

## The “Egg-shell Skull” Rule in Cases of Nervous Shock in Islamic Law of Tort

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### ABSTRACT

*The “egg-shell skull rule” is a legal rule or doctrine used in both tort law and criminal law that bears or shoulders upon a person the liability for all injuries resulting from his acts leading to such injuries to another person regardless whether they are foreseeable injuries or unforeseeable injuries. The rule or doctrine is applied in all areas of torts that are intentional torts, negligence, nervous shock, strict liability and so on. The main aim of this paper is to diagnose whether the rule or doctrine is available in the discussion of the Muslim jurists or not. The method used in this paper is analyzed document (library research). The result of the paper is in the fact that it could be said that the “egg-shell skull rule” is not a strange rule in the Islamic law of tort, but however it is not highlighted by the Muslim jurists in a specific term in their works, which may be focused directly on the rule.*

*Keywords: egg-shell skull; nervous shock; tort; diyah; liability*

## Prinsip “Egg-shell Skull” dalam Kes-kes Kejutan Saraf dalam Undang-undang Tort Islam

### ABSTRAK

*“Peraturan egg-shell skull” adalah suatu peraturan atau doktrin yang telah diguna pakai dalam undang-undang tort dan juga undang-undang jenayah. Ia membebankan liabiliti ke atas seseorang bagi keseluruhan kecederaan yang terjadi daripada tindakannya terhadap seseorang lain tanpa mengambil kira kecederaan tersebut boleh diramal ataupun tidak. Peraturan itu diguna pakai dalam kesemua bidang tort, iaitu tort berniat, kecuaiian, kejutan saraf, tanggungan tegas dan sebagainya. Tujuan utama artikel ini adalah untuk mengenal pasti sama ada peraturan atau doktrin tersebut wujud ataupun tidak dalam perbincangan para ulama. Metode yang digunakan dalam menghasilkan artikel ini adalah analisa dokumen (kajian kepustakaan). Hasil daripada kajian ini dapat dikatakan bahawa peraturan egg-shell skull*

*bukanlah suatu peraturan yang asing dalam undang-undang tort Islam, cuma ia tidak diketengahkan oleh para ulama Islam secara spesifik dalam penulisan mereka.*

*Kata kunci: egg-shell skull; kejutan saraf; tort; diyah, tanggungan*

#### BACKGROUND TO THE ISLAMIC LAW OF TORT

The Islamic law of tort is that body of law concerned with civil injury or wrong. Civil injury means any injury, legal action for which is brought to the civil court by the injured party himself, not by the state. Any injury or wrong which is designed to punish the defendant and the legal action or legal proceedings for which are taken and conducted in the name of the state is called as crime.

In other words, **tort** recognizes misdeeds or wrongs committed against individual members of the public, otherwise **crime** is considered in terms of a violation of the public interest as a whole. In elaboration, we can say that the case of the public interest, the *imam* (ruler), or as commonly referred to in the modern time by current lawyers- the state- has the absolute power to prosecute and inflict the punishment upon the criminal on behalf of the public. These cases are of divine prescribed punishments. They are categorically stipulated by the verses of the Qur'ān and the texts of the ḥadīth and they are called and recorded, in the writings of the Muslim jurists, as *al-hudūd*. In the punishments of *ḥudūd* no remission, emendation or reconciliation can be granted by anyone, not even the state or the *imam* when the case has been brought to the notice of the authority. For instance, in the case of theft, the person whose property is stolen cannot free the thief from the divine punishment of amputation of his hand in terms of the conditions which are required to be completed. Even after the owner of the property has collected the stolen property from the thief, the punishment for theft (one of the *ḥudūd*) remains the public right ordained by the Law-Giver, God. Regarding the cases of tort against a man (private rights), the injured or the relative of a dead person has the full power to sue and bring the case to court. Beside that, he or his relative has the right to go into reconciliation with the defendant or wrongdoer, or to remit the reciprocal injury which would have been a possible punishment or death with *diyah* or *arsh* or *hukūmat al-<sup>c</sup>adl*. However, in the case of transgression against a man's



property, the man has the option of claiming compensation or remission.

In Islamic law, the criminal cases have been analysed and discussed by the Muslim scholars in their manual texts in the topic of *ḥudūd* (pl. of *hadd*, i.e. limits). Cases other than *ḥudūd* which are treated in the topic *jināyah* (offence), or of *qisās* (retaliation), or of *diyat* (blood-money/blood-wit), or of *arsh* (compensation), or of *siyāl* (assault), or of *ghaṣb* (usurpation), or of *ṣulḥ* (compromise) are dealt with as tort.

The most important fact to record here is that the early Muslim jurists such as Abū Ḥanīfah (d. 150H/767M), Mālik bin Anas (d. 179H/795M), al-Shāfi'ī (d. 204H/820M) and Aḥmad bin Ḥanbal (d. 241H/855M) do not make any distinction between both terms of "civil" and "criminal", and yet do not conduct a good compartment between both civil and criminal cases in their manual texts. They, in general, used the popular term "*al-jināyah* or *al-jarimah*" in dealing with both cases.

Besides the discussion above which explains the post of tort is whereabouts, it could also be looked into the rule of right in order to examine the tortious liability in cases of tort rather than the cases of crime in making clearer the position of tort in the scope of Islamic law.

