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Product Liability Law under the Malaysian Consumer Protection Act 1999: Justice for Consumers?

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Abstract: Product liability law is associated with consumers' right to damages. Under the product liability law, the consumers can sue the producers or manufacturers for the damage that has been caused by a defect in a product. Product liability law is necessary in order to provide protection to consumers. In Malaysia, prior to 1999, product liability law is based on claims under law of contract and law of negligence. In 1999, the government of Malaysia has introduced the Consumer Protection Act 1999 (CPA 1999) which provides for strict civil liability under Part X of the CPA 1999 for product liability. The purpose for introducing strict civil liability is to lessen the burden of proof of consumers. The introduction of strict civil liability is in line with the international development in which many countries have adopted strict civil liability to overcome the obstacles under the law of contract and law of negligence. Based on doctrinal research and by adopting content analysis method, this study examines the elements of product liability law and defences provided under Part X of the CPA 1999. The study analyses the relevant provisions under Part X of the CPA 1999 to see whether the act is able to give full protection to Malaysian consumers for product liability claims and whether the introduction of strict product liability brings justice to the consumers in terms of reducing their burden of proof.

Key words: Consumer protection, Consumer Protection Act 1999 of Malaysia, product liability, strict civil liability, burden of proof

INTRODUCTION

Product liability refers to a responsibility that must be borne by the individual in ensuring the safety of a product. If the product is defective, then redress should be available to those who suffered damage. Ringstedt explained product liability as follows:

It concerns the obligation to pay compensation for injuries caused by a product to persons or other property than the product itself.

Product liability law seeks to protect consumers from defective products. Traditionally, individuals who were injured by manufactured products looked to the teories of negligence and implied warranties for their causes of action. However, neither theory was totally responsive to the needs of all plaintiffs (Sharp, 1982). Contract law will only favor the consumer buyers. This is due to the doctrine of privity of contract. Parties may claim provided that they have privity to the contract. For consumer who is not a buyer, he will not gain any benefit in a claim for defective product under contract law. In a claim for negligence there are three elements that must be proved by the consumers. However, these three elements are very difficult to prove which left the consumer unsuccessful in the claim under law of negligence. In view of the problems in the application of contract law and the law of negligence, specific law relating to strict product liability was introduced in Consumer Protection Act 1999. Whether the introduction of strict product liablity bring justice to the Malaysian consumers will be dicussed later.

PRODUCT LIABILITY IN MALAYSIA

The era of pre-1999 position: The pre-1999 position had witnessed the product liability in law of contract and law of negligence. Law of contract and law of negligence create obstacles in their application. The obstacles created by the law of contract and law of negligence will be discussed.

Law of contract: The law of contract is heavily relied on the doctrine of privity of contract. The application of this doctrine makes it difficult for non-buyer consumers to claim for a damage caused by a defective product. Only those who have privity to a contract have the right to claim. The case of Winterbottom v Wright [(1842)] 10 M&W 109) had decided that only the husband had the right to sue the seller under the contract. The wife who

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had suffered an injury had no right to sue the seller under the law of contract because she was no the buyer. The same decision was arrived in Priest v Last ([1903] QB 148). In Daniels and Daniels v White Sons ([1938] 4 All ER 258), the husband who was the buyer of lemon drink had sued the seller for defective lemon drink. The wife who only consumed the drink, sued the manufacturer. The court held that only the husband could succeed in his claim based on contractual relationship between him and the seller. The wife's action failed because there was no contract between the wife and the manufacturer. This has caused prejudiced to non-buyer consumers. Therefore, the law of contract has caused injustice to the non-buyer consumers.

Law of negligence: Due to the obstacles and injustice created by the law of contract, the product liability law under the law of negligence has developed to give ways to non-buyer consumers to claim for a damage caused by a defective product. The case of Donoghue v Stevenson ([1932] AC 562) was the first case which recognized the claim by a consumer who was a non-buyer. This case has successfully ousted what is called a privity of contract fallacy in which a claim for defective product did not depend on contractual relationship (Jones, 2002). Rogers (2002) said that:

> The law of torts is concerned with the redress of wrongs or injustices (other than breaches of contract) by means of a civil action brought by the victim. This redress most commonly takes the form of damages that is to say, monetory compensation

However, claims under negligence have its own hurdles in which a consumer has to prove three elements, i.e:

