alternate Dispute Resolution (ADR) and Pre-Trial Settlement mechanism. The PCPA covers all products and services excluding: products in its natural state, rendering of any service under a contract of personal service, palmistry/astrology, a service, the essence of which is to deliver judgment by a court of law or arbitrator.⁽⁵⁾

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- (1) 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 available at: http://pcpc.punjab.gov.pk/?q=system/files/reseach_paper.pdf.
 - (2) See <http://www.studymode.com/essays/Analysis-Of-Consumer-Protection-Laws-In-1638913.html> (last accessed on 29-07-2013).
 - (3) Official Website Consumer Rights Commission of Pakistan at: <http://www.crcp.org.pk/index.htm> (last accessed on 12-08-2013).
 - (4) See <http://icid.punjab.gov.pk/pcpc.html> (last accessed on 29-07-2013).
 - (5) 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.

Without delving on the legislative competence of the national and provincial legislatures it would not be possible to examine the efficacy of consumer protection laws applicable in the country. The eighteenth constitutional amendment passed in 2010, widened the legislative domain of the provinces. Many subjects that were previously part of the concurrent legislative list came under the exclusive domain of the provinces in the aftermath of the 18th amendment. The area of consumer protection has also devolved to the provinces which means that the national Parliament's power to legislate on this issue is limited to Islamabad Capital Territory. However, in order to streamline the consumer protection standards in the entire country, the federal government may compile a national consumer policy with the consultation of provincial governments. The national policy should entail uniform legislative changes in the existing consumer protection framework and bring harmony in the federal and provincial laws on consumer protection. After this each provincial government may enact the agreed upon law in their respective province. The modern strict liability concept can thus be incorporated in the whole country. 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.

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.⁽¹⁾ 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

(1) 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>).

quality services in their daily livings.⁽¹⁾ Though there is a plethora of laws dealing with consumer protection in Pakistan, an important question is whether the existing legal framework incorporate the modern principle of strict liability for manufacturers of defective products? The United Nations Manual on Consumer Protection defines strict liability as “liability of any or all parties along the chain of manufacture (the manufacturer of component parts, manufacturer who assembles the parts, wholesaler and retailer) for the whole damage caused by the product, without prejudice to the recovery action among responsible parties.”⁽²⁾ As per the manual, liability will be imposed on the manufacturer regardless of the fact that he exercised reasonable care or not.⁽³⁾ The manufacturer will be liable if defect in the product causes any harm to the consumer. For the purposes of this article, I will rely on this definition and would examine whether any Pakistani law entails strict liability for the manufacturers of defective products. Moreover, they should be compensated for any harm caused by defective products and faulty services. Importantly, the masses are becoming aware of their consumer rights because of the awareness programmes and efforts of some leading NGOs working for consumer protection in Pakistan. As mentioned earlier that Pakistan has inherited its legal system from Britain, therefore this paper recommends the application of English measures on product liability in Pakistan is it matches with the legal culture of the country and is a piece of up-to date legislation.

The liability for defective products is mentioned in Part-II of the PCPA which starts from s. 4 to 12. S.4 of PCPA hold the manufacturer of a product liable to a consumer for damages proximately caused by a characteristic of the product that renders the product defective when such damages arose form a reasonably anticipated use of the product by a consumer. The Act provides the kinds of defects in the products and they include construction or composition defect⁽⁴⁾ as given in S.5, design defect as given in S.6, warning defect as given in S.7 and defect if it does not conform to an express warranty of the manufacturer as provided in section 8. As mentioned that s. 6 is about the design defect of a product and a

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- (1) 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.
 - (2) United Nations Conference on Trade and Development Manual on Consumer Protection available at <https://unctad.org/en/PublicationsLibrary/webditcclp2016d1.pdf>
 - (3) Ibid
 - (4) In a case under this provision, a consumer purchased Peanut Peak Biscuits from the shop of defendant no.1 and he alleged that while he was consuming the Biscuits with a cup of tea, he was shocked to see that there was a hair in a Biscuit.

product shall be defective in design if, at the time the product left its producer's control-

- a. there existed an alternative design for the product that was capable of preventing the damage to a consumer; and
- b. the likelihood and gravity of damage outweighed the burden on the manufacturer of adopting such alternative design and any adverse effect of such alternative design on the utility of the product.

