The Basis of Civil Liability for Service Providers in Islamic Law and Its Comparison with French, American, and European Union Law

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Abstract

The foundation of civil liability for service providers is not uniformly interpreted across different legal systems. In Imami jurisprudence the narrations indicate that the Sacred Lawgiver, to enhance caution in service provision and protect victims, has established a presumption of liability for service providers placing the burden of proof for exoneration on them, or at the very least, presuming their fault in liability arising from causation, obligating them to prove the absence of fault. This solution is also suggested to be accepted in Maliki jurisprudence specifically for craftsmen, although there is contrary opinion. In Hanafi and Hanbali jurisprudence, the liability of a common hireling is based on "destruction," whereas in Shafi'i jurisprudence, the presumption of non-liability is stronger. In European countries the 1991 European Commission proposal envisaged a presumption of fault for service providers, placing the burden of proving the absence of fault on the service provider, although this was not enacted due to member states' disagreements.

However, there is a tendency to facilitate the proof of their fault. Therefore, as specified in the comprehensive research conducted in 2004 commissioned by the European Commission and accepted by the judicial practice of France, the United States, and the European Court of Justice, the liability of service providers is based on fault, and the burden of proof lies with the "consumer." Consequently, the solution accepted in Imami jurisprudence, for the aforementioned reasons, is preferred over the solutions established in the other legal systems studied, and it is proposed that the global community should also adopt this approach.

Keywords: Service Providers, Fault, Strict Liability, Presumption of Fault, Presumption of Liability.

Introduction

The global movement to support victims of unsafe products against "manufacturers and suppliers of defective goods" spearheaded by judicial precedents particularly in the United States, ultimately bore fruit. This movement compelled legislators to adopt the doctrine of "strict liability" for manufacturers of defective products and to facilitate the compensation of injured parties. Consequently, Article 1 of the European Community Council Directive enacted in 1985[1] and amended in 1999[2] imposed strict liability on "producers of goods" mandating its implementation across the member states of the European Union. In a similar vein Law No. 389-88 enacted on May 19, 1998 added eighteen provisions to Article 1386 of the French Civil Code marking France's eventual acceptance of strict liability for manufacturers of defective products after years of resistance primarily due to the European Court of Justice's mandates (Le Tourneau, 2005, p.126)[3].

However, there has been no success regarding the basis of liability for "service providers." The European Commission's[4] 1991 proposal which envisaged a "presumption of fault" for service providers was not adopted by member states and subsequent efforts to harmonize views and reach a consensus have also been unsuccessful (Weatherill, 2005, p.147)[5].

1. Council Directive 85/374/EEC of 25 july 1985 on liability for defective products (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31985L0374).
2. Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31999L0034).
3. For a detailed discussion, see: Hortala, 2024: https://www.dalloz-actualite.fr/flash/prothese-defectueuse-conditions-de-responsabilite-du-producteur-et-du-chirurgien; https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000205903
4. Liability of Suppliers of Services in the European Community: The Draft Council Directive (1991).
5. In Iranian law, the Law on Protection of Consumer Rights enacted in 2009 subjects both producers of goods and providers of services to a unified legal framework. However, it does not introduce a new basis for their liability and refers to other laws, contracts and customary practices for the foundation of their liability in Article 2. Consequently, the prevailing view in legal doctrine is that the legislature in this article and in a debatable perspective has established the liability of producers of defective goods and providers of faulty services on the basis of fault. Without the occurrence of fault they are not recognized as liable. Nonetheless, in certain scattered laws, a "presumption of liability" or "presumption of fault" has been accepted for

In contrast, under Islamic law particularly Shia jurisprudence based on narrations from Shia Imams, the rights of victims against service providers are safeguarded through the establishment of a "presumption of liability" or at least a "presumption of fault." This discussion falls under the topic of "liability of the employee" in Shia and Sunni jurisprudence. An employee in this context is someone with professional skills who provides services and, in the course of providing these services causes damage to others. Examples include a tailor who burns or cuts fabric improperly, a launderer who damages clothing while washing, a carrier who causes damage during transportation or a carpenter who splits a door while hammering a nail.
Nevertheless before commencing the discussion it is necessary to elucidate the application of the "liability of the employee"[1] to "service providers." In the traditions reported in Shi'a jurisprudential sources and the writings of both Imami and Sunni jurists, numerous instances of service providers such as launderers, dyers, craftsmen, porters, weavers, sailors, camel

some service providers, such as physicians and commercial and maritime carriers (see: Badini and Javaherkalam, 2018: 16-18; Badini, Javaherkalam, and Radparvar, 2012: 31-33).

1. In Islamic law, an employee (Ajir) is divided into "Ajir Khas" (specific employee) and "Ajir Mushtarak" (common employee); although there is a difference of opinion among jurists regarding their definitions. Some believe that an Ajir Khas accepts work from a single individual, whereas an Ajir Mushtarak accepts work from two or more individuals, and because several people share in his benefit, he is called Mushtarak (common) (Al-Sheikh Nizam, 1411, Vol. 4, p. 500; Al-Zayla'i Al-Hanafi, 1413, Vol. 4, p. 134; Al-Nawawi, n.d., Vol. 15, p. 99; Al-Maqdisi, 1405, Vol. 6, p. 117; Al-Buhuti, 1402, Vol. 4, p. 32). In Imami jurisprudence, an Ajir Khas is defined as one who is hired to perform an act by himself within a specified period or for a specific act that has a defined beginning. An Ajir Mushtarak, on the other hand, is one who is hired to perform an act within a specified time without the condition of direct involvement or with the condition of direct involvement but without a specified period or without both conditions; although this definition has also faced criticism (Amili, 1413, Vol. 5, p. 189; Bahrani, 1405, Vol. 21, p. 558; Najafi, 1404, Vol. 27, p. 268; Amili, 1410, p. 156; Mughniyah, Vol. 4, p. 280; Amili, 1422, p. 493). Another group considers Ajir Khas as referring to a "personal or specific lease" and Ajir Mushtarak as referring to a "general lease on liability" (See: Ardabili, 1403, Vol. 10, p. 14; Allamah Hilli, 1413, Vol. 6, p. 156; Najafi, 1359, Vol. 2, p. 133; Sharif Murtaza, 1415, p. 466). From this definition, it appears that the division of Ajir into Khas and Mushtarak is meant to distinguish between specific and general leases. In reality, just as the sold item (Mabi') is divided into specific and general, the jurists have sought to divide the lease into specific and general to determine whether the employee can work for others as well. Consequently, in both Imami and Sunni jurisprudence, after defining Ajir Khas and Ajir Mushtarak, it is stated that an Ajir Khas cannot work for another during that period.