- Duty of care
- Breach of duty of care
- Damage or injury

The burden of proving negligence is on the claimant/plaintiff/consumer and the liability is based on fault. To prove fault on the part of the producer is not an easy task for the consumer. This is due to the lack of knowledge of manufacturing process. Claims under negligence can only be made if the defective product has caused damage or injury. In other words, claims under negligence concern about dangerous products. This has been emphasized by Lord Bridge in the case of D&F Estates Ltd. v Church Commissioners ([1989] AC 177) where he said that:

> If the hidden defect in the chattel is the case of personal injury or damage to property other than the chattel itself, the manufacture is liable. But if the hidden defect is discovered before any such damage is caused, there is no longer any room for the application of the Donoghue v Stevenson

Besides that the consumer also has to prove the causal link between the breach of duty and damage or injury. This is another hurdle faced by the consumer. To prove causation needs expert evidence since consumers do not have expertise on a products, particularly sophisticated products. One of the cases which can illustrate this difficulty is Wong Tan Kan and 7 Others v Asian Rare Earth Sendirian Berhad ([1993] 1 AMR 244). The case involved claims made by the plaintiffs in relation to chemical products produced by the defendant. The chemical products were kept in barrels and these barrels were kept in an open space. The plaintiffs alleged that the radioactive from these chemical products had deteriorated the health of the plaintiffs and other people living in nearby area. Plaintiffs sued the defendant for negligence. Unfortunately, the claim was rejected by the court because the plaintiff failed to prove causation.

The era of 1999 and post: The difficulties of the law of contract and the law of negligence have prompted the Malaysian government to introduce strict product liability regime in the CPA 1999. The law relating to strict product liability is provided under Part X of the Consumer Protection Act 1999 (CPA 1999). Part X of the CPA 1999 is based on the European Product Liability Directive (85/374/EEC). Part X of the CPA 1999 introduces the concept of strict civil liability. It imposes liability directly to producers, those who put his name on the product and importers for any loss or injury suffered by the consumer due to a defect in a product.

Product liability introduced under Part X of the CPA 1999 does not require consumer to prove contractual relationship or breach of duty by the manufacturer as required under the law of contract and law of negligence, respectively. One of the primary reasons for the introduction of strict liability was the perceived need to relieve plaintiffs or consumers of some of the burdens of proving negligence (Gershonowitz, 1987). Producers will be liable for any loss or injury suffered by the consumer even if the manufacturer has taken careful steps during the process of production of the product. Part X has introduced the application of strict civil liability regime in matters related to death, injury and loss of personal property due to defective products.

Elements of product liability under consumer protection act 1999: The elements of product liability can be found in Section 68 (1) which reads: where any damage is caused wholly or partly by a defect in a product, the following persons shall be liable for the damage:

- The producer of the product
- The person who, by putting his name on the product or using a trade mark or other distinguishing mark in relation to the product has held himself out to be the producer of the product
- The person who has in the course of his business, imported the product into Malaysia in order to supply it to another person

This provision clearly indicates that liability under strict liability is dependent upon defective products instead of fault of the producer (Diamond and Howells, 1991). Liability can be placed upon defendant if the plaintiff is able to prove damage due to defective product. Under this provision, the plaintiff need not prove the contractual relationship and also do not have to prove fault on part of the defendant. Application of strict civil liability will lighten the burden of proof of the plaintiff and thus provide more protection to the plaintiff. Strict civil liability requires the plaintiff to prove the following:

- Defect
- Damage or loss incurred
- Causal link between the defect and the damage

Defect: Defect is an essential element that must be proved for claims under product liability. There are three types of defect which can give rise to product liability. The types of defect can be clearly seen from the decision of Weber v Fidelity and Causalty Insurance Co (259 La 599; 250 So. 2nd 754 (1971)). In that case the Supreme Court of United states ruled that:

A manufacture of a product which involves a risk of injury to the user is laible to any person, whether the purchaser or a third person, who without fault on his part, suatains an injury caused by a defect in the design, composition or manufacture of the study if injury might reasonably have been anticipated. Rheingold explains the importance to prove defect in product laibility claims as follows:

> One of the basic elements which every plaintiff must establish in order to make out a prima facie case of strict products liability (of any kind of products liability) is the existence of a defect in the product which was if not the sole cause, at least a contributing cause of injury

Section 67 (1) defines 'defect' for the purposes of CPA 1999 as follows:

> Subject to subsection (2) and (3) there is a defect in a product for the purpose of this Part if the safety of the product is not such as a person is generally entitled to expect

Defect in accordance with this section shall be assessed based on consumer expectation test. Consumers are given the power to decide whether the product is defective or not based on their expectation. However, the word 'entitled to expect' is a drawback to this provision. This is because the expectation of a consumer is different from one consumer to another and consumers themselves may not be aware of the safety standards that they entitle to expect. According to Keeton, "In most cases, the purchaser does not have any idea about the safety or danger of what he is buying. He is generally buying on price, on beauty and on function".