1. The right of God. Means the right of the public and is linked with no specific person. It involves benefit to the community at large and not merely to a particular individual. It is understood that this right is not any benefit to God because he is above everything. This right is referred to God because of the magnitude of the risks involved in its violation and of the comprehensive benefit which would result from its fulfilment. In cases of public right which affect some particular individuals, they will not be entitled to condone the acts of the offender. For instance, on the infliction of the punishment of *ḥadd* (a fixed punishment) for theft, the person from whom the property is stolen is not entitled to condone the act. This right accommodates no remission. Even emendation or reconciliation is not permitted and the law has to take its course.
2. The right of mankind is a right of individual interest and is called "private right", such as a right to the enforcement of contracts, protection of property and the like. Enforcement of

such a right is entirely at the option of the individual whose right is infringed. This right, conversely to the right of God, accommodates emendation and remission. The injured person affected by the infringement of a private right, may either sue for compensation or pardon the tortfeasor.

3. When the rights of two natures are combined, of God and of mankind, the former is preponderant. An example of this right is *qadhf* (defamation) in the Ḥanafī school. The right of the public is infringed by reason of depreciation of the honour of one of its members, and the right of the individual defamed is violated by the defamation which tends to destroy one's prestige. According to the Ḥanafī school, the right of God preponderates in this matter by reason of the attack made on the honour of one of the public and the person defamed is not entitled to compound the offence. The Shāfi'ī school, the Ḥanbalī school and the popular opinion in the Mālikī school (according to Ibn Rushd) however, holds a contrary view. They opine that the person defamed is entitled to exonerate the defamer.
4. When the rights of two natures are combined, of God and of mankind, the latter is preponderant. An example of this right is *qiṣās* (retaliation) which is the punishment for murder. The right of the public here consists in putting a stop to disturbances and breaches of the peace on this earth. The private right in a case of murder arises from the fact of the offence having caused loss and sorrow to the heirs of the person murdered. The private right preponderates in this case because the heirs of a murdered person may pardon the murderer or accept blood-money (*diyyah*) or enforce punishment, there being a specific texts of the Qur'ān and Traditions. The right of the individual is here subsumed into the right of God by reason of the text.

From the classification of the rights above, we can classify the liability in them are of two kinds:

1. Specific punishment.
2. Unspecific punishment.

When the punishment is unspecific, the judge is empowered to adjudicate in such cases. These cases could, in general, be put in the class of "civil wrong", which may be connected to the "tort



law" and the most popular term for the cases under unspecific punishment which is submitted for discretionary power of a judge is called "*ta'zīr*". The liability in this kind warrants that the tortfeasor is liable to indemnify of his wrongful act against another's person, land or chattels as regulated in the rule of right. However, there are cases of "civil wrong" which their punishments have been specified like in the case of *qiṣāṣ* and *diyyah*.

As we have known that the Islamic law insists that no person should interfere with the personal liberty of another without any legal right or deal with another's properties without his permission, and thus a person should neither take another's property without legal cause, nor wrongfully destroy or appropriate another's properties. So, any wrongful act committed by a person to another's property, personal life or indignity, it could be classified into the term of tort, so long as it is not a kind of *ḥudūd* cases. Tort cases certainly are based on the Qur'ān and ḥadīth.

The Qur'ān says:

"And in no wise covet those things in which God hath bestowed His gifts more freely on some of you". (al-Qur'ān, 4:32; all Quranic verses cited in this article are taken from *The Meaning of the Glorious Qur'ān*, translated by Abdullah Yusuf Ali).

A good explanation of the above verse is put forward by al-Mawdūdī (d. 1400H/1979CE) when he states:

"Man is naturally inclined to feel uneasy whenever he sees someone else ahead of him. This is the root of jealousy and envy, of cut-throat competition and animosity, of mutual strife and conflict. When anyone attempts to obliterate all differences between human beings, he in fact engages in a war against nature and inflicts wrong of another kind". (al-Mawdūdī 1989: 2/34).

Islam acknowledges the rights of human beings from the following verses of the Qur'ān:

"The recompense for an injury is an injury equal thereto" (al-Qur'ān, 42: 40).

"And if ye do catch them out, catch them out no worse than they catch you out". (al-Qur'ān, 16: 126).

"Eat not up your property among yourselves in vanities". (al-Qur'ān, 4: 29).

In the ḥadīth, the Prophet (peace be upon him) remarked in his last sermon about the sacredness of the body, property and honour of others:

“Your blood, your properties and your honour are as sacred as the sacredness on this day of yours, in this city of yours and in this month of yours”. (Ibn Mājah n.d.. 2/1015; al-Tirmidhī 1937: 4/461; Ibn Hishām n.d.. 4/250-252).

In another ḥadīth, the Prophet (peace be upon him) said:

“There should be neither harming nor reciprocating harm”. (Ahmad bin Hanbal 1954: 313; Mālik bin Anas 1989: 529; Ibn Rajab 1995: 2/207; Ibn Ḥajar: 396; al-Suyūfī 1995: 83; Ibn Nujaym 1986: 94; Ibn Mājah 1993: 784; Mahmassāni 1983: 1/166-168; Majallat al-Aḥkām al-ʿAdliyyah 1967: article 19).

Again, the Prophet (peace be upon him) said:

1. “Nobody among you should take a chattel of his partner with or without serious intention. If anyone takes even the stick of his partner he should return it to him.” (al-Tirmidhī 1937: 4/462; al-Marghīnānī n.d.: 4/12; Ibn Ḍawayyān 1984: 1/433; al-Sarakhsī 1986: 11/49).
2. “It is incumbent upon a person who takes a thing from another to return the thing to the rightful possessor”. (al-Marghīnānī n.d.: vol.4, p.12; al-Sarakhsī 1986: 11/49; al-Khaṭīb 1958, 2/277).
3. “It is not allowed for a man to take his brother’s staff except with his goodwill”. (Ibn Hajar 1993: 376).

From the Quranic verses and the ḥadīths, we can say that Islam preserves and protects the property and honour of people from any tort, and lays down justice in society as a whole.