drivers, lessors, carpenters, tailors, physicians, ophthalmologists, veterinarians, circumcisers, cuppers, ship owners, guards, shepherds, cattle herders, automobile drivers and similar professions have been addressed in terms of liability and responsibility. Although in Islamic jurisprudence the liability of this group of individuals has been discussed under the title of employees these individuals have no unique characteristics and the reference is to all those who provide services. In some traditions, as will be discussed the general liability rule applies to any "worker" or "common worker" (i.e., someone who works for multiple people), indicating that it pertains to individuals engaged in performing tasks for others and providing services (Badini and JavaherKalami, 1397: 8-9; Javadi and Karimi, 1397-51-52). Some Imami jurists, after categorizing leases based on the subject matter into leases on the benefits of property (including goods, real estate, and animals) and leases on labor have included cases such as the lease of professional services and craftsmen within the scope of labor leases (Kashif al-Ghita, 1359, Vol. 2, p. 131). Therefore, "professionals" corresponds to "professionals" in French law, and "lease of professionals" corresponds to "service providers" in current law. Consequently, from the examples mentioned in the jurisprudential texts one can derive the general rule of civil liability for service providers.

Nevertheless a disagreement has arisen among Islamic jurists regarding whether an employee or service provider in the aforementioned cases is liable for the damages incurred. However, it is necessary to clarify the concept of "liability" as many Islamic scholars have erred in interpreting traditions and principles underlying service providers' liability due to a lack of clarity about what constitutes employee liability. Employee liability can be examined from two perspectives:

1. "Absolute liability" ("liability of hand") or "responsibility arising from dominion over another's property": In Islamic law as a general rule any person who, without the owner's or legislator's (Shar') permission, dominates and takes possession of another's property is liable for that property, even if the damage to the property was not caused by their action and was attributable to a third party or even a force majeure. This rule is

referred to as "liability of hand," based on a hadith from the Prophet of Islam which states " It must be returned by anyone who controls another's property, otherwise it is their own responsibility."[1] Accordingly, the possessor of another's property is generally liable for it unless the legislator (Shar') or the owner has permitted the possession and recognized them as a "trustee." In this case, the trustee is not liable for the "destruction" of that property unless they have committed negligence or intentional wrongdoing in its preservation and safekeeping. In such a scenario the trustee will be "absolutely" liable for the damages incurred to the property termed "absolute liability" or "objective liability" (for a detailed discussion, see: Safaei and JavaherKalami, 2023, 262-267 and 290-298).

Based on this a hireling or service provider, who gains control over property with the owner's permission to handle it, is undoubtedly not liable for the said property; rather, they are considered a trustee. According to legal principles a trustee is not held responsible as long as they have not committed any fault in the preservation and maintenance of the property. Consequently, if the property is lost or damaged by a third party or due to natural disasters, such as an earthquake, flood, or fire without any fault or negligence on the part of the trustee, the hireling or service provider will not be held liable.

2. "Destruction" or "Causation" or Civil Liability in the Specific Sense: According to legal principles, if someone destroys another's property or causes its destruction, meaning the damage is attributable to the wrongdoer they are liable to the injured party and must compensate for the damage caused. "Liability of the hireling" or the service provider's liability falls under this category; meaning, the discussion revolves around whether the hireling or service provider, while providing the service, causes damage and whether they are liable for compensating the damage even if no fault was committed. Or are they only liable if they have committed a fault? Is there a presumption of fault or a liability presumption in proving their

1. "Liability remains on the possessor for what is taken until it is returned" (Ahsa'i, 1405 AH, Vol. 1, p. 389, and Vol. 3, pp. 246, 251; Noori, 1408 AH, Vol. 14, p. 8; Tabataba'i Borujerdi, 1429 AH, Vol. 24, p. 180).

liability? This means that "fault is presumed" and they have to "prove the absence of fault" to be exempt from liability, or their obligation is considered an obligation to achieve a result, and their "liability presumption" is established, allowing them to be exempt from liability only by "proving the occurrence of force majeure" and attributing the damage to an external event or a third party's act or the fault of the injured party.

Here is where the disagreements arise; because the apparent narrations indicate the existence of this "liability presumption" or at least a "presumption of fault". However, this ruling which is crucial for protecting the rights of the injured and preventing carelessness among service providers, has been overlooked by the majority of Islamic jurists. However, it can be utilized as an important source of liability for service providers in Modern Law through the organisation of hirelings' liabilities within Islamic jurisprudence, particularly Imamiyyah law and is proposed to the world as a model which would have been appropriate.

Given the aforementioned discussions, the question is on what basis is the liability of service providers established: Is it subject to general civil liability rules and based on "fault", which the injured party must prove, or should "strict liability" also be established in this context, or is it better to adopt a "presumption of fault" (liability presumption) for service providers? What are the views of Islamic law (including Imami jurisprudence and the four Sunni schools), French law, United States law and European Union law on this issue, and which one provides a more appropriate and effective solution for protecting the injured and compensating for the damages?

To answer these questions, first, the civil liability of service providers in the Islamic legal system will be examined (First Section). Then, the liability of service providers in French law, U.S. law, and European Union law will be studied (Second Section).

First Section: Basis of Civil Liability of Service Providers in Islamic Law (Imami Jurisprudence and Sunni Schools)

Considering that the issue of lessee's guarantee or the liability of service providers has been extensively discussed, particularly in Imami jurisprudence, and this ruling has been legislated since the time of the first Imam of Shia, Imam Ali, with numerous narrations also entered from other Shia Imams, the civil liability of service providers in Imami jurisprudence (First Clause) and the Sunni schools (Second Clause) is separately examined.