Problems in the application of consumer expectation test can be seen in some of the English cases. The case of A and others v National Blood Authority and Others ([2001] 3 All ER 289) involved blood transfusion. In this case, blood transferred to the plaintiff was found to have contaminated with hepatitis C. Plaintiff brought a claim under the Consumer Protection Act 1987 (UK). The court ruled that the plaintiff's right was to expect that the blood transferred was free of any contamination. Since the transferred blood was contaminated, the blood was defective.

The court also has the same opinion in the case of Bogle and others v Mc Donald's Restaurants Ltd. ([2002] EWHC 490). This case involved a hot drink provided by the defendant, causing injury to the plaintiff. Plaintiff asserted that the drink was defective as it was too hot and served in a cup with a lid that was easily dislodged. However, the court decided that the drink served was safe as the drink was at the right level of heat for consumption although the lid was easy to open. Thus, the drink was safe and not defective.

Burton J in A and others v National Blood Authority argued that the application of consumer expectations test was not to be allowed. He felt that the word 'entitled to expect' should be changed to 'reasonable expectations'. 'Reasonable expectations' refer to the projection made by the judge because a judge is considered as 'an informed representative' of the public at large. Standard of 'reasonable expectations' may be higher or lower compared to standard of consumer expectations. Nevertheless, this task can only be done by the judiciary as the judicial community is labelled as "the reflactor of community standard".

According to Section 67(2) CPA 1999 in assessing the safety of a product, the court will take into account the following circumstances:

- All aspects of the marketing of the product
- The get-up of the product
- The use of any mark in relation to the product
- Instructions and warnings
- What may reasonably be expected to be done with the product
- Time the product was supplied

Damage: Product liability claims require a consumer to prove that damage has occurred due to the defect in the product. Damage is defined under Section 66 of the CPA 1999 to mean death or personal injury or any loss of or damage to property including land as the case may require. However, according to Section 69 (1) CPA 1999, claim for damage shall not include the loss of or damage to:

- The defective product
- The whole or any part of the product which comprises the defective product
- Any property which at the time it is lost or damaged is not:
    - Of a description of property ordinarily intended for private use occupation or consumption
    - Intended by the person suffering the loss or damage mainly for his own private use occupation or consumption

Causal link between defect and damage (causation): Causal link between defect and damage must be proved by the consumer in product liability claim. In the case of Weber v Fidelity and Casualty Insurance Co., the Supreme Court of the United States further held that "the plaintiff claiming injury has the burden of proving that the product was defective, i.e., unreasonably dangerous to normal use, and that the plaintiff's injuries were caused by reason of the defect". However, it is a problem for the consumer to prove the causal link. This is because the consumers with low level of knowledge might have difficulties in proving that damage occurred due to defective product. The burden of proving this causality according to Hodges *et al.* (1996) is a burden to the consumers.

The best example of the problem in proving causal relationship is illustrated in Foster v Biosil ((2001) 59 BMLR 178). The case involved the use of artificial breasts whereby the product were giving pain to the plaintiff after the breasts were attached to the plaintiff's body. Plaintiff alleged that the product was defective as there was leakage in the artificial breast produced by the plaintiff. As a result, the plaintiff had to undergo a surgery to restore it. In this case, causal link was strictly defined by the court. The court ruled that there was no causal link between defect and damage although plaintiff had suffered pain due to the leakage. This case addressed the problem of causal link between defect and damage. In order to overcome the problem, it is suggested that the court should interpret causal link less strictly.

DEFENCES IN PRODUCT LIABILITY CLAIM UNDER PART X OF THE CPA 1999

Although, the liability is strict under Part X of the CPA 1999, the Act does provide defences for the defendants. The defences are provided under Section 72 (1) of the CPA 1999. Section 72 (1) intoduced 5 defences and these defences are discussed below.