The section also discussed that when the manufacturer has used reasonable care to provide adequate warning to the users or handlers of the product, it shall be considered in evaluating the likelihood of damage arising from the design of a product.⁽¹⁾ But later on in s.9 the PCPA has given many grounds for defending the design defects related claims under s.6. S.9 of the Act states that a manufacturer of a product shall not be liable for damage proximately caused by a characteristic of product's design if the manufacturer proves that at the time the product left his control he did not know and, in the light of the then existing and reasonably available scientific; and technological knowledge, could not have known the design characteristic that caused the damage or the danger of such characteristic; or he did not know and, in the light of the then existing and reasonably available scientific and technological knowledge, could not have known of the alternative design identified by the consumer under section 6 (1); or the alternative design identified by the consumer under section 6 (1) was not feasible in the light of the then existing and reasonably available scientific and technological knowledge or then existing economic practicality.

Regarding the warning defect in S.7 of the PCPA, s.9 (2) states that a manufacturer of a product shall not be liable for damage if the manufacturer proves that, at the time the product left his control, he did not know and, in the light of the then existing and reasonably available scientific and technological knowledge, could not have known of the characteristic that caused the damage or the danger of such characteristic. These and many other defences are there for the manufacturers that make the Act fewer consumers oriented. Other defences that can be availed by the manufacturers are:

It is contested by some defendants that the petition is not maintainable as it is filed to blackmail and harass the defendant;

The plaintiff has not sent the defendant a legal notice;

S.10 of the PCPA, where the consumer has not suffered any damage from the product except the loss of utility, the manufacturer

(1) S.6 Punjab Consumer Protection Act, 2005.

shall not be liable for any damages except a return of the consideration or a part thereof and the costs.

Product Liability and Islamic Law

Islamic law is revealed by Allah (S.W.T) to guide human beings in their religious and worldly affairs to make them capable of achieving success in this world and hereafter. The Muslim jurists define Islamic law as it is a communication from Allah, The Exalted, related to the acts of the subjects through a demand or option, or through a declaration.⁽¹⁾ This is what makes *Shariah* or Islamic law different from other legal systems of the world as the basics of Islamic law are extracted from the revelation of Allah i.e. Qur`an and *Sunnah*. Muslim jurists and legal philosophers mentioned that all the rules and principles of Islamic law revolve round the objectives (*Maqasid*) of *Shariah*. By *Maqasid* it is meant that which concerns the subsistence of human life, the completion of man's livelihood, and the acquisition of what his emotional and intellectual qualities require of him, in an absolute sense.⁽²⁾

The Muslim legal philosophers have emphasized the following fundamental freedoms or rights in respect of every individual. These are: preservation and protection of religion, human life, and progeny, human honor or dignity (*ird*), intellect, and wealth.⁽³⁾ Islamic law 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 Islam, 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. Allah's forgiveness or otherwise in such cases is dependent on the will of the individual sinned against; if he does not forgive, Allah will punish the defaulter. Therefore, it is imperative for the individuals to deal with fairness in trade and commerce as well.⁽⁴⁾ Islamic law provided guidelines for the protection of Consumers 1400 years ago which are based on divine principles set by Allah. Moreover, Allah promised the believers rewards both in this world and the Hereafter for complying with Islamic principles. Islamic law included a set of rules to protect consumer from himself first, then the product and dealer and

(1) Nyazee, Imran Ahsan khan, *Outlines of Islamic Jurisprudence*, ALSI, Islamabad, p.32

