

Legal Issues in Relation to Product Liability Defences in Malaysia under the Consumer Protection Act 1999

Muhammad Hafiz Mohd Shukri^{a*}, Rahmah Ismail^b, Ruzian Markom^c,
^aFaculty of Economics and Business, Universiti Malaysia Sarawak, ^bFaculty of Law, Universiti Kebangsaan Malaysia, Email: ^{a*}msmhafiz@unimas.my

Under product liability law in Malaysia, a manufacturer, producer, or seller can be held liable for any injury or property damage suffered by the consumer or third party as a result of a defective product. However, strict civil liability under product liability laws and its defences have been a subject for debate due to its legal impact on consumers. This study aims to analyse the types of defences available in law that can be applied by the defendant in product liability cases. This doctrinal study focuses on the legal provisions available in consumer law pertaining to strict civil liability. The data was gathered and analysed by way of content analysis and critical analysis of legal sources. The findings, mainly based on a study of the relevant statutory provisions and court cases, indicate that there are several contentious legal issues regarding the application of defences under product liability law. It is proposed that better defence alternatives under product liability laws should be formulated and this can be an area for future research in order to provide solutions to the problematic issues that currently exist in this area of law.

Key words: *Defective Product, Defences, Legal Issues, Product Liability, Strict Civil Liability.*

Introduction

Product liability law defines product liability as the liability borne by a manufacturer or seller for any injury or property damage suffered by a consumer or a third party due to any defect in the production of goods (Harbour, 2015). A consumer is any individual who uses a commodity or service to fulfil his or her requirements without any intention to earn profit or safeguard professional interests (Al-Enizi & Aladaseen, 2019). To prove a product liability case under the provision of strict civil liability, there are three elements which must be satisfied: that the

product is defective, that the plaintiff is injured or there is damage to the plaintiff's personal property, and that the injury or property damage occurred as a result of the defect of the product (causation) (Dobson & Stokes, 2012).

The law on product liability originates from the law of contract. Initially, liability issues involving a third party is dealt with by applying the law of contract. This was found to pose a legal constraint for court adjudication, due to the doctrine of privity of contract between the seller and the consumer (Szladits, 1966). An implication of the privity of contract theory on the development of law of liability is that the negligence principle is applied by the court to adjudicate product liability cases. Generally, based on the principle of negligence, three major elements must be proven in court to attach liability under product liability law: that the manufacturer has a duty of care, that the manufacturer has neglected such duty of care, and that the injury or damages suffered by the consumer are the result of the manufacturer's failure to perform its duty of care (Jenkins, 1971).

Subsequently, strict civil liability under the law of product liability has been introduced to facilitate the consumers' claims of damages in court, available as a redress for the injury or property damages suffered by consumers due to usage of defective products (Nelson & Drews, 2008).

It is evident that consumer safety is influenced by the quality of the manufactured product (Priyatno, 2017). Therefore, a comprehensive legal provision on product liability should be formulated in order to provide full legal protection to the consumers and prevent manufacturers from neglecting their duty of care and escaping liability when their products have caused harm to consumers.

In Malaysia, the Consumer Protection Act 1999 (hereinafter "CPA 1999") came into force on 15 November 1999. It aims to provide better legal protection to consumers. Furthermore, legal protection is the main function of legislation that provides regulations, guarantees, and benefits to society (Putra & Zamroni, 2019). The legal provision on product liability provided in Part X of the CPA 1999 is similar to that found in Part I of the Consumer Protection Act 1987 (United Kingdom). The said legal provision is regarded as a major change, as it marked the abolishment of the doctrine of privity of contract in product liability law. Now, product liability law, which is based on strict civil liability, has provided an opportunity to a third party in a contract for sale of goods to seek redress or file claims in product liability cases (Owen, 2007).

Nevertheless, the major issue that should be further examined is the extent to which the existing defences under product liability law in Malaysia can affect consumer rights and ensure the fair treatment of consumers who suffer physical injury or property damage as a result of defective products. This has rarely been analysed, especially from the perspective of Malaysian law. The

findings are expected to prove that there are still several unresolved issues and weaknesses in existing product liability provisions in Malaysia, particularly in terms of product liability defences.