Section 72(1)(a); the defect is attributable to compliance with any requirement imposed under any written law: If the defendant can prove that the defect is due to the compliance with any written law, the accused will not be liable. The defence is only available where the standrad is a mandatory standard. It will not help a defendant where compliance with a standard is only advisory (Silberstein, 1997). The defendant must be able to prove that the defect was the inevitable consequence of complying with the standard. In Malaysia in 2009, the mandatory standards for toys have been prescribed by the Ministry of Domestic Trade, Cooperatives and Consumerism via the Consumer Protection (Safety Standards for Toys) Regulations 2009 which came into force on 30 January 2010. These regulations list out the standards which need to be complied with by the producers or impoters. Besides that the Ministry has also enacted the Consumer Protection (Certificate of Approval and Conformity Mark of Safety Standards) Regulations 2010. These regulations was enforced on 1 August 2010.

Section 72(1)(b); the producer did not at any time supply the defective product to another person: There are two situations whereby this defence is applicable. The first situation is where a producer produced a product such as a car in prototype model. If during a test drive it was found that the brake failed to function effectively and as a result the person who drove this prototype car was injured, the producer of the car can rely on this defence. This is because the producer did not at any time supply the defective product to another person. The crucial word

here is the word 'supply'. The word 'supply' in relation to goods is defined in section 3 of the CAP 1999 to mean to supply or resupply by way of sale, exchange, lease, hire or hire purchase. A prototype model is not meant for sale, exchange, lease, hire or hire purchase. Another situation where this defence is applicable is where a producer produced a machine to be used in his factory and one of his emplyees is injured which is due to the defective mechanical of the machine. Again, this producer can rely on this defence because he did not at any time supply the defective product to another person by way of sale, exchange, lease, hire or hire purchase (Rogers, 2002).

Section 72(1)(c); the defect did not exist in the product at the relevant time: If a producer is sued under Part X of the CPA 1999, he can exonerate himself form liability if he can prove that the defect did not exist in the product at the relevant time. The relevant time is defined in Section 72(2)(b)(i) to mean the time when the producer supplied the product to another person. This defence means that the producer will not be liable for the defects that exit in the chain of distribution (Corones and Clarke, 1997). To succeed in this defence, a producer has to prove either of these situation:

- At the time the product is supplied to another person such as supplier or wholeseller, the defect does not exist. The product becomes defective after it has left the producer's control and the defect is due to misuse, wrong installation, mismanagement and others (Hodges *et al*., 1996)
- The producer has to prove that the manufacturing process, quality control system and inspection before delivery show the product was defect free when it left the producer's control (Wu, 2001)

In Evans v Triplex Safety Glass Co ([1936] 1 All ER 283) the plaintif failed to prove that the windscreen was dangerous when it left the manufacturer.

Section 72(1)(d); the state of scientific and technical konwledge at the relevant time was not such that a producer of products of the same description as the product in question may reasonably be expected to discover the efect if it had existed in his product while it was under his control: This defence is also known as state of art defence. The knowledge here refers to the scientific and technical knowledge of all producers of the same product at the time of supply not the subjective knowledge of the individual producer (Wu, 2001). The phrase 'relevant time' refer to the time when the producer supplied the product to another person. If advances in knowledge have occurred subsequent to the product leaving the producer's control, the producer is not liable for injury or damaged caused because the crucial time to determine the liability is when the producer supplied the product to another person. To rely on this defence, the producer has to prove that not only him cannot detect the defect based on the current scientific and technical knowledge, other producers of the products of the same description also cannot the detect the defect. This defence requires the producer to have the same level of knowledge with other producers who produce the product of the same description. If the level of kowledge of the producer in question is higher than the level of knowledge of other producers who produce the product of the same description this will not be taken into account (Newdick, 1988). However if the level of knowledge of the producer in question is lower than the level of knowledge of other producers who produce the product of the same description this will not be considered as well. In the case of A and others v National Blood Authority, the defendant argued that the scientific and technical knowledge at that time was not able to detect Hepatitis C in blood. However, the court ruled that risk of blood being contaminated with Hepatitis C virus was the risk which was already known although the defendant failed to detect the virus. Therefore based on A and others v National Blood Authority, the defence ceases to apply once the risk is known in the industry (Woodroffe and Lowe, 2010).

Section 72(1)(e); that the defect:

- Is a defect in a product in which the product in question is comprised therein (the "subsequent product")
- Is wholly attribute to
  - The design of the subsequent product or
  - Compliance by the producer of the product in question with instructions given by the producer of the subsequent product

The "subsequent product" refers to the finished or final product (Wu, 2001). This defence is useful to component producer. If a component product causes damage or injury to consumers, and the defect was due to the defective component product, the component producer may raise a defence that the defect was due to the compliance with the istructions given by the producer of the subsequent product.