(2) Muhammad Khalid Masud, *Islamic Legal Philosophy*, p.225

(3) Shatibi, *Al-Muwafaqat*, vol.2, pp.4-5

(4) Kishwar Khan and Sarwat Aftab, *Consumer Protection in Islam: The Case of Pakistan*, Article published in Australian economic papers, December 2000.pp.486

producer. It contains rules and regulations for governing transactions with traders in the market.⁽¹⁾

In order to protect rights of the consumers, Islamic Shariah has strongly condemned dealing in prohibited (*Haram*) goods/services, usury (*Riba*), sale of *Al-Gharar* (uncertainty, risks, speculation), *Qimar* (gambling) and *Maysir* (games of chance), arbitrarily fixing the Prices, measures causing price-hike, hoarding (*Ihtikar*), exploitation of consumer's ignorance of market conditions, *Al-Najsh* (trickery), swearing, giving short measures, dealing in stolen goods, adulteration, fraud and fraudulent transactions etc. Islamic law discourages all such transactions that may inflict harm. Others' interest should be regarded in the business. Therefore, a Muslim businessman is required to be very careful lest he should harm someone else or even himself through his heedless conduct in business. Among the harmful practices expressly stated and condemned by the Qu'ran are extravagance and waste. Although Muslim jurists had mentioned general principles and rules for the protection of consumers in detail under the chapters of *Daman*, contracts, *Tadles*, *Gharar*, hoarding, law of options, *Hisba* and *Fiqh ul Suq* 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. 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. The classical institution of *Hisba* (Ombudsman) was devoted the power to look after the matters related to the market and safeguard rights of the consumers.⁽²⁾ The general rules of Islamic law, provided in Ottoman Justice Rules Magazine (*El-Majjala*), which dates back to 1876 and was the first attempt to codify Islamic law of contract, and still applicable in Palestine, is an important document that contains many provisions of Islamic consumer law. Thus, Islamic law is rich enough to provide adequate protection to the consumers.

Product liability seems to be a new concept to Islamic law. However, *Shariah* contains an effective legal regime that can be invoked to get over the use of defective products in the local market. Safety of products in production process is an important objective in Islamic law. As far as product liability under Islamic law is concerned so almost the similar kind of classification like that of English law may be followed to analyse the Islamic perspectives on the issue. Islamic law of contract is formed in

(1) Ibid.

(2) For a detail discussion see article: *The Islamic Institution of Hisba and Consumer Protection*, Hamdard Islamicus, Karachi, 2012

such a way that protects rights of both i.e. the seller and the buyer.⁽¹⁾ Islamic law of contract has provided options to the contracting parties in order to protect their rights. The option of defect (*Khiyar al-ayb*) is very much relevant to our research and will be analyzed later on in the paper. The option of defect is of much importance as it is an implied warranty in favour of the consumer that if he discovers any defect in the product, he may rescind the contract and reject the goods or demand reduction in the price within a specific period. The concept will further be analysed keeping in view *privity of the contract* principle. As far as the harm caused by any product is concerned, though it appears a new concept to Muslims today, however, Islamic *Shariah* contains rules under the Islamic law of torts (*Fiqh al-Daman*) based on the principles of negligence and strict liability. 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.⁽²⁾ The principle of Islamic law that “Every profit has a corresponding liability”⁽³⁾ is a very important base for the establishment of manufacturer’s liability under *Shariah*. This may be referred to retailers, suppliers, seller and the manufacturer etc. to recover the damages as all of them are getting profit in one way or the other. In the upcoming discussion the key notions, on which product liability law is based in Pakistan, have been analysed and compared with Islamic law.