Literature Review

This section contains the author's analysis of prior research conducted on product liability law based on strict civil liability, which seeks to identify whether the existing legal issues in terms of product liability defences in Malaysia have been reviewed. The research gap discovered will then be able to assist the authors in proposing recommendations with regards to the direction of future legal research.

Strict Civil Liability under Product Liability Law

Although there is strict civil liability in product liability law, it is not absolute in nature (Stuart, 2001). This is because the defendant can still make use of any of the defences provided by the said statute in court (Nahler, 2009). Also, product liability law in Malaysia places emphasis on the manufacturer's efforts to prevent the existence of defective elements in a particular product (Brennan & Thomson, 1990).

A legal study was conducted in Australia on cases of food and beverage contamination, and their status based on product liability law. The researcher delivered a commentary on several relevant court cases and suggested the term 'product' from the perspective of Australian consumer law include food and beverages, although these can generally be considered as consumer goods (Rajapakse, 2016). However, a large portion of this study had discussed cases of food and beverage contamination based on product liability law according to the principle of negligence in tort law. No specific discussion was made regarding the position of such cases from the perspective of strict civil liability under product liability law, even though this law has been in force in Australia since 1992.

In general, there are three major components of product defect based on strict civil liability under product liability law, namely design defects, manufacturing defects, and the manufacturer's failure to provide adequate warnings or instructions for consumers' reference (Wu, 2016). Wu (2016) had also discussed the impact of product liability law on manufacturers in the United States (especially manufacturers of driverless cars), the types of defences that are available, and the steps that they can take to reduce the risk of being taken to court for breaching product liability law. However, the scope of the current study is different, as it gives more focus on issues surrounding product liability defences from the angle of consumer protection in Malaysia.

Additionally, some studies have pointed out that certain problems persist, especially in terms of the definition of defective product, the difficulty in proving the element of causation, and the types of defences available in product liability cases (Fairgrieve, Howells, & Pilgerstorger, 2013). However, these studies did not offer any specific solutions in the legal context, except for suggesting that product liability law can be improved by drafting a 'soft law', namely specific rules in the form of guidelines.

The question of whether a non-halal product can be considered as defective under Section X of the CPA 1999 was also studied by previous researchers. They argued that a product with non-halal status may be considered defective if it is not safe for consumption and may cause physical harm, especially to Muslim consumers. However, cases of non-halal product usage have rarely resulted in physical injury to consumers. Even if a Muslim consumer is found to have vomited after consuming non-halal food, the process of proving causation would be difficult because the vomiting might have been caused by other health problems (Amin & Abdul, 2015). Researchers in the said study had successfully proven that proving the element of causation would be difficult, yet this legal issue has been left hanging and remains unsolved. In addition, no specific legal review has been made, especially in relation to the issues of product liability defences in Malaysia. As such, it is paramount that this study be done in order to fill this knowledge gap.

Methodology

The nature of this research requires an application of doctrinal approach which is based on legal research methodology and a qualitative method for the purpose of examining the types of defences available for defendants in product liability cases. Generally, the doctrinal approach involves analysis of legal principles, statutes and court cases (primary sources) in order to come up with proper legal solutions (Parkinson, 2016). Hence, the analysis in this research is focused on Malaysian consumer law, particularly on defences under product liability law based on the CPA 1999 and previous court cases. Further, comparing the decisions of judges in certain cases can also help researchers to carry out comprehensive research about the grounds of judgement and the uniformity of the courts in deciding the outcome of a particular case.

Since, to this date, the law on strict product liability in Part X of the CPA 1999 has not been tested in Malaysian Courts, the authors will refer to English cases when discussing the meaning of 'defect' and 'causation'. The reason why English cases are used as an analysis is because the law on strict product liability law in Malaysia is in *pari materia* with the United Kingdom (UK). Since the laws are in *pari materia*, whatever problems faced by the UK laws, might also be a problem in Malaysia. Besides that, the Malaysian courts used to refer to the English cases when laws are in *pari materia*.