First Clause: Civil Liability of Service Providers in Imami Jurisprudence

In Shia narrations, abundant and seemingly conflicting reports regarding the lessee's guarantee and the liability of service providers have reached us from the infallible Imams (A), for which Imami jurists have proposed solutions (B). It appears that complete categorization of these narrations has not been done (C).

A- Overview of Narrations Regarding the Liability of an Employee

Although Imami jurists have sporadically referenced narrations concerning the liability of an employee, a comprehensive categorization of these narrations has not been undertaken. It appears that the narrations can be classified into five distinct categories:

1. Non-guarantee of the lessee:

The only narration indicating the non-guarantee of the lessee is from Imam Sadiq, wherein he said to Muawiya ibn Ammar regarding a dyer and a launderer: "They are not guarantors" (Sheikh Tusi, 1407, Vol. 7, pp. 220; Hur Amili, 1409, Vol. 19, pp. 144; Sheikh Tusi, 1390, Vol. 3, p. 132).

2. Absolute guarantee of the lessee:

Some narrations suggest that the lessee's hand is a guarantee, and his liability is absolute. Halabi and Abu Basir narrate from Imam Sadiq that Imam Ali considered dyers and launderers as guarantors for the sake of caution in people's properties. Yunus also reported that Imam Reza said about guaranteeing dyers and launderers: "The affairs of people cannot be organized without appointing guarantors for them" ((Kulayni, 1407, Vol. 5, pp. 242-243; Sheikh Tusi, 1407, Vol. 7, pp. 219; Hur Amili, 1409, Vol. 19, pp. 142-145; Sadouq, 1413, Vol. 3, p. 256; Sheikh Tusi, 1390, Vol. 3, p. 132).

3. Lessee's guarantee in case of damage and loss:

Numerous reports indicate the lessee's guarantee in case of damaging goods. Halabi and Abusalah narrate from Imam Sadiq concerning the guarantee of launderers and dyers that every lessee who receives payment for repairing goods, if he damages them, is a guarantor. Zaid ibn Ali reports from his ancestors regarding a porter who broke a large glass oil jar, Imam guaranteed him and said: "Any joint worker who damages goods is a guarantor." It has also been narrated that Imam Sadiq ruled for guaranteeing launderers because the garment was given to them for repair, not for damage.

Ibn Ri'ab reports regarding a case where a slave, while accompanying livestock, trampled upon a person along the way. He quotes the Imam as stating that the master of the slave is liable for the compensation (Sadouq, 1413, Vol. 3, p. 253; Sheikh Tusi, 1407, Vol. 7, pp. 220-223, 242; Kulayni, 1407, Vol. 5, pp. 241-243; Hur Amili, 1409, Vol. 19, pp. 141-153; Tabataba'i Borujerdi, 1429, Vol. 24, pp. 131, 137; Sheikh Tusi, 1390, Vol. 3, p. 132).

4. Liability of the Hired Worker Except in Cases of Force Majeure:

Certain other narrations hold the hired worker liable unless the loss results from predominant events (force majeure). Sukuni narrates from Imam Sadiq (peace be upon him) that the Commander of the Faithful (peace be upon him) held dyers, launderers, and craftsmen liable for people's goods as a precaution, but did not consider them liable in cases of drowning, fire, or other predominant incidents. Masma' ibn Abdul-Malik also narrates from Imam Sadiq (peace be upon him) that the Commander of the Faithful (peace be upon him) held the common worker liable except in cases of predation, drowning, fire, or theft by an overpowering thief (Kulayni, 1407, Vol. 5, pp. 242, 244; Sheikh Tusi, 1407, Vol. 7, p. 219; Hur Amili, 1409, Vol. 19, pp. 143, 149; Sheikh Tusi, 1390, Vol. 3, p. 131).

5. Distinction Between Trustworthy and Non-Trustworthy Agents:

Some narrations differentiate between a trustworthy agent and one under suspicion in terms of liability. Ja'far ibn Uthman narrates about a camel herder who claimed a camel was lost, quoting Imam Sadiq (peace be upon him) as saying: "Do you suspect him?" I replied: "No." He said: "Do not hold him liable." Bakr ibn Habib asked Imam Sadiq (peace be upon him) about a garment given to a launderer who claimed it was stolen. The Imam (peace be upon him) replied: "If you suspect him, make him swear an oath. If you do not suspect him, nothing is upon him." Furthermore, he narrated from the same Imam (peace be upon him) that a launderer is not liable except for what he damages with his own hands; if he is under suspicion, make him swear an oath. Khalid ibn Hajjaj also inquired of Imam Sadiq (peace be upon him) about reduced foodstuffs entrusted to a sailor for transportation. The Imam (peace be upon him) responded: "If he is trustworthy, do not hold him liable." Abu Basir narrates from the same Imam (peace be upon him) that goldsmiths, launderers, and weavers are not liable unless they are under suspicion; in such cases, they are intimidated with a request for proof and an oath to ensure they do not take

anything unlawfully. Moreover, regarding a person who hired a porter and the porter broke or spilled the load, the Imam (peace be upon him) stated: "He is like an agent; if he is trustworthy, nothing is upon him. If he is not trustworthy, he is liable" (Hur Amili, 1409, Vol. 19, pp. 144-150; Sheikh Tusi, 1407, Vol. 7, pp. 217-221; Sadouq, 1413, Vol. 3, p. 257; Kulayni, 1407, Vol. 5, pp. 243-244; Tabataba'i Borujerdi, 1429, Vol. 24, p. 143; Sheikh Tusi, 1390, Vol. 3, p. 133).

B- Opinions of Imamiyya Jurists on the Liability of the Hired Worker:

Considering the aforementioned narrations, which suggest the liability of the hired worker, many Shi'a jurists have interpreted these reports to mean that "the hand of the hired worker is a liability." Since they view the principle of the hired worker's liable hand as contrary to the general rules, they have attempted to demonstrate that the rule of liability does not apply to the hired worker. Therefore, the hired worker should not be held absolutely liable for damages to the goods.