The Notion of Product in Pakistani Laws

The Islamabad Consumer Protection Act, 1995 did not define the word “product” or “good”. Punjab Consumer Protection Act, 2005 in S. 2 (j); NWFP Consumer Protection Act, 1997 in S.2 (g); Baluchistan Consumers Protection Act 2003 in S.2 (h) have defined the word “product” in the following words: “product” has the same meaning as assigned to the word “goods” in the Sale of Goods Act, 1930, and includes products which have been subsequently incorporated into another product or an immovable but does not include animals or plants or natural fruits and other raw products, in their natural state, that are derived from animals or plants. According to the Sale of Goods Act, 1930-section 7- ‘goods’ means every kind of movable property other than actionable claims and

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- (1) Muhammad Akbar Khan, *Consumer Protection in Islamic Law: An analytical Study*, 72.
 - (2) Abdul Basir Mohamad, *The “Egg-shell Skull” Rule in cases of Nervous Shock in Islamic Law of Tort*, *Islamiyyat* 30 (2008): 3-28
 - (3) Muhammad Tahir Mansoori, *Shariah Maxims Modern Application in Islamic Finance*, 65.

money; and includes (electricity, water, gas,)⁽¹⁾ stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

Apparently, there seems to be not much difference between the definition of product provided in the England's Consumer Protection Act, 1987 and that provided in Pakistani laws. But the Pakistani law has not yet discussed the issue of digital contents, books, blood transfusion, advice, buildings, aircrafts, ships, nuclear accidents, complex structure theory. Moreover, the agricultural products which have been considered as products under English regime of product liability but they are not products under Pakistani law. The reason is that not much case law has been developed in the area of consumer protection in Pakistan. It is evident that the law related to product liability in Pakistan is not in its developed form rather it is based on the old format of contract and negligence.

The Notion of Product in Islamic Law

Islamic law has not given any specific definition of the term 'product'; instead, it uses the term '*mabi*' means subject matter to indicate all sold 'valuable' things.⁽²⁾ The subject matter *mabi* 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.⁽³⁾ Otherwise, there are not any other conditions. For this reason, a product may be non-material, immovable, and so on in Islamic law. For example, agriculture products and cattle are products within the meaning of Islamic law. For instance:

The Prophet Muhammad (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.'⁽⁴⁾

In another case:

The Muslim scholars Ibn il-Asqa Wathilh said: 'I bought a camel from a seller and when leaving the place of contract Oqba ibn Nafi 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

(1) Inserted by the Sale of Goods (Amendment) Ordinance, 1962 (47 of 1962), S.2 with effect from the 7th June, 1962.

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

(3) Al-Kasani, *Badai al- Sanai*, vol.5, 192.

(4) Muslim ibn Hajjaj, *Sahih, Kitab ul-iman*, tradition no. 102, vol.1, 99.

not appropriate for your travel. Are you looking to rescind the agreement? The seller asked Oqba. Oqba responded: I heard Prophet Muhammad (pbuh) say that the contracting parties have the choice.⁽¹⁾

Islamic *Shariah* 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 *Shariah* has held a person liable for giving a wrongful advice. Advice is a matter of trust in Islam.⁽²⁾ 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 Islam. 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.

The Notion of ‘Defect’ in Pakistani Law

S.4 of the Punjab Consumer Protection Act, 2005 states that the manufacturer of a product shall be liable to a consumer for damages proximately caused by a characteristic of the product that renders the product defective when such damage arose from a reasonably anticipated use of the product by a consumer. A product is considered defective under the Act if–

- a. it is defective in construction or composition;
- b. it is defective in design;
- c. it is defective because an adequate warning has not been given; and
- d. it is defective because it does not conform to an express warranty of the manufacturer.⁽³⁾

One fact is clear that the defect is not associated with the notion of the safety i.e. the defect that may cause any harm to a person or his property rather the term is weighed from the perspective of the value of the item i.e. a sale of goods law oriented definition of the defect is adopted.

(1) Ahmad Ibn Hanbal (d.241 A.H.), Musnad, tradition no. 16013 Muassisah Al-Risalah, 2001, vol.25, 394.