In addition, this study has also employed library research methods involving primary sources and secondary sources (Hussin et al., 2018). The secondary sources include law textbooks, law dictionaries, and online resources such as *LexisNexis* and *CLJ Law*. Data is critically examined by using the techniques of content analysis and textual analysis of the types of defences in various cases of product liability. The above techniques of data analysis are paramount (Mohaisen & Muttair, 2019) in this legal research, especially in analysing legal sources through statutes and court cases.

Findings

Section 67(1) CPA 1999 provides that a product can be regarded as defective if the safety of the product does not meet the expectations the consumer is generally entitled to. Meanwhile based on Section 72(1)(a) under Part X of the CPA 1999, the manufacturers could defend themselves, if they can prove that defects in products are attributable to regulatory compliance. The provision is similar to Section 4(1)(a) of the Consumer Protection Act 1987 (United Kingdom). However, strict civil liability law as entrenched in Part X CPA 1999 is not seen as able to provide full justice to all consumers.

Nevertheless, the court's interpretation of the above provision is seen as out of context as found in the case of *Pollard v Tesco Stores (Ltd & Anor, 2006)*. In this case, the Court of Appeal changed the decision of the lower court that had imposed liability on the manufacturer and the owner of a dishwashing product, due to injuries it caused to a 13-months-old child, when the child was able to open the safety cap. The defendants claimed that the design and safety features of the cap were in accordance with British Standards. However, it was found that the force required to open the cap is lower than the minimum specification required by the British Standards. The plaintiff argued that non-compliance with British Standards rendered the cap unsafe as per the Consumer Protection Act 1987. Nonetheless, the Court of Appeal rejected the plaintiff's argument, by ruling that the public should only expect the safety cap to be more difficult to open compared to the ordinary cap. In other words, the defendant was not under any liability, although the design of the safety cap was not even in accordance with the prescribed standards.

Evidently, in this case, the court decision was not congruent with the provision under section 4(1)(a) of the Consumer Protection Act 1987. Although the standards have not been complied with and the defect was not a result of regulatory compliance, the manufacturer and brand owner still managed to escape liability.

In addition, the relevancy of section 72(1)(a) of the CPA 1999 in Malaysia is also questionable. For example, if the law mandates the usage of preservatives in breadmaking (despite its

harmfulness to consumers), a baker can use regulatory compliance as a defence in product liability cases (Elliott & Quinn, 2005).

This issue is viewed as being opposed to the original intent of the law in general, that is to provide wellbeing and resolve conflict in society (Cane, 2013). Compliance with the law should not bring any harm to any parties. Therefore, such an inadvertent effect of regulatory compliance to consumers should not be allowed to be exploited by manufacturers as a 'shield' for them to escape from liability in product liability cases.

Furthermore, manufacturers may also be able to rely on section 72(1)(b) of the CPA 1999 to defend themselves, if they can prove that they have not supplied the defective product to anyone at any time. The term 'supply' in relation to a product is defined under section 3 of the CPA 1999 as 'supplying or resupplying through sales, exchange, lease, rental or hire-purchase.' However, when such a defence is further examined, the provision provides some form of leeway for the manufacturer to claim that the product in dispute is only a prototype and not a real product (Raposo & Morbey, 2015). This means that any prototype of a product which are distributed free of charge as samples or which are still under trial would not fall within the term 'supplying', since there is no element of sale or exchange. Consequently, in cases of injury or damages to property suffered by consumers due to the usage of free samples of a manufactured product, there may not be protection for such consumers since the manufacturer may rely on section 72(1)(b) of the CPA 1999 and use the above argument as a defence to avoid legal penalty. Therefore, the said provision must come under review to prevent unfairness to consumers in product liability cases.

Apart from that, the manufacturer can also rely on the defence provided under section 72(1)(c) of the CPA 1999 by claiming that the product defect has not occurred within the contested period. The term 'period of time' is defined as the time in which the manufacturer supplies the product to anyone (Section 72(2)(b)(i) of the CPA 1999). This provision allows the manufacturer to not being made liable in case of sabotage by a third party on a product that have been supplied (Silberstein, 2004). However, it would be difficult for consumers to provide evidence of product defects if the product has been used for a certain period of time before it caused personal injury to the consumer, adding on to the fact that they need to also prove that the injury suffered was not caused by misuse or mishandling on their part (Rocheford, 2016). Eventually, the consumer would end up having to bear the losses and injury without getting any compensation, if the defect did not yet exist during the said period (Amin, 2007).