Therefore, many Imami jurists attribute the doctrine of the absolute liability of the hireling to only two early Imami jurists, namely Sheikh Mufid and Sayyid Murtadha (Hosseini Ameli, 1419 AH, vol. 19, p. 774; Kashif al-Ghita, 1422 AH, p. 34; Eshtehari, 1417 AH, vol. 27, p. 138), and they themselves have sought to justify the traditions that indicate the liability of the hireling. Accordingly, some jurists, by comparing the hand (possession) of the hireling with that of the lessee, have considered the hand of the hireling, such as a tailor, laundress, dyer, lessor, sailor, and camel driver, as that of a trustee (Hosseini Ameli, 1419 AH, vol. 19, p. 774; Ameli Karaki, 1414 AH, vol. 7, p. 261); but in reconciling the mentioned traditions, they have become despondent and have deemed the definite instance from them to be the hireling who is suspected and does not provide evidence for the destruction of the item (Hosseini Ameli, 1419 AH, vol. 19, p. 783; Najafi, 1422 AH, p. 35; Bahrani, 1405 AH, vol. 21, p. 622). Others, relying on the principle of exoneration and the principle of non-liability and considering the hadith of Muawiya ibn Ammar from

Imam Sadiq, have ruled that the hireling is not liable and have interpreted the traditions that indicate liability as referring to negligence or delay beyond the specified time (Allama Hilli, 1413 AH, vol. 6, p. 157). Some have also held the hireling liable if the destruction is due to his negligence, act, or defective workmanship, citing the consensus of the jurists, the transmitted reports, and the principle of exoneration, and have interpreted the traditions indicating liability as referring to destruction due to the hireling's act (Sheikh Tusi, 1407 AH, vol. 3, pp. 203-501). Others have relied on more widely recognized traditions than those cited by Sheikh Mufid and Sayyid Murtadha and have interpreted the traditions indicating liability as referring to the hireling's negligence (Ameli Karaki, 1414 AH, vol. 7, p. 262). Some prominent jurists have interpreted the traditions of liability as pertaining to instances where the hireling has caused destruction and, based on texts consistent with the principle of trusteeship and the principle of exoneration, have dismissed the traditions indicating liability and considered the hireling a trustee, attributing this view to Shia jurists as the stronger opinion (Najafi, 1404 AH, vol. 27, p. 344; Eshtehari, 1417 AH, vol. 27, p. 140). Muhaqqiq Ardebili, by applying the absolute to the restricted, has interpreted the traditions indicating liability as pertaining to the untrustworthy hireling. As a result, if it is known that the item has been destroyed, the hireling is not liable; otherwise, he will be liable (Ardebili, 1403 AH, vol. 10, p. 75). Some have also distinguished between "causing destruction" or the hireling's negligence and "the occurrence of destruction" without his negligence, ruling in the latter case that the craftsman is not liable (Muhaqqiq Hilli, 1408 AH, vol. 2, p. 148; Mughniyah, 1421 AH, vol. 4, p. 283).

In summary, from the perspective of Shia jurists, the possession of the hireling is that of a trustee, and he is not liable for destruction that occurs unless he has committed negligence or recklessness, or the damage is attributable to his act and he has essentially caused the destruction (Ardebili, 1403 AH, vol. 10, pp. 73-75; Allama Hilli, 1414 AH, vol. 15, pp. 138, 186; Sheikh Tusi, 1387 AH, vol. 3, p. 242; Hilli, 1405 AH, p. 295; Ameli, 1413 AH, vol. 5, p. 224; Mughniyah, 1421 AH, vol. 4, pp. 283-

284; Halabi, 1403 AH, p. 347; Dailami, 1404 AH, p. 196; Ibn Idris Hilli, 1410 AH, vol. 2, p. 470; Sheikh Tusi, 1407 AH, vol. 3, p. 501; Kashif al-Ghita, 1359 AH, vol. 1, p. 220; Tabatabai Yazdi, 1409 AH, vol. 2, p. 601; Eshtehari, 1417 AH, vol. 27, pp. 138-140; Esfahani, 1409 AH, p. 287; Hashemi Shahroudi, 1417 AH, vol. 1, p. 55; Fazel Lankarani, 1424 AH, p. 626; Hashemi Shahroudi, 1423 AH, vol. 3, p. 241).

C. Reconciliation of Traditions: Indicia of Liability for Service Providers

It appears that the efforts of the jurists to reconcile the received traditions regarding the liability of the hireling have not been successful, and they have been unable to reconcile the trustee nature of the hireling's possession (meaning that the hireling is not liable for the destruction of the item due to force majeure or the act of a third party) with his liability for damages to the subject matter of the contract (which is attributable to his act and ascribed to him, even though no negligence during the work on the item has been committed or proven).

However, by categorizing the narrations concerning the liability of a hireling (ajir), some can be seen as indicative of primary rulings (hukm-e thubuti) while others can be seen as illustrative of secondary rulings (hukm-e ithbati). In essence, the narrations addressing the liability of a hireling in cases of corruption and destruction articulate the primary rule of the hireling's civil liability. Conversely, the narrations indicating the absolute liability of the hireling convey a secondary ruling; meaning that whenever the goods are lost or damaged in the hireling’s possession, the presumption is that the hireling is liable, unless they can prove that the loss was not due to their actions. Essentially, the sacred law has established a "presumption of liability" for tradespeople to safeguard people's property and has placed the burden of proving the loss due to uncontrollable events (overwhelming occurrences) on them[1].