(2) There are many traditions of the Holy Prophet (pbuh) in this regard. See Ahmad Ibn Hanbal, Musnad, tradition no.22360, vol.37, 43; Ibn Majah, Sunan, tradition no.3746, vol.2, 1233; Abu Daud, Sunan, tradition no.5128, vol.4, 333.

(3) S.4. Punjab Consumer Protection Act, 2005.

The Notion of Defect in Islamic Law

Under Islamic law it is the 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.⁽¹⁾ The consumer has been given an implied warranty against latent defects in the products purchased.⁽²⁾ The option of defect (*khiyar 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 has in it some defect diminishing its value.⁽³⁾ 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 *khiyar 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 (*khiyar al-ayb*) is based on the following verse:

“O ye who believe! Eat not each other's property by wrongful means...”⁽⁴⁾

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;⁽⁵⁾ 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;⁽⁶⁾ 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,

(1) See chapter 5 of the thesis for a detailed discourse on the subject of implied warranties under Islamic law of contract.

(2) Majjallah, Art. 336.

(3) Al-Marghinani, *Al-Hidaya*, vol.3, 36; Al-Qawanin al-Fiqhiyyah, vol.1, 176; Al-Muharrar fi al-Fiqh ala mazhab Ahmad ibn Hanbal, vol.1, 324.

(4) Qur'an; 4:29.

(5) Al-Bukhari, *Sahih, Kitab al Buyu*, tradition no. 2082, vol.3, 59.

(6) Ibid.

then the blessings of their transaction would be lost.”⁽¹⁾

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 Dhaman*. 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-kharaj bil-Dhaman*” i.e. every profit has a corresponding liability.⁽²⁾

The Notion of Producer in Pakistani Law

As we have mentioned that the application of consumer protection law is a provincial subject in Pakistan, while in United Kingdom contains a Federal Consumer Protection Act, of 1987. Due to the disconnect between the consumer protection laws in Pakistan, consumers are unable to gain desired appreciation of their rights. NWFP Consumer Protection Act, 1997 and Baluchistan Consumer Protection Act, 2003 provided the definition of a “Manufacturer” in the following words. “Manufacturer” includes a person who: -

- a) makes or manufactures any goods or parts thereof; or

(1) Ibid.

(2) Ibn Qudama, Al-mughni, vol.3, 489; Shah Waliullah Al-dihlawi, Hujjat-ullah al-baligha, Dar al-jeel, Beirut, Lebanon, vol.2, 174; Al-maqdisi, Zia al din, Al-sunan wa al-ahkam anil-mustafa alaihi al-salam, Dar Majid A’siri, Saudi Arabia, 2005, vol.4, 389.

b) does not make or manufacture any goods but assembles parts thereof made or manufactured by others and claims the end product to be goods manufactured by himself; or

c) puts or causes to be put his own mark on any goods made or manufactured by any other manufacturer and claims such goods to be goods made or manufactured by himself;

Explanation :- A branch office of a manufacturer shall not be deemed to be different manufacturer even though an assembly operation, distribution and sale of goods is carried out at such branch office;⁽¹⁾

The Punjab Consumer Protection Act, defined “manufacturer” in the following words, “Manufacturer” includes a person or entity who—

- i. is in the business of manufacturing a product for purposes of trade or commerce;
- ii. labels a product as his own or who otherwise presents himself as the manufacturer of the product;
- iii. as a seller exercises control over the design, construction or quality of the product that causes damage;
- iv. assembles a product by incorporating into his product a component or part manufactured by another manufacturer; and

v. is a seller of a product of a foreign manufacturer and assumes or administers warranty obligations of the product, or is affiliated with the foreign manufacturer by way of partial or complete ownership or control; or modifies or prepares the product for sale or distribution;⁽²⁾

S.2 (i) of the Punjab Consumer Protection Act, 2005 further explains it in the words that “manufacturing a product” means producing, fabricating, constructing, designing, remanufacturing, reconditioning or refurbishing a product.