#### A BRIEF DEFINITION OF “TORT” IN ENGLISH LAW

The term “tort” and “wrong” are originally synonymous. Tort is derived from the Latin word “*tortum*” while “wrong” is in its origin identical with “*wrung*”, both the English and the Latin terms mean primarily conduct which is crooked or twisted, as opposed to that which is straight or right (*rectum*). (Heuston and Buckley 1992: 14). From the term “tort”, it is derived to be the adjective “tortious”, the adverb “tortiously” and “tortfeasor” which is the name for one who commits a tort. (Mullis and Oliphant 1993: 1). Among lawyers say as to tort and wrong that all torts are wrongs, but not all wrongs are tort, like cats are animals, but not all animals are cats. May be it is not to be wrong to say that all torts are crimes in general, but not all crimes are torts.



It should be known that the origin of the word "tort" is from the French. And then it was widely used by the English. In the English law, it is used to explain about a wrong which entitles a person who is injured to claim damages for his loss. Compensation is one of the remedies for tortious injury, and an injunction is also a proper remedy granted to the plaintiff in some circumstances. In exceptional case, the tort may be remedied by an order for specific restitution of something withheld from the plaintiff. (James and Brown 1978: 3; Redmond and Stevens 1993: 205; James 1976: 278). Another remedy available in some torts is self-help, as if a man is wrongfully dispossessed of land, he is permitted by law to re-enter it and resume possession if this can be done without force. (Cooke 1992: 3; Sim and Scott 1974: 141).

The authors of *Salmond and Heuston on the Law of Torts* define tort as: "A civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation." (Heuston and Buckley 1992: 14-15). Alan Pannett records in his book a definition of tort from *Salmond and Heuston on the Law of Torts*: "...a tort consists in some act done by the defendant whereby he has without just cause or excuse caused some form of harm to the plaintiff". (Pannett 1997: 2). This definition attempts to focus in differentiating between tort and other wrongs. (Redmond and Stevens 1993: 206). Of this definition, a few differences between tort and other wrongs will be highlighted later on.

According to Winfield: "Tortious liability arises from the breach of duty primarily fixed by the law, such duty is towards persons generally and its breach is redressible by an action for unliquidated damages". (Rogers 1979: 11).

From the above definition, Winfield impressed that the duty to refrain from committing a tort is imposed by the law, not by the parties involved in the tort, and that the duty is owed to everybody. And then he insisted that the victim in tort cases could sue in tort action for unliquidated damages.

In the words of John G. Fleming:

Tort is derived from the Latin "*tortus*", meaning twisted or crooked, and early found its way into the English language as a general synonym for "wrong". Later, the word disappeared from common usage, but retained its hold on the

law and ultimately acquired its current technical meaning. In very general terms, a tort is an injury other than a breach of contract, which the law will redress with damages. (Fleming 1987: 1).

From the definition above, Fleming gave a point about the word of tort-> *tortus* with its literal meaning and then he stated that a tort is different from a breach of contract, which in general the victim of a tort will be awarded damages by the court.

Arthur Underhill described tort as:

An act or omission, which is unauthorised by law, and independently of contract;

- i. infringes either:
  - a. some absolute right of another; or
  - b. some qualified right of another causing damage; or
  - c. some public right resulting in some substantial and particular damage to some person beyond that which is suffered by the public generally; and
- ii. gives rise to an action for damages at the suit of the injured party. (Underhill 1937: 3).

Arthur Underhill meant that the commission or omission of a person is considered as a tort when it is against the law by encroaching to the right of another and the tort is distinguished from breach of contract, and then the injured party has a right to claim damages for his remedy from the defendant.

The definition which is given by Harry Street is: "A tort is a wrong, the victim of which is entitled to redress". (Street 1983: 2). This definition is very short, but it is very sharp. The words of Harry Street are very focus to explain what is the tort, irrespective of comparing to other civil laws as contract and trust.

From the definitions of tort above, some of them are too long and others are too short in order to understand the sense of the signification. Like Alan Pannett says: "...some definitions are at too high a level of abstraction and others are too cumbersome to be a practical guide". (Pannett 1997: 2). However, such definitions could be extracted their essences of tort, which may become fundamentals of it, as follows: (Pannett 1997: 2).

- i. **Duty of care.** Tortious liability is based on breach of duty of care. Such a breach is recognised by the law as actionable.



- ii. **Tortious liability is imposed to persons by the law in general.** It means that tortious liability arises by enforcement of law to anybody and not by agreement of the parties. It differs to tortious liability and liability imposed through contract.
- iii. **A tortious duty is owed to persons generally.** It will not be a tort case if a complaint arises from a breach of agreement between parties, like breach of contract, breach of trust or breach of some other equitable obligation.
- iv. **Tort cases will give rise a civil action for unliquidated damages.** The unliquidated damages are not a fixed sum of compensation, but they are determined by the Judge according to his discretion to compensate or to redress the plaintiff for the loss or injury sustained by him. Some tort cases give space for the plaintiff to claim an injunction as a remedy, either jointly with or independent from damages.

The first reported use of the word "tort" is in the case of *Boulston v. Hardy* (1597) Cro. Eliz. 547, 548 (Heuston and Buckley 1992: 14). Tort, however, has become specialised in its application, while wrong has remained generic.

Summing the matter up, we have seen that there are four classes of wrongs which stand outside the sphere of tort, even though there are under a list of felony and misdemeanour, namely:

1. Wrongs exclusively criminal;
2. Civil wrongs which create no right of action for unliquidated damages, but give rise to some other form of civil remedy;
3. Civil wrongs which are exclusively breaches of contract;
4. Civil wrongs which are exclusively breaches of trust or of some other merely equitable obligation. (Heuston and Buckley 1992: 14).