1. Some jurists believe: "Joint operators or professionals who are specialists, if they cause harm to another, are presumed to lack the necessary knowledge to manage their profession properly, thereby causing damage. Alternatively, it is presumed they had sufficient knowledge but failed

This principle is well illustrated in several narrations regarding the liability of a hireling. For example, Halabi narrates from Imam Sadiq regarding a transporter of olive oil who claimed it spilled, was lost, or was stolen. The Imam said that if he provides a just witness (bayyina 'adla) proving that it was stolen or destroyed, nothing is upon him; otherwise, he is liable. Zayd Hasham and Halabi narrate another report from the same Imam, wherein a person rents a camel and sends olive oil with the camel driver. The camel driver claims some of the containers burst and the oil spilled. The Imam said if he wishes, he can take the olive oil from him, but if the camel driver claims the containers burst, his claim is not accepted without a just witness. Halabi further reports from Imam Sadiq about a launderer and dyer: if anything is stolen from them and there is no clear evidence of the theft, they are liable for it; if they provide a just witness, nothing is upon them. Similarly, Abu Basir and Ibn Muskan narrate from Imam Sadiq regarding a launderer who claimed clothes were stolen from his items. The Imam said he must provide a just witness proving that it was stolen from among his items; in this case, nothing is upon him, and if all his items were stolen, still nothing is upon him (Hurr al-Amili, 1409 AH, vol. 19, pp. 141-153; Saduq, 1413 AH, vol. 3, pp. 255-256; Sheikh Tusi, 1407 AH, vol. 7, pp. 217-218 and 225; Sheikh Tusi, 1390 AH, vol. 3, p. 131; Kulayni, 1407 AH, vol. 5, pp. 242-243; Tabataba'i Borujerdi, 1429 AH, vol. 24, p. 129).

The aforementioned narrations leave no doubt that the hireling is liable for the loss of the goods unless they prove the loss was not due to their actions. Nonetheless, except for a few Imami jurists (Sharif Murtaza, 1415 AH, p. 466; Mufid, 1413 AH, p. 463; Najafi, 1422 AH, p. 34; Esfahani, 1409 AH, p. 306), most others, considering the hireling as a trustee (amin), have disregarded these narrations and believe that whenever an artisan, a lessor, or a sailor claims loss and the owner denies it, the hireling's word, with an oath, takes precedence (Muhaqqiq Hilli, 1408 AH, vol. 2, p. 150; Najafi, 1404 AH, vol. 27, p. 342; Eshtehari, 1417 AH, vol. 27, p. 149; Halabi,

to apply it, making them liable in either case. In other words, the fault of professionals is presumed. Although this presumption can be rebutted, in practice, it is rarely achievable, thus resulting in strict liability for them" (Javadi and Karimi, 2018, pp. 51-52).

1403 AH, p. 347; Hilli, 1405 AH, p. 295; Ibn Idris Hilli, 1410 AH, vol. 2, p. 470; Allamah Hilli, 1420 AH, vol. 3, p. 132; Amili Karaki, 1414 AH, vol. 7, p. 297; Amili, 1410 AH, vol. 4, p. 362; Amili (Shahid Awwal), 1410 AH, p. 157; Tabataba'i Yazdi, 1409 AH, vol. 2, p. 627; Hakim, 1416 AH, vol. 12, p. 167; Amili, 1413 AH, vol. 5, p. 233). This opinion, as it contradicts the aforementioned texts, is subject to criticism.

The aforementioned opinion is subject to criticism because it contradicts the aforementioned texts. Additionally, this perspective is incompatible with the "reasoning" mentioned in some narrations, as the Infallibles (peace be upon them) have ruled for the liability of the hirer to protect people's property and ensure their affairs are managed. Considering the hirer as a trustee and placing the burden of proving loss on the owner is inconsistent with the aforementioned reasoning, and as a result, such an interpretation should be disregarded.

Consequently, it becomes clear from the interpretation provided of the above narrations that the hirer's possession is neither a liability that makes them liable for the loss of goods under all circumstances nor a typical trust that places the burden of proof on the other party. Rather, the law has accepted the hirer's responsibility as a principle, and it is the hirer who must prove their non-liability. What Sheikh Mufid and Sayyid Murtadha have stated also supports the presumption of the hirer's responsibility, as Sayyid Murtadha, although considering craftsmen liable and citing the principle of "al-yad ma akhadhat hatta tu'addiyah" to prove their liability, believes that whenever it is established that the goods have perished, it is common knowledge that they could not have been prevented, or if there is evidence proving the loss, the hirer will not be liable (Sharif Murtadha, 1415, p. 466). Sheikh Mufid also considers craftsmen such as washers, dyers, tailors, as well as sailors, renters, and camel owners liable for the goods delivered to them unless it becomes apparent that the goods have perished or it is widely known that they were lost due to an unavoidable cause, or if there is evidence proving that the loss occurred without the hirer's negligence or fault (Mufid, 1413, p. 463). Therefore, contrary to what has been claimed, these two great jurists do not hold the hirer liable

under all circumstances, and a careful examination of their words indicates the presumption of the hirer's responsibility (Badini and Javaherkalam, 1397: 13-15).

The proposed solution for reconciling the various narrations is also consistent with the narrations that distinguish between the hirer's liability based on whether they are considered a trustee or not. This is because the presumption of the hirer's responsibility applies when they are not trusted and are, in other words, subject to suspicion; however, if the hirer is trusted by the owner, this presumption is set aside and the usual trust rules apply. Therefore, if the service provider is suspected and not trusted by the owner of the goods, the law has established the presumption of the hirer's responsibility to protect people's property and placed the burden of proof for non-liability on the hirer. The exception of prevalent circumstances and unavoidable accidents from the hirer's liability also supports the proposed view, as the narrations indicating this exception are stating a substantive rule and show that the hirer's possession is not a liability, and the principle of liability of possession does not apply to them. However, in terms of evidence, the narrations that distinguish between a trusted hirer and a hirer subject to suspicion apply, and it is the non-trusted hirer who must attribute the loss of goods to prevalent circumstances. Additionally, the narration indicating the non-liability of the hirer, besides explaining the non-application of the principle of liability of possession to the hirer, refers to the case of the hirer being trusted (Sheikh Tusi, 1407, vol. 7, p. 220; Sheikh Tusi, 1390, vol. 3, p. 132); but whenever they are not trusted and are subject to suspicion, derived from other narrations and by interpreting the general in light of the specific, the rule of their liability must be applied[1].