The Islamabad Consumer Protection Act, 2005 did not mention the definition of producer at all. While the Sindh province does not have a Consumer Protection Act, so far.

Whether importer of any goods into Pakistan is liable under existing Pakistani Consumer Law?

In the definition of a manufacturer in all the three Acts (i.e. N.W.F.P, Islamabad and Punjab), importers is not mentioned which means that he cannot be a defendant in product

(1) S.2 (J) NWFP Consumer Protection Act, 1997.

(2) S.2 (h) Punjab Consumer Protection Act, 2005.

liability claim. Here Pakistan should learn from the English measures and should held him liable too, and consider him a defendant, EU Directive is very clear in this regard.

That is the reason because of which in some of the cases the defendants argued that the court does not have jurisdiction over them.

To cut a long story short, traditionally liability of defective products in Pakistani consumer laws has been fault-based under which requires the plaintiff to prove the negligence on the part of the defendant and can be defeated on many grounds (i.e. defences) and the situation is not of strict liability of the manufacturer etc. However, the Punjab Consumer Protection Act, 2005 brought about the concept of strict product liability, as it made the manufacturer liable for damages that are proximately caused by a characteristic of the product. Despite this landmark change, there is a need to review the consumer protection laws of the country and bring them in accord with the international best practices.

Another problem in the existing Pakistani law is that it does not cover a consumer who has not paid any amount in consideration for the product i.e. being a third party one cannot sue the defendant.

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 *Shariah* that produce any goods or services for the benefit of community is considered as worship.

Islam 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 (ﷺ) 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’.*”⁽¹⁾

Shariah has encouraged the production of all beneficial things and condemned the production of harmful things to humanity. Thus many

(1) Ahmad ibn Hanbal, *Musnad*, tradition no. 17265, vol.28, 502; Ibn Abi Sheba, *Musanaf*, tradition no.23083, vol.4, 554; Al-baihaqi, *Al-sunan al-kubra*, tradition no.10397, vol.4, 432.

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 *Shariah* the producer is not defined in any specific words. Thus *Shariah* 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*”.⁽¹⁾ 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.

Anything that is explicitly prohibited by the Qur’an and the Sunnah, such things are not considered *mal* (property) in *Shariah*. The contract in which the subject-matter is something that is not considered *mal* by *Shariah* 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 *Shariah* 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 *Haram* animal is also *Haram* 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 Allah, 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

(1) Ibn Qudama, *Al-mughni*, vol.3, 489; Shah Waliullah Al-dihlawi, *Hujjat-ullah al-baligha*, Dar al-jeel, Beirut, Lebanon, vol.2, 174; Al-maqdisi, *Zia al din, Al-sunan wa al-ahkam anil-mustafa alaihi al-salam*, Dar Majid A’siri, Saudi Arabia, 2005, vol.4, 389.

principle of necessity. Since adultery, obscenity and immorality are prohibited by the *Shariah*, 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 (*haram*) products.

The Notion of ‘Damages’ in Pakistani Product Liability Laws

As far as the Pakistani product liability regime regarding damages is concerned the adequate details are given in the Sindh Consumer Protection Act, 2014. Section 4 of the Sindh Consumer Protection Act, 2014 states: “(1) the manufacturer of a product shall be liable to a consumer for damages proximately caused by, a characteristic of the product that renders the product defective when such damage arose from a reasonably anticipated use of the product by a consumer. (2) A product shall be defective only if- (a) it is defective in construction or composition as provided in section 5; (b) it is defective in design as provided in section 6; (c) it is defective because as adequate warning has been given as provided in section 7; and (d) it is defective because it does not conform to an express warranty of the manufacturer as provided in section 8.” Section 10 of the Sindh Consumer Protection Act, 2014 further states that where the consumer has not suffered any damages from the product except the loss of utility, the manufacturer shall not be liable for any damages except a return of the consideration or a part thereof and the costs. Similarly Section 10 of the Punjab Consumer Protection Act, 2005 imposes restrictions on grant of damages to the consumers of defective products. The section 16 of the Baluchistan Consumer Protection Act, 2003 states that If after the proceedings conducted under section 15, the Court is satisfied that the goods complained against suffer from any of the defects specified in the complaint or that any of the allegations contained in the complaint about the services are proved, it shall issue an order to the opposite party directing him to take one or more of the following actions, namely: “(a) to remove defect from the goods in question; (b) to replace the goods with new goods of similar description which shall be free from any defect; (c) to return to the complainant the price or as the case may be the charges paid by the complainant; (d) to do such other thing as may be directed by the Court for adequate and proper compliance with the requirements of sections 4, 5 or 6; and (e) to pay such amount as may be awarded by it as compensation to the consumer for any loss or negligence of the opposite party.”