#### INTRODUCTION AND A BRIEF DISCUSSION OF THE "EGG-SHELL SKULL" RULE IN THE ENGLISH LAW OF TORT

The "egg-shell skull" rule or the "thin skull" rule and it was also called as "the egg shell personality" is a rule which is applied in the case of a person of unusually nervous disposition to whom an injury causes more than normal shock. The injury is of a foreseeable type and this leads to injury of a different and unforeseeable type, the defendant is responsible for whole injury. In another words, it could

be said that the injury inflicted by the defendant's negligence to the plaintiff and he/she suffers a kind of injury and that injury triggers off a latent physical or psychological predisposition to a particular form of illness, the defendant is responsible for the additional damage, regardless whether it is unforeseeable, that his negligence has produced. It is a major exception to the requirement that the type of harm suffered by the plaintiff must have been foreseeable which caused by the defendant's negligence. Where the plaintiff suffers reasonable foresight injury as the result of the defendant's negligence and then the first injury triggers off an unforeseeable reaction that the plaintiff has already had a pre-existing of abnormal sensitivity, the plaintiff may claim damages for all injuries suffered from consequences of directly and indirectly of that negligence. In such cases, a major reference which should be looked at is golden words as a principle enunciated by Lord Parker C.J. in the leading case of *Smith v. Leech Brain & Co. Ltd.* (1962) 2 Q.B. 405, is that "a tortfeasor takes his victim as he finds him".

The fact of the case was an employee (Mr. Smith) was splashed by a piece of molten metal on his lip and burnt at the defendant's iron work. The incident happened by some of the metal flew out of the tank and burnt him on the lip when he was dipping a large object in the tank to galvanize it. He later contracted cancer from which he died three years later. As he had a pre-malignant condition, the burn sustained in the accident had aggravated cancer in certain of his tissues. His condition was considered as abnormal for susceptible to cancer. It was held that his widow was still entitled to damages as the type of injury which the deceased suffered was reasonably foreseeable, although the ultimate consequences were out of foreseeability. The first injury that harm from a piece of molten metal was foreseeable, but the death caused by the cancerous growth which proved to be fatal, formed at the side of the burn was unforeseeable. Even though the subsequent cause to be death was unforeseeable, but damages were wholly calculated without separating between foreseeable cause and unforeseeable cause. This was intended by the words of Lord Parker C.J. which were aforementioned, "a tortfeasor takes his victim as he finds him", where the elements of pre-existing sensitivity or susceptibility in the life of the plaintiff were let go away. The liability of damages is imposed upon the defendant based on the sufficiency of the burn which the plaintiff had suffered it was foreseeable.



The defendants were held liable, even though the only foreseeable injury was a splash or hit causing a burn, the egg-shell skull rule applied. Here, the question to be asked was whether the burn could be foreseen, not whether the cancer was foreseeable.

Regarding the case above and the egg-shell skull rule, Lord Parker C.J. presented a general opinion in his judgement:

"The Judicial Committee (in *Wagon Mound*) were not, I think, saying that a man is only liable for the extent of damage which he could anticipate, always assuming the type of injury could have been anticipated... The test is not whether these (defendants) could reasonably have foreseen that a burn would cause cancer and that (Mr. Smith) would die. The question is whether these (defendants) could reasonably foresee the type of injury which he suffered, namely the burn. What, in the particular case, is the amount of damage which he suffers as a result of that burn, depends upon the characteristics and constitution of the victim". [(1962) 2 Q.B. 415; (1961) 3 All E.R. at 1162].

The egg-shell skull rule or the thin skull rule is a rule where a plaintiff suffers foreseeable injury as the result of the defendant's negligence and this triggers off an unforeseeable reaction which is attributable to the plaintiff's pre-existing susceptibility. In the situation of like this, the plaintiff can recover in respect of both foreseeable and unforeseeable consequences of the negligence. This could be seen in the aforementioned case, that is *Smith v. Leech Brain & Co. Ltd.* (1962), where Lord Parker C.J. enunciated a principle in that case, that was "a tortfeasor takes his victim as he finds him"; and the case was held that the plaintiff could recover damages by reason of the fact that though her husband had a special sensitivity then the defendants had to take him as they found him.

In the historical point of view, the egg-shell skull rule may be seen in the sense of the decision made by the court in *Dulieu v. White & Sons* (1901) 2 K.B. 669 at 679. In this case, the plaintiff's person was negligently endangered by the act of defendant's negligence and she was placed in fear of an injury which would immediately have occurred to her but lastly it did not occur. However, she suffered serious shock resulting in the premature birth of her child. The court held that there would be liability. Reasonable fear of immediate physical injury to the plaintiff herself which results in shock is actionable. The duty to take care here is not meant to everyone, but it will only be owed to those within the area of potential danger created by the defendant's negligence. The liability is not



merely for the shock but also for the wholly injury occurred including premature birth of her child. The duty of care is not merely for the person's herself which within foreseeable area of potential danger but also for unforeseeable injury which may occur from that foreseeable type of danger. So, it could be said that a tortfeasor should take his victim as he finds him. It might be referred to a short passage in the decision of Kennedy J. in *Dulieu v. White & Sons*, where he said: "If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart".

#### THE "EGG-SHELL SKULL" RULE IN THE ISLAMIC LAW OF TORT

In the Islamic law of tort, there is no a specific term or discussion in the classical writings of Muslim jurists which may be analogized to "egg-shell skull" rule as aforementioned in English law. Also, Muslim jurists did not a little bit deal with the concept in their manuscripts. It could merely be understood, however, from the cases which are cited in their writings, especially in the discussion of abortion resulting from screaming, threatening or frightening of another. Is there liability for indemnity in that case? If liability could be imposed upon the person who has screamed, threatened or frightened the victim, it might be related to the discussion of the egg-shell skull rule.