1. It is noteworthy that in "Imamiyyah Fiqh," unlike certain Sunni schools of thought, there is no distinction in terms of liability (ḍamān) between a general employee (ajīr mushtarak) and a specific employee (ajīr khāṣṣ). Additionally, with regard to liability or non-liability, it makes no difference whether the employee works on his own property or on the property of the employer, or whether the employer is present or absent (ʿĀmilī, 1413 AH, vol. 5, p. 224; Sabzawārī, 1421 AH, p. 354; Shaykh Ṭūsī, 1407 AH, vol. 3, p. 501; Ḥusaynī ʿĀmilī, 1419 AH, vol. 19, p. 774; Sharīf Murtaḍā, 1415 AH, p. 466; Ibn Idrīs Ḥillī, 1410 AH, vol. 2, p. 470; ʿĀmilī Karkī, 1414 AH, vol. 7, p. 269; Hāshimī Shāhrūdī, 1417 AH, vol. 1, p. 53).

Second Clause: Civil Liability of Service Providers in Sunni Jurisprudence

Considering the various opinions regarding the liability of hirelings (Ajir) in the four Sunni schools of thought, the perspectives of the Shafi'i (A), Hanbali (B), Hanafi (C), and Maliki (D) schools will be discussed separately.

A- Civil Liability of Service Providers in the Shafi'i School

According to the Shafi'i school, all hirelings (Ajir) are treated equally regarding liability (Daman), with no distinction between a single hireling (Ajir Wahid) and a common hireling (Ajir Mushtarak). However, Shafi'i himself differentiates between negligence (Tafrit) and non-negligence, ruling for liability in the case of the former. In instances of non-negligence concerning the common hireling, both liability and non-liability are considered possible (Shafi'i, 1321, Vol. 4, p. 37; Al-Nawawi, n.d., Vol. 15, p. 95). Despite this, Al-Rabi' states that Shafi'i's actual opinion was against liability but refrained from issuing a fatwa to that effect due to societal corruption. The rationale is that the hireling possesses the property for both his benefit and that of the owner, similar to a Mudharib (agent in a profit-sharing contract) who is not liable. Consequently, some scholars deem this view as the more apparent opinion in Shafi'i jurisprudence (Al-Nawawi, n.d., Vol. 15, p. 96; Al-Maqdisi, 1405, Vol. 6, p. 117). Nonetheless, the author of Al-Mughni mentions that Shafi'i, in "Musnad," narrates from Imam Ali (AS) that hirelings were held liable and that societal reform depended on this ruling (Al-Maqdisi, 1405, Vol. 6, p. 117).

B- Civil Liability of Service Providers in the Hanbali School

Hanbali jurists distinguish between a "special hireling" (Ajir Khas) and a "common hireling" (Ajir Mushtarak) regarding liability. They believe that a special hireling is not liable for loss occurring in his possession because, according to the narration of Imam Ali (AS), launderers and dyers were held liable, and the general narrative is applied to common hirelings. This

is due to the fact that the hireling, while performing instructed tasks, acts as an agent of the owner, thus only liable if he commits transgression (Ta'adi) or negligence (Tafrit). However, a common hireling is liable for any damage caused, even if accidental, due to the narrations from Ali (AS) and Umar (Al-Buhuti, 1402, Vol. 4, pp. 33-34; Al-Maqdisi, 1405, Vol. 6, p. 117). Hence, it appears that the liability of the common hireling in Hanbali jurisprudence is due to direct causation (Itlaf), as the act of the hireling leading to loss is considered a form of direct involvement in destruction. Thus, speaking of the common hireling being liable without causation is incorrect.

According to Hanbali doctrine, if the common hireling acts gratuitously, he is not liable for damages resulting from his actions, as he is considered a pure trustee in this case. Additionally, if a "common hireling" hires a special hireling, the special hireling is not liable, and the liability falls on the common hireling (Al-Nawawi, n.d., Vol. 15, p. 100; Al-Maqdisi, 1405, Vol. 6, p. 117; Al-Buhuti, 1402, Vol. 4, p. 34).

C- Civil Liability of Service Providers in the Hanafi School

In Hanafi jurisprudence, a "special employee" (ajir khas) is considered both a trustee and authorized agent. Even if the destruction (talf) of property is directly attributable to the actions of the special employee, they are not held liable unless they deviate from the instructions given to them. Similarly, a "general employee" (ajir mushtarak) is not liable for the destruction of property in their possession that is unrelated to their professional duties. However, if the destruction is directly attributable to the actions of the general employee and arises from their work, they are liable because the contract covers only legitimate and sound actions, not those that cause harm. Additionally, since the destruction is attributable to their actions, they must be held liable (Sarakhsi, 1421, Vol. 15, pp. 89-90 and Vol. 16, pp. 9, 14; Sheikh Nizam, 1411, Vol. 4, pp. 500-505; Al-Zayla'i Al-Hanafi, 1313, Vol. 4, pp. 134-138). Nevertheless, it appears that in Hanafi law, the liability of the general employee is a specific instance of the broader principle of causing loss (qawa'id al-itlaf).

Notably, in Hanafi jurisprudence, if a "general employee" hires a special employee and the latter causes damage, the liability falls on the general employee and not their hired special employee, since the latter is considered a trustee and authorized in that task by their employer (Sarakhsi, 1421, Vol. 16, pp. 9-11; Sheikh Nizam, 1411, Vol. 4, pp. 503-505; Al-Zayla'i Al-Hanafi, 1313, Vol. 4, p. 136).