Section 16 of the KP Consumer Protection Act, 1997 is inclined more towards punitive measures in cases of defective products and it states that: “(1) Where any right of consumer required to be protected under this Act, is in any way infringed, or is likely to be infringed, the

person responsible for such infringement shall be punished with rigorous imprisonment which shall not be less than seven days or with fine which shall be extended to fifty hundred thousand rupees but not less than ten thousand rupees or with both and shall also be liable to provide such compensation or relief to the consumer as may be determined by the Court. (2) Whoever makes advertisement through print or electronic or social media or by wall chalking or in any other manner in contravention of the provisions of this Act, the person responsible shall be punished with rigorous imprisonment which shall not be less than seven days or with fine which shall extend to twenty hundred thousand rupees but not less than ten thousand rupees or with both.] (3) The 3 [Court] may, where it is deemed appropriate, order for payment of compensation to the consumer to the extent the consumer has suffered any damage or loss through any unfair trade practice. (4) The 4 [Court] may, where it is deemed necessary for protection of the rights of other consumers, order for confiscation of any goods or material or direct for their destruction.”

The Notion of ‘Damages’ 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 *Daman*. It is defined as the responsibility to pay a financial compensation as a result of an injury inflicted on others.⁽¹⁾ 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 (*darar*) 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.

Contractual liability for compensation in Islamic law is well known as *dhaman-al-uqud*. The contract liability is applied only to damage or loss

(1) Al-Ghazali, Al-Mustasfa, Dar al-Kutub al-Elmiyyah, 1993, vol.1, 281; Ibn Qudama, Al-Mughni, vol.4, 403; Zuhaili, Al-Qawaid al-Fiqhiyyah wa Tatbiqatuha fi al-Mazahib al-Arba’a, Dar al-Fikr, Damascus, 2006, vol.1, 547.

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”.⁽¹⁾

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.⁽²⁾ 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.⁽³⁾ He is also reported to have said that if someone breaks something belonging to another he shall take it and give the owner its equal.⁽⁴⁾

Islamic law stress on compensation (*tawid*) 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.⁽⁵⁾ *Majalleh* states that there shall be no damage and no counter damage.⁽⁶⁾ It further states: “*injury must be removed*”.⁽⁷⁾ It is the direct consequence of the prohibition on causing damage.

(1) Majallah, Articles: 39-40.

(2) Monzer Kahf, “*Economics of Liabilities: An Islamic View*” (2000) 8(2) Journal of Economics and Management 85.

(3) Ibn Majah, Sunan, tradition no.3466, vol.2, 1148; Al-nasai, Sunan, tradition no. 4830, vol.8, 52; Al-darqutni, Sunan, tradition no.3438, vol.4, 265.

(4) Al-baihaqi, Al-sunan al-kubra, tradition no.11521, vol.6, 159.

(5) Ibn Nujaim, *Al-ashbah wa al-nazair*, vol.1, 72; Muhammad Siddique b.Ahmad al-Burnu, *al-Wajiz fi Idah Qawaid al-Fighiyyah al-Kulliyyah*, 192.

(6) Majallah, Art. 19.

(7) Majallah, Art. 20.