Muslim jurists of Islamic schools of law just mentioned the case of abortion and its liability, as well as its features and criteria which could be connected to the egg-shell skull rule through the example which could be understood explicitly or implicitly. When the case of abortion is scrutinized and looked into, it would be a basis and foundation for the further discussion to establish the egg-shell skull rule in the Islamic law of tort either it may occur in case of nervous shock involving human beings, animals and so on.

To make easier in dealing with this topic, it would be better to break it up into three sub-topics, namely:

1. Shock which causes abortion in dead or alive fetus.
2. Shock which causes the death of a pregnant woman.

3. Shock which causes abortion and thereafter the death of the woman.
4. Shock which causes death of a pregnant woman and then the abortion in dead or alive fetus.

#### SHOCK WHICH CAUSES ABORTION IN DEAD OR ALIVE FETUS

The major evidence and indication for discussion to the egg-shell skull rule in the Islamic law of tort which could be related to shock impact to mental impression of a pregnant woman which subsequently leads to abortion of her pregnancy is a case which happened in the reign of Caliph ʿUmar, a second successor of the Prophet Muhammad. It was reported that ʿUmar sent for a woman whose husband had been absent and whom a man used to visit. She asked: "What happen to ʿUmar? (i.e. why ʿUmar call her)". And while on her way she suddenly became frightened and birth pains struck her and she unexpectedly delivered a boy. The boy cried twice and then died. Thereupon, ʿUmar sought the advice of the Companions of the Prophet. Some of them counselled that, there is no obligation upon you since you are ruler and instructor. ʿAlī remained silent, so ʿUmar turned towards him and asked: "What do you say, O Abū al-Ḥasan?", he replied: "If they are speaking from their opinions, they are mistaken; and if they are speaking to please you, they are not giving you good advice. Verily, his (the foetus) *diyāh* (i.e. *ghurrah*) is your responsibility because you frightened her and she delivered him unexpectedly". Then ʿUmar said: "I adjure you not to depart from here until you have apportioned the *diyāh* among your tribe".

From the case we can say that any shock (*fazʿ*) resulting from a fright, threat or fear act arising from the request of authority for a pregnant woman in order to uncover something either relating to the right of God from *ḥudūd* or *taʿzīr*, or to uncover the right of human beings, then she suffers miscarriage of a dead embryo, the authority should be liable for *ghurrah* in the incident. This decision was wholly agreed by Islamic schools of law. (Ibn Ḍuwayyān 1984: 2/337; al-Bahūtī(a) 1982: 6/16; Ibn Qudāmah 1947: 9/579; al-Shīrāzī 1995: 3/205; al-Ramlī 1992: 7/348-350; al-Tasūlī 1991: 2/719; Sulaymān 1989: 12; ʿAwdah 1993: 2/74-75; al-Shāfiʿī 1993: 6/172; Maḥmaṣṣānī 1983: 1/185; al-Khaṭīb 1958: 4/81; al-Dardīr n.d.: 2/397; al-Mawāq 1992: 6/257). The liability arises regardless whether



the request of the ruler has made it directly to the woman or his request has been made through his official staff. (al-Bahūtī(a) 1982: 6/16; al-Khaṭīb 1958: 4/81). The ruler has a duty of care in respect of shock suffered by the woman and it is a foreseeable consequence in the woman of ordinary strength and the miscarriage is regarded as an injury due to the woman egg-shell skull personality. Thereupon, the ruler is required to take the woman as he finds her.

Because of that we can see the conditions which should be fulfilled in the case of causing abortion to a pregnant woman by the way of material or immaterial act in the Islamic law are: (Sulaymān 1989: 11).

- i. The place of transgression, namely a pregnant woman.
- ii. The wrongful act, namely an act to cause abortion.
- iii. The wrongful intention.

From the above cornerstones, it obviously seems that the second condition deals with directly in this discussion. Even though the act for abortion is normally caused by physical or material harm, but it may also be equally the cause and effect of that through the word or statement as intimidating, threatening or screaming towards a pregnant woman by a beat, hit, punch and so on. (al-Khaṭīb 1958: 4/103; al-Bahūtī(a) 1982: 6/23; Sulaymān 1989: 12). Anything happens to the pregnant woman like miscarriage or bleeding, the woman can claim damages from the tortfeasor.

In the Mālikī school of law, if the case was committed intentionally the *qisās* punishment is due on the tortfeasor either the foetus dropped in death or alive and then died, but merely the *ghurrah* if it has happened unintentionally. (al-Tasūlī 1991: 2/718-719; al-Dardīr n.d.: 2/397). But the other schools of law viewed that in all situations, the *ghurrah* is appropriate indemnity to the tortfeasor. (Mat Saat 1990: 245-246; al-Shīrāzī 1995: 3/22).

Similarly, were a man to seek the assistance of police authority or any person from state authority to be a judge against her so as to her comes to the court, and she frightened or shocked (*fazʿ*) and miscarried thereby, he is liable for what happened on account of his seeking such assistance and the miscarriage manifestly occurred because of that. (Ibn Ḍuwayyān 1984: 2/338; al-Bahūtī(a) 1982: 6/17; Ibn Qudāmāh 1947: 9/487-580; Sulaymān 1989: 13; °Awdah 1993: 2/74). In a specific text of the Ḥanbalī school according to a view stated by Ibn Qudāmāh in his treatise *al-Mughnī*, the element



of perpetration (*zulm*) is insisted in this case. The liability is due on the man, either in the case of miscarriage or death of the woman, if the pregnant woman is not recognized as a perpetrator (*zālimah*), otherwise he is not liable if she is commanded to come over to the court due to her perpetration. (Ibn Qudāmah 1947: 9/487-580; °Awdah 1993: 2/74; al-Bahūtī(a) 1982: 6/17; al-Bahūtī(c) n.d.: 3/305-306). Likewise, if a person by way of a perverted practical joke tells a pregnant woman that her husband is lying injured in an accident and the resultant shock to the woman's nervous system produces a severe abortion, the person is liable for compensation. Similarly, if a pregnant woman suffers nervous shock due to some terrible news or a threatening situation in which she is put in fear of her own safety, etc., and a miscarriage results, she may claim damages.