D- Civil Liability of Service Providers in Maliki Jurisprudence

In Maliki jurisprudence, a "special employee" is not liable. However, determining the basis of liability for a "general employee" is complex. Malik himself held only craftsmen liable for items entrusted to them because the entrustment is not based on trustworthiness but on necessity for their work, which would otherwise lead to the destruction of people's property. Therefore, due to public interest, craftsmen are held liable for items, unless they can provide evidence that the destruction was not due to their actions. Some Maliki jurists, following the narrations from Ali (a.s.) and Umar, hold only general craftsmen liable, while other general employees such as doctors, circumcisers, and ship owners are not liable for accidents or destruction unless they commit negligence or the damage directly results from their actions. However, food carriers and millers are exceptions and are liable unless they provide evidence that the destruction was not due to their actions (Al-Maqdisi, 1421, Vol. 2, p. 757; Al-Kurdi Al-Maliki, n.d., Vol. 1, p. 440; Al-Qurtubi, 1395, Vol. 2, p. 232; Al-Rafi'i, 1417, Vol. 4, pp. 25-28; Al-Kalbi Al-Gharnati, n.d., Vol. 1, pp. 183, 220; Al-Asbahi Al-Madani, n.d., Vol. 3, pp. 400-403). Hence, it is possible that Maliki jurists' imposition of liability on craftsmen and food carriers, unless evidence is provided, aligns with similar narrations in Imamiyyah jurisprudence, serving as an indication of the liability of certain employees. Additionally, Malik himself considers the liability for destruction after washing and tailoring, ruling for the payment of the current value (Al-Asbahi Al-Madani, n.d., Vol. 3, p. 400), which does not align with the indication of liability and suggests an absolute liability for the employee.

In any case, within Maliki jurisprudence, if a general employee has their own employee, the latter is not liable for the goods unless they commit negligence or transgression, leaving the liability with the general employee. Furthermore, the payment of wages to the employee does not affect the liability status.

Section Two: The Basis of Civil Liability for Service Providers in French, American, and European Union Law

In contemporary Western legal systems, the liability of service providers for defective services is based on fault (First Clause). This approach creates a distinction between the liability of manufacturers for defective products and the liability of service providers for defective services (Second Clause). Although efforts have been made to adopt a presumption of fault for the liability of service providers (Third Clause), this is not yet widely accepted.

First Clause: Fault as the Basis for Liability of Service Providers and the Obligation of the Injured Party to Prove Fault

In French and European Union law, the provision of services falls under contract law and consumer protection law, and the liability of service providers in France is generally governed by the principles of civil liability for "professional persons" (Le Tourneau, 2005, pp. 6-7, 16, 20, 122-126). Furthermore, the liability of service providers is based on fault in Western legal systems and it is typically an injured party that bears the burden of proving their guilt. The position of European Union law (Section A), French law (Section B), and American law (Section C) will be examined separately.

A- The Basis of Liability for Defective Services in European Union Law

The most significant case concerning the basis of civil liability for service providers before the Court of Justice of the European Union (CJEU) is the "Besançon" case. The facts were that Mr. Dutrueux suffered burns due to the malfunctioning of a heating pad during surgery at Besançon University

Hospital. The question arose whether the injured party could invoke civil liability systems other than the Directive of 25 July 1985 on defective products. The Court finally concluded that the service provider was not covered by this Directive because it did not participate in the production and marketing chain of the product or could not be regarded as a manufacturer or supplier pursuant to Article 3 thereof. However, the CJEU clarified that the basis of liability for service providers, even strict liability, depends on the regulations of the member states, with the condition that both the injured party and the service provider have the right to invoke the manufacturer's liability if the conditions set out in the directive are met (CJUE, n° C-495/10, Arrêt (JO) de la Cour, Centre hospitalier universitaire de Besançon contre Thomas Dutrueux et Caisse primaire d'assurance maladie du Jura, 21 décembre 2011).[1]

It is noteworthy that in the European Union, general civil liability rules do not apply when a specific regime exists. For instance, in the Beobank case, the CJEU ruled on 16 March 2023 that financial and tax law replaces general civil liability law for payment services (CJUE, 16 mars 2023, aff. C-351/21). Thus, regarding the civil liability of payment service providers for unauthorized or improper transactions, only the specific liability regime defined in Articles L.133-18 to L.133-24 of the Monetary and Financial Code is applicable (Articles 58, 59, and 60, Clause 1, of Directive 2007/64/EC).[2]

1.Hortala, 2020; https://www.cemcap.fr/produit-defectueux-a-lhopital-cjue-grande-chambre-21-decembre-2011; https://www.legifrance.gouv.fr/juri/id/JURITEXT00004170163; https://www.doctrine.fr/d/CJUE/2011/CJUE62010CA04953; https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0495:FR:HTML.

2. For a detailed discussion, see: https://actu.dalloz-etudiant.fr/a-la-une/article/responsabilite-du-prestataire-de-services-de-paiement-seul-le-droit-special-sapplique/h/d06c6559229eba5dbd235e8d6867e165.html; Lecourt, 2019: 226-234; CJUE, 2 sept. 2021, aff. C-337/20, pt 45; Com. 27 mars 2024, n° 22-21.200; Com. 14 févr. 2024, n° 22-11.654 : D. 2024. 308.

B. Basis of Liability for Defective Service Providers under French Law

In French law, jurisprudence, particularly from the Court of Cassation, has not imposed a safety obligation or an obligation of result and strict liability on service providers. In 2004, a prosthetic surgeon installed a prosthesis in a patient's right thigh. In 2007, the patient suffered a fall due to a rupture of the prosthesis and subsequently sued the surgeon and the manufacturer. On October 4, 2018, the Versailles Court of Appeal held the prosthesis manufacturer fully liable for the damages incurred by the injured party. This was based on the early rupture of the prosthesis being due to its defectiveness, by Article 6 of EU Directive 374-85[1] (Article 1245-3 of the Civil Code) and under the principle of strict liability of the manufacturer. However, the court rejected the surgeon's liability due to the lack of proven fault and no error in the selection, design, and installation of the prosthesis. Upon the appeal by the manufacturer and the injured party, the First Civil Chamber of the Court of Cassation did not recognize the service providers' obligation as an obligation of result and exonerated the surgeon from liability while upholding the manufacturer's liability (Cour de cassation, civile, Chambre civile 1, 26 février 2020, 18-26.256, Published in the bulletin).[2]

It is noteworthy that following the decision of the Court of Justice of the European Union, the French Council of State applied the strict liability regime to public hospital services and extended it to cases where a defective product such as a prosthesis is implanted in a patient's body (CE, 12 March 2012, CHU Besançon, n° 327449; CE, section, 25 July 2013, M. Falempin, n° 339922).In contrast, the Court of Cassation adopted a different approach regarding private medical centers and hospitals (for the liability of doctors and health centers and manufacturers,

1. La responsabilité de plein droit du producteur: Directive 85/374/CEE du Conseil du 25 juillet 1985 relative au rapprochement des dispositions législatives, réglementaires et administratives des États membres en matière de responsabilité du fait des produits défectueux.
2. Hortala, 2020; https://www.legifrance.gouv.fr/juri/id/JURITEXT000041701633.

in cases where damage is caused by defective medical equipment, and the various stages of jurisprudence, see: Javaherkalam, 1400: 636-639).