Time Limitations for Product Liability claims under the existing Regime in Pakistan

Under s.28 of the Punjab consumer protection act, 2005: “a claim by a consumer or authority shall be filled within 30 days from the arising of the cause of action.” Under s. 28 (4) proviso-2: “extension shall not be allowed beyond a period of 60 days from the expiry of the warranty or guarantee period specified by the manufacturer or service provider and if no period is specified by one year from the date of purchase of the products or providing of the service”. This is again a very short period and needs to be reconsidered in the light of English regime of product liability.

According to section 30 of the PCPA the procedure for the disposal of complaints is given. It states the Consumer court after receipt of a claim related to a product should forward a copy of the claim directing him to file his written statement within a period of fifteen days or such extended period not exceeding fifteen days. In case the claim alleges that products are defective and do not conform to the accepted industry standards, the Consumer Court may decide the dispute on the basis of the evidence relating to the accepted industry standards and by inviting expert evidence in this regard. Following the powers given to the consumer court according to Civil Procedure Code, 1908, the Consumer Court shall decide the claim within six months after the service of summons on the respondent.⁽¹⁾

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.⁽²⁾

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.³ Similarly, keeping in view public interest a reasonable time should be specified for bringing suits. The *Hanafi* school permit a claim to be barred if a certain period of time has passed. The Ottoman Civil Code that is based on *Hanafi* school has provided for statutes of limitations in the following

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- (1) S.30, PCPA, 2005.
 - (2) Ibn Abidin, Rad al-muhtar, vol.5, 420.
 - (3) Al-mausua' al-fiqhiya al-kuatiyya, vol.28, 271; Al-Zuhaili, Al-fiqh al-Islami wa adillatuhu, vol.4, 3269.

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.”⁽¹⁾

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.”⁽²⁾

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⁽³⁾ or from the date the plaintiff had knowledge of the damage⁽⁴⁾ 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.⁽⁵⁾ 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.⁽⁶⁾

Conclusion

"Product liability" is the area of law in which manufacturers, distributors, suppliers, retailers, and others who make products available to the public are held financially responsible for the injuries those products cause. Pakistan has inherited its legal system from Britain and as a general rule the principles of English law have been deemed to be applicable, is still striving for an adequate product liability regime. Currently there are various consumer protection Acts in the country but only one Act (Punjab Consumer Protection Act, 2005) has provisions about the liability for defective products. Pakistani law on product liability is facing disparity and not clear as in many statutes on consumer protection (e.g. Islamabad

(1) Majalla. Art.1660.

(2) Majalla, Art.1661,.

(3) Sec.11A(4), Limitation Act, 1980.

(4) Sec.14 (3), Limitation Act, 1980.

(5) Sec.11 A (3), Limitation Act, 1980.

(6) Sec.33 (1A) (a), Limitation Act, 1980.

Consumer Protection Act, NWFP Consumer Protection Act, Baluchistan Consumer Protection Act) there is no reference to the liabilities arising out of the products. Moreover, Pakistani regime of contract and tort have failed to provide adequate protection to the consumers in product liability cases, it is, therefore, unavoidable to promulgate legislation based on the notion of strict product liability. Under these circumstances, the application of strict product liability regime is recommended as it highly insures protection of the consumer's right to safety. The application of strict product liability regime would not only help in creating consistency among the laws of various provinces on the subject but would also insure improvements of the product quality and safety of the products. It would also be easy for the consumers to know about their rights. It would also improve the protection offered to the consumers in Pakistan against the products imported from other countries. Moreover, the strict product liability regime is in conformity with the principles of Islamic law as the objectives of Shariah are to give maximum protection to the consumers and guarantees compensation against harms caused by defective products to the victims. Moreover, the constitutional requirement that all the laws should be in conformity with the injunctions of Qur'an and Sunnah will also be met. Thus, it is recommended that strict product liability regime should be adopted in Pakistan in the vital interests of consumer

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