In the foetus dropped case caused by a shout, otherwise according to some Ḥanafī jurists, the defendant is not liable for the incident. Therefore, if a person shouts to one woman or he enters her home inadvertently happened to horror and the woman prematurely abort the foetus in consequence, no liability will be borne by the person. This is on the reason of the fact that the death or the abortion is in fact not resulting from the shout, but from the inner feeling of fear which exists in the victim's body and mind, not coming from the person who has made shouting. (al-Ramlī 1992: 2/194 and 196; Maḥmaṣṣānī 1983: 1/186). Or in another word, the injury suffered by the victim is considered as a result from a remoteness of causation, where there is not a clear linkage of causation between the tortuous act of the defendant and the injury underwent by the plaintiff.

In the Ḥanafī school of law, the case was elaborated that the causation which is made eventually resulting in abortion of a pregnant woman by a shout or a threat, it was dealt with according to types of shock. It was stated in *al-Fatāwā al-Khayriyyah* that if a person yells at a woman and her foetus is aborted thereby, he is not liable. But, if he threatens her with beating, he is liable. And then the difference between a shout and a threat to beat are classified. No liability for the former case is that the woman abortion due to the person's shout and it is obviously that the main cause here is from her own fear that comes out of her own sense that finally leads to the incident. But, for the latter case, the liability is imposed onto the person on the ground that the main cause for the woman

prematurely giving birth is the person's threat, and his threat is legally regarded as a major source to cause abortion for the woman and so he is held liable. (Ibn ʿĀbidīn 1992: 6/588; Bahnasī(a) 1984: 148; Bahnasī(b) 1989: 102-103; Bassiouni 1982: 179; Abdul Basir 1997: at end note 31).

#### SHOCK WHICH CAUSES THE DEATH OF A PREGNANT WOMAN

According to the Ḥanbalī school of law, if a woman dies either as a result of miscarriage or not, or she loses her mind on account of shock (*fazʿ*) as a result in either being summoned by a ruler (or any governmental authority) or being threatened by him, or being shocked by a court claim filed by a man, the ruler or the man is responsible to pay damages (*diyyah*). (Ibn Ḍuwayyān 1984: 2/337; al-Bahūtī(a) 1982: 6/16; al-Bahūtī(b) 1986: 494; Ibn Qudāmah 1985: 284). The death is amounted to quasi-wilful murder or manslaughter (*qatl shibh ʿamd*). (Ibn Qudāmah 1947: 9/487-580; ʿAwdah 1993: 2/74). The incident is considered in legal parlance as foreseeable negligence, even though the injury which occurred might be classed under remoteness of damage. But, according to the Shāfiʿī school of law, if a woman suffers shock and dies in consequence, without any cause of miscarriage, no damages should be put onto the shoulder of the tortfeasor on the ground that in a normal situation (*fī al-ʿādah*) the death will not happen or will unlikely be foreseeable to happen by such an act. (al-Shīrāzī 1995: 3/205; al-Ramlī 1992: 7/348-350; al-Khaṭīb 1958: 4/81; ʿAwdah 1993: 2/75). And also the ruler, the judge or the man involved is in fact uses their rights in the case for justice. (al-Ramlī 1992: 7/348-350; ʿAwdah 1993: 2/75). This view is also supported by a view in the Ḥanbalī school of law stated by al-Bahūtī that if a pregnant woman dies resulted in shock in a case of an act of asking by a ruler for probing something relating to the right of God or of a man files a claim against her in court, the ruler or the man will not be liable for the death of the woman. This is because by such an act no death will usually happen (*fī al-ʿādah*). (al-Bahūtī(b) 1986: 493-494). It could be said that the breach of duty of the ruler or the man is not the legal cause of the death and it will obviously be expressed by saying that the damage is too remote. This is because the death occurred is unforeseeability.

In another case where a man implores his assistance of police authority (or any person from state authority) to be a judge against



a pregnant woman, causing her shock (*fazc*) by the way of frightening or fearing and then she dies, (or suffers a miscarriage or loses her mind or sustains mental illness or suffers mental retardation or a kind of illnesses causes her psychiatric damage) in consequence, the man is liable for indemnity on account of his act to find out such assistance and the death obviously occurred by such an act. (Ibn Ḍuwayyān 1984: 2/338; al-Bahūtī(a) 1982: 6/17). According to a view in the Ḥanbalī school of law, the element of perpetration (*zulm*) is insisted in this case. The man is considered as a murderer of manslaughter if the pregnant woman is not recognized as a perpetrator (*zālimah*), otherwise he is not liable if she is commanded to come over to the court, where she has been admitted due to her perpetration. (Ibn Qudāmāh 1947: 9/487-580; °Awdah 1993: 2/74; al-Bahūtī(a) 1982: 6/17).