C. Basis of Liability for Defective Service Providers under United States Law

In U.S. law, legal experts argue that courts have never imposed strict liability on professional service providers (Prosser and Keeton, 1984, p. 679; Goodman, 1983, p. 216). Some rulings also explicitly state the non-application of strict liability to service providers.

For example, in the case of Margine v. Krasnica (1967), a scenario involved a dentist who administered a local anesthetic to a patient's lower gum using a hypodermic needle. The needle separated from the hub and broke, leaving the entire length of the needle embedded in the patient's jaw. Consequently, the patient brought a lawsuit against the dentist for the broken injection needle lodged in their jaw. However, the court held that the dentist was not liable, reasoning that the dentist did not create the defect in the needle, lacked the capability to detect and remedy the defect, and considering that dental services have a service-oriented nature, the societal benefits of medical services outweigh the benefits of imposing strict liability on the dentist. Notwithstanding, while the judicial precedent clearly indicates that strict liability does not extend to professional service providers, and their liability is based on fault (Morgan, 1987, p.50), some scholars have argued for the application of strict liability in the service sector (Vandal, 1983-84, p.54; Morgan, 1987, p.48). This highlights the necessity of facilitating proof of fault on the part of service providers, thereby holding them liable to the injured parties. Currently, the trend in civil liability for service providers leans towards easing the proof of fault based on the doctrine of "res ipsa loquitur" (Mangnus and Micklitz, 2004, p.7).

Second clause: Distinction Between the Basis of Liability for Defective Product Manufacturers and Defective Service Providers

From the foregoing discussion, it becomes clear that in the legal systems under study, there is a distinct difference in the basis of civil liability between "manufacturers of defective products" and "providers of defective services." The former group is subject to strict liability, while the latter's liability is predominantly based on fault. The rationale behind this distinction is that product manufacturers have an obligation to achieve a specific result and are held liable unless the damage can be attributed to an external cause. In contrast, service providers typically have an obligation of means, and they can escape liability by proving the absence of fault. In other words, guaranteeing the safety of the service does not equate to guaranteeing the result, as the service may be rendered safely, yet the desired outcome may not be achieved (Le Tourneau et Cadiet, 2002, p. 732-735; Powers Jr, 1984: 420). For instance, a physician may provide a faultless service, but the patient might not recover. Thus, the guarantee of service safety by providers implies adherence to professional standards and specific industry norms.

Third clause: Efforts to Adopt Presumptive Fault for Service Providers' Liability

Contrary to the global movement towards adopting strict liability for "manufacturers of defective products," the basis of civil liability for providers of "defective and harmful services" has not seen similar success due to the vast diversity of services. The European Commission's draft proposal (Liability of Suppliers of Services in the European Community: the Draft Council Directive 1991) in 1991, which in its Article 1 envisaged a "presumption of fault for service providers" and placed the burden of proving the absence of fault on the service provider, was not adopted due to disagreements among member states. Subsequent efforts to reconcile differing views and reach a consensus have also been unsuccessful (Weatherill, 2005, p.147). Furthermore, a comprehensive study on the liability of service providers, focusing on the laws of France, Germany, the

United Kingdom, the United States, Italy, Spain, and Sweden, was commissioned by the European Commission and completed in 2004.
In this report, without distinguishing between different service providers, their liability was based on "fault," and the burden of proof was placed on the "consumer." Nevertheless, there is a tendency for the courts to ease the burden of proof of liability (Mangnus and Micklitz, 2004).
Thus, the civil liability of service providers in Western law is fundamentally based on fault, and the injured party generally must prove this fault to claim damages. However, protecting victims and easing the burden of proving fault is a critical need that lawmakers are expected to address soon, at least by establishing a "presumption of fault" and placing the burden of proving the absence of fault on the professionals and service providers. These parties, from a technical, specialized, and financial perspective, can more easily bear the burden of proving the absence of fault. Islamic law, for over 14 centuries, has mandated that professionals and service providers are responsible for taking precautions and care with people's property, placing the burden of proving non-liability on them.

Conclusion

Regarding the basis of civil liability for service providers various legal systems have expressed different views. In Imami jurisprudence the narrations concerning the liability of hired workers or service providers indicate that the sacred lawgiver has, to increase caution in service delivery and protect the victims and recipients of services and their property, established a presumption of liability for service providers. It is the provider who must prove their non-liability and demonstrate that the damage was due to unavoidable factors or a lack of causal relationship in cases of no-fault liability or no fault in fault-based liabilities. This solution might also be accepted in Maliki jurisprudence concerning craftsmen, although there are opposing views. In Hanafi and Hanbali jurisprudence,

the liability of a common worker is based on "loss," while in Shafi'i jurisprudence, the theory of non-liability is stronger.

In European countries, the European Commission's 1991 draft anticipated a presumption of fault for service providers, placing the burden of proving the absence of fault on the service provider but it was not ratified due to disagreements among member states. Additionally, in 2004, a comprehensive study commissioned by the European Commission established the liability of service providers based on "fault" and placed the burden of proof on the "consumer," although there is a tendency to facilitate proving their fault.

Thus, comparing the approaches of the studied legal systems clearly shows that the Imami jurisprudence's stance, which presumes the liability of service providers and places the burden of proving non-liability or absence of fault on them thereby offering greater protection to consumers and facilitating civil liability claims for victims, is preferable. It is recommended that the global community adopt this approach.

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