ANALYSIS

Altough, there are no cases on Part X of the CPA 1999, based on the decided cases in other jurisdiction, especially the United Kingdom, one would notice that the

strict civil liability regime under Part X of the CPA is actually does not bring justice to the Malaysian consumers. The requirement to prove defect has caused problem because the proving of defect is based on what a person/consumer is generally entitled to expect. Section 67(1) clearly state that a product is defective if the safety of the product is not such as a person generally entitled to expect. According to Howell (2005), the 'reasonable consumer expectation' test should be changed to 'reasonable expectation test'. Reasonable expectation test refer to the expectation made by the judges because judges are considered as 'an informed representative of the public at large' and reflector of community'. It is submitted that instead of asking the consumers to prove a defect, the law should ask the producer to prove that their product is safe which is not defective.

In Foster v Biosil, the court agreed with the defendant's contention that before the claim could succeed, the plaintif has to prove that the artificial breast was defective and how the defect occurred. The plaintiff produced evidence from a scientist to prove that the artificial breast was defective because it leaked and burst. Nonetheless, the plaitiff failed to prove the scientific theory how the burst and the leakage might occur. It is submitted that the court in this case has used a very high standard of proof for defect. This case proves that to prove defect may involve high cost which an ordinary consumer could not afford it and this will cause injustice to the consumers.

Besides that the requirement to prove causal link between the defect and the damage has also created problems to the consumers. Roth-Behrendt (German MEP) said that:

> It is hard to prove the defect and/or causal relationship between the defect snd damage and consumers rarely have the financial and technical means required to prove defect, especially in the case of technically complex products such as chemical products or medicaments

This has been illustrated in the case of Foster v Biosil. Foster v Biosil which involved a tecnically complex product, i.e., artificial breast. Although, the artificial breasts were defective as it caused pain to the plaintiff, the court ruled that there was no causal link between the defective breast and the pain suffered by the plaintiff. The court has given a strict interpretation forcausation.

Even if the consumers have succeeded in proving the element of strict liability, it does not mean that the cosumers will succeed in their claims. This is due to defences available to the producers. The effect of all the defences stated in Section 72(1)(a-e) is that they will relieve the producers from liability and will leave the consumers without remedy. These defences have caused injustice to the consumers. If the producer succeeds in relying on the defence stated in Section 72(1)(a), the consumers could not seek remedy from the government because there is no where in Part X which says that the government is responsible to pay damages to the consumers although the requirement is imposed by the government. Unlike Australia, it is clearly stated in Section 148 of the Competition and Consumer Act 2010 that if the defect is due to the compliance with a mandatory standard, the government is liable to pay the plaintiff/consumer for the amount of the loss or damage caused by the safety defect.

For the defence stated in Section 72(1)(b) Stapleton did not agree with this defence, particularly when it involved prototype product. According to Stapleton, the producer has to be responsible for the defect which injures someone although he does not supply the product to other person. The defence provided in Section 72(1)(c) may also cause injustice to the consumers because this defence will relieve the producers from liability when the damage occurs after the product have left the factory and the producers do not have the duty to inform the consumers about the defect.

The defence in Section 72(1)(d) has been criticised by many researchers for its unfairness to consumers. This defence shifts the risks of new products to the consumers and it is unfair to the consumers. According to Hodges, 'The producer of newly developed products, who enjoys a competitive advantage because of the use of new technologies and who may make corresponding profits after successfully putting innovative product into circulation should logically also assume liablity in the event of his product proving to be defective'. Keeton is also not favour of the defence. He says that 'Business or industrial custom should not control the determination as to whether a product has been properly designed. A defendant's conformance with the "state of the art" when the term is used in the sense of business or industrial custom, should not absolve him from liablity for a defective product'. It is submitted that this defence should be abolished from the CPA 1999 due to the unfairness created.

CONCLUSION

Although, the purpose for the introduction of strict civil liability regime under Part X of the CPA 1999 for product liablity is to lessen the burden of the consumers under the law of negligence, it does not serve its purpose and does not bring justice to the consumers. The above discussion reveals that the elements of product liablity are

difficult to be proved by the consumers and is costly. The elements are quite similar to the elements under negligence. The only thing which will relieve the consumers is that the consumers do not have to prove fault of the producers. Even though the consumers can overcome the obstacles created by the elements of product liability, it will not guarantee that the consumers will be successful in their claims due the defences available to the producers. The defences bring more injustice to the consumers rather than the producers. At the end, the consumers will not gain anything.

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