#### SHOCK WHICH CAUSES ABORTION AND THEREAFTER THE DEATH OF THE WOMAN

How about in the case of a pregnant woman dies after suffering abortion caused by a shock (*fazc*)? In this case, according to the Shāfiī school of law, the muslim jurists in this school opine that if a woman dies as a result of abortion or miscarriage, a *diyyah* should be paid by the °*āqilah* of the tortfeasor (al-Khaṭīb: 4/81; al-Ramlī: 7/348-350; °Awdah: 2/75) because miscarriage could normally cause the death of a pregnant woman. (al-Khaṭīb: 4/81). This is also followed by the Ḥanbalī school of law and the death is amounted to quasi-wilful murder. (al-Bahūtī(a) 1982: 6/16; al-Bahūtī(c) n.d.: 3/305; °Awdah 1993: 2/74). The woman in this case might be said that has an "egg-shell skull" personality on account of her condition while pregnancy state is susceptibility and sensitivity to any sudden shock and threat. The liability for damages, which should be paid by the defendant, includes the death of the woman though it was unforeseeable, because the law will ask whether the defendant could have foreseen the abortion, not the death. It was sufficient that the abortion she had suffered was foreseeable, though the death was unforeseeable.



SHOCK WHICH CAUSES DEATH OF A PREGNANT WOMAN AND THEN  
THE ABORTION IN DEAD OR ALIVE FETUS

In this case, the Mālikī school of law opines that no liability for the death of fetus, but the punishment of *diyāh* or *qisās* for the death of his mother. (al-Tasūlī 1991: 2/718-719; Ibn Juzayy n.d.: 228; Ibn Rushd n.d.: 2/311; al-Dardīr n.d.: 2/398; Mat Saad 1990: 248). But according to Ashhab, also a Mālikī jurist, a *ghurrah* should be imposed. (Ibn Juzayy n.d.: 228; Ibn Rushd n.d.: 2/311). Even though the death of the mother is unforeseeable consequence, but the extreme reaction from a pregnant woman who has had pre-existing susceptibility in that situation, the punishment will be imposed on the tortfeasor. So, the thin skull rule will be operated in this case. Whereas, the abortion of the fetus is regarded as a remoteness of damage, which is unforeseeable result. The *diyāh* or *qisās* based on tort, whether it has intentionally or unintentionally been done. No liability for fetus on the reason that the death is considered more likely resulted in the death of his mother. (°Awdah 1993: 2/301; Mat Saad 1990: 248). This is also the opinion of the Ḥanafī school of law, only *diyāh* should be paid for the death of the mother. (Ibn °Ābidīn 1992: 6/589; Mat Saad 1990: 248). But according to the Shāfiī school of law, only *ghurrah* for the fetus must be imposed on the tortfeasor regardless the abortion occurs while in alive or dead mother. (al-Khaṭīb 1958: 4/103; Ibn °Ābidīn 1992: 6/589). The abortion is considered foreseeable consequences of the negligence in whatever circumstance, unlike the death of the mother, where it is unforeseeable result in 'customary phlegm' though through negligence shock. It is followed by the Ḥanbalī school. (al-Bahūtī(a) 1982: 6/23; al-Bahūtī(c) n.d.: 3/310; °Awdah 1993: 2/301; Mat Saad 1990: 248). The Shāfiī school of law adds that even though any act done to a dead pregnant mother, which results in abortion thereby, the tortfeasor must be liable for a *ghurrah*. (al-Khaṭīb 1958: 4/103).

In case of abortion, which the fetus is fortunately alive, the tortfeasor should be imposed the *ta'zīr* punishment, where its quantity and kind based on the discretion of judge. And if after that he dies by other cause, the punishment will be decided based on such a cause. (°Awdah 1993: 2/301; Mat Saad 1990: 247). According to Mālikī jurists, if the fetus is aborted after his mother dies and the fetus is alive for a while and then dies, the payment of *diyāh* is due

on the condition that his *walī* (*awliyā'*) should make *qasāmah* that the fetus death has been caused by the tortfeasor. However, if the fetus dies in a fast conjuncture after dropping, no *ghurrah* is due because at that time the fetus is in very weak condition and lest or more probably his death not resulted in by the tortfeasor's act. (al-Dardīr n.d.: 2/398; al-Şāwī n.d.: 2/398).

#### A FEW RELATED CASES TO THE EGG-SHELL SKULL RULE

1. If a person threatens a boy (*şabī*) or a vulnerable or weak mind mature teenager (*bāligh maḍ'ūf: bāligh ḍa'īf al-ʿaql*)- (*bāligh* means a person who has attained the age of puberty) by showing or drawing a sword rigorously (*tahdīd shadīd*) towards him or the person does an extreme scream (*şayhah ʿazīmah*) towards him, and later the boy or the teenager loses his mind in consequence, the person is liable to pay a *diyāh* due to his action is considered in the fact that to be a real cause of the loss of mind. (al-Shīrāzī 1995: 3/222; al-Dimashqī 1987: 612; al-Khaṭīb 1958: 4/80). But, however if the threat by the sword or the extreme scream has been done to a normal mature teenager (*bāligh mutayaqqız*) - (means an adolescent who has not a vulnerable or weak mind) and then he suffers the similar injury, the payment of *diyāh* would not be ascribed to the person, because the loss of mind is not legally considered to happen to a normal person. (al-Shīrāzī 1995: 3/222-223). This decision will be judged similar in this respect to an intelligent minor who is almost to achieve the age of puberty (*murāhiq mutayaqqız*). (al-Nawawī n.d.: 283).

From the above case, the liability is definitely fixed on the boy or the vulnerable mind mature teenager. No question arises about the condition or situation of the victim, in the matter of the liability of *diyāh* should be extended to pre-existing mental weakness and whether the hidden sensitivity of the victim may not be foreseeable. The important thing is if the boy or the vulnerable adolescent suffers foreseeable injury as the result of the person's threat or extreme scream and the act triggers off an unforeseeable counteraction which gives affection to his pre-existing sensitivity, the person will fully bear liability in respect of both foreseeable and unforeseeable results of his acts. Even though the victim seems to be so



sensitive and susceptible to the threat and intimidation, the Islamic law seems not to consider taking account of that. This may be because the law takes more serious, attention and priority to the concern and advantage of the boy and the vulnerable mind adolescent in terms of physically and mentally circumstances. Thus, it could be said that the measurement of liability is based on “customary phlegm” of people, where the tortfeasor will be liable for the injury sustained by the victim as finds him. So, in this case, it could be looked at that there is manifestly a space for the egg-shell skull rule to be applied.

2. If a person screams with a shock shouting (*ṣayḥah munkarah*) to a minor who has not been *mumayyiz* (*ṣabī*), who is standing on the edge of a roof or at a sloping margin of a river or at the edge of a well, the minor shudders thereby and causes him falling down and dies in consequence, the payment of *diyāh mughallaghah* is obliged to the person's *‘āqilah*. The case is considered as *shibh ‘amd or amd khaṭa’* case, because it is most probably not deemed to happen. However, there is an opinion in the Shāfi‘ī school that the punishment of *qiṣās* should be carried out because it is most likely (*ghālib*) considered to happen. It would be regarded as *qaṭl al-‘amd*. (al-Nawawī n.d.: 283; al-Khaṭīb 1958: 4/80; al-Shīrāzī 1995: 3/205; al-Dimashqī 1987: 612). Conversely, if the case happens on the ground or it happens to an adult (*bāligh*) who is on the edge of a roof, and the unexpected scream leads a fatal fall, no liability of *diyāh* will be ascribed to the person based on the more correct opinion (*aṣaḥh*). This is because in such situations, a death does not usually occur. (al-Nawawī n.d.: 283; al-Khaṭīb 1958: 4/80; al-Shīrāzī 1995: 3/205; al-Dimashqī 1987: 612). However, there is an opinion in the Shāfi‘ī school that in both situations, the person is liable on the reason that for the minor it may clearly cause the death to him, and for the *bāligh* lack of holding or lack of firmness (*‘adam al-tamasuk*), or the scream happened unexpectedly (*fī ḥāl ghaflah*), that causes him to be shock to be regarded as a minor. (al-Khaṭīb 1958: 3/80; al-Shīrāzī 1995: 3/205).

In the above case, the position of the minor is regarded similar to a person who is sleeping (*al-nā'im*), a minor who has been *mumayyiz* but having weak-spirited (*ḍa‘īf al-tamyīz*),

an insane *bāligh*, a feeble-minded person/semi-lunatic person (*ma<sup>c</sup>tūh*) and also a woman who has weak or feeble-minded (*al-mar'ah al-da<sup>c</sup>īfah/imra'ah da<sup>c</sup>īfat al-<sup>c</sup>aql*). (al-Dimashqī 1987: 612; al-Khaṭīb 1958: 4/80).

If the case of nervous shock happens against the persons above, inevitably the court will apply to use the foreseeability test to the tortfeasor and willy-nilly the egg-shell skull rule will be taken into account by the court. No question may rise on the side of the tortfeasor about the condition of the victim whether he is a *ṣabī* or a sleeping person or a weak-spirited and so on to reduce his burden of liability. He must take the victim or the plaintiff as he finds him as regards his physical characteristics. Whatever differences will be happening in the sense of the plaintiff's non-physical condition or unknown characteristics which already available in the plaintiff's body, compared to a normal person in customary phlegm, will not be concerned.

3. In the case that the defendant, by way of a practical joke, falsely represented to the plaintiff that his wife or her husband had met with a serious accident. The plaintiff, believing the story, suffered a violent shock to his or her system and subsequently became ill. Then he or she brought an action against the defendant claiming damages for her psychiatric illness. The effect of this kind of joke is a tort of nervous shock and the plaintiff's claim should be succeeded. It was clearly that the action of the defendant as having intended to induce the psychiatric illness in the plaintiff. This is in a line of a statement made by Ibn Ḍuwayyān: "If a person acts immoderately or in excess of what would achieve the purpose intended and a person is injured (or dies) because of it, he is responsible for the victim due to his *ta<sup>c</sup>addī* (transgression) of immoderate action". (Ibn Ḍuwayyān 1984: 2/337; al-Bahūtī(c) n.d.: 3/305; al-Bahūtī(a) 1982: 6/16). So anything beyond normal practices is not permitted to be done, as a husband punishes his wife for disobedience or a father disciplines badly behaved of his children or a teacher educates his students or a ruler punishes his subjects, all are done immoderately or in excess, they will be liable. Likewise, a seriously joke made by a person tells a false news to another about his relative, which subsequently causes him sustaining nervous shock culminating in an illness.



The person should be liable for either intentionally or negligently doing something which could be calculated to cause injury to the victim in whatever condition of physical and mental of the victim. If the victim has suffered a further illness which is unforeseeable in nature, it is sufficient to be proved that the first injury he has suffered is foreseeable.

### CONCLUSION

After the discussion, it could be summed up that the egg-shell skull rule or the thin skull rule was formulated by the lawyers, in English law and Islamic law, in going to achieve a standard of justice for both, the plaintiff and the defendant. Thereupon, for some cases the defendant should take his plaintiff as he finds him. He should be liable for the whole injury inflicted on the plaintiff, inclusively foreseeable and unforeseeable injury.

In brief, the egg-shell skull rule in the Islamic law may be defined as the tortfeasor cannot deny or argue against the liability imposed on him for his tortious act which causes more loss or extent of injury to another compared to a normal situation or a normal person in the similar case. He should accept the liability as he finds the case based on the current situation of the victim. To sum up, the above discussion clearly demonstrates and proves that the “egg-shell skull” rule is not uncommon and irregular in Islamic law of tort.

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