The manufacturer is also provided with another ground of defence in product liability cases under section 72(1)(d) of the CPA 1999, if they can prove that the defect was reasonably undetectable by existing scientific and technical knowledge at the time when the product was under their manufacturing control. The application of the above defence has been illustrated in

the case of *Olson v. Arctic Enterprises, Inc* (1972). The plaintiff suffered an injury on a snowmobile ride and claimed that the injury was due to a design defect of the snowmobile. However, the court accepted the defendant's argument that the said snowmobile's safety design was at its best, given the technological and industrial knowledge applied in its design. Therefore, the snowmobile ridden by the plaintiff was certified as non-defective. Hence the defendant won, even though the plaintiff had suffered injury.

Such a defence is known as the '*development risk defence*' or the '*state of the art defence*'. It has brought on various reactions and viewpoints by manufacturers and consumers in terms of its fairness towards consumers. Manufacturers argued that the absence of such a defence would be unfair to them, since they should not be held liable if the said defects are not detectable within the said period. Moreover, if such a defence cannot be applied, product innovation will be affected since manufacturers would have no opportunity to conduct research for the purpose of product improvement from time to time due to the risk of liability being imposed upon them (Arbour, 2014). In other words, it indicates that manufacturers are generally supportive of such defences and it shows their strong opposition to the removal of such defences under product liability law.

On the other hand, such defences are unfair to consumers when they cannot hold manufacturers liable, even when their products have been detrimental to consumers, causing property damage, injury or even death. As such, it is unfair to consumers if manufacturers manage to escape liability with their debatable argument of purported failure to detect product defects despite the knowledge and resources available to them. Another setback to consumers is that industry experts will find it difficult to identify the limit of scientific and technical knowledge that exist, specifically during the period of product invention, which might go as far back as many years ago (Stolker, 1990). Therefore, these issues will serve as barriers that will make it difficult for consumers to claim damages or seek redress in product liability cases (Mackie, 2018).

Conclusion and Recommendation

Generally, this study has revealed a few weaknesses in relation to the defences available for strict civil liability under the law of product liability in Malaysia, particularly section 72(1)(a) until section 72(1)(d) of the CPA 1999. Analysis of previous court cases substantiates our claim.

These weaknesses, particularly in relation to the defences available under the CPA 1999, have negatively impacted and weakened consumers' right to safety and right to claim damages or redress. This scenario is likely to persist if manufacturers still have the opportunity to apply such defences in order to avoid penalty under product liability law even though evidence of physical injury, property damage, or death can be clearly proven.



In conclusion, authors would like to propose that an in-depth legal analysis be conducted on the existing product liability law in Malaysia so that the existing legal issues identified in this paper can be resolved. It is hoped that the outcome of future research will not only provide new insight into the body of legal knowledge utilised by policy makers and the academic community but will also benefit society.

Indeed, the enhancement of consumer law is essential to protect the welfare and well-being of consumers. Comprehensive consumer law, especially in the aspect of product liability, must also be prioritised to ensure that the manufacturing industry in Malaysia will always place emphasis on the quality and safety of products to be marketed. Consequently, a competitive and high impact manufacturing industry will become one of the key drivers of the country's economic growth. It is hoped that a comprehensive product liability law can ensure the physical safety of consumers, especially to protect consumers from being supplied with products that may result in physical injury or property damage.

Acknowledgements

This research is funded and supported by the Ministry of Education, Malaysia, Universiti Malaysia Sarawak, and Universiti Kebangsaan Malaysia.



REFERENCES

- Al-Enizi, Z. K., & Aladaseen, M. A. (2019). Consumer protection in international online consumption contracts: In view of UAE law. *Journal of Legal, Ethical and Regulatory Issues*, 22(3), 1-11.
- Amin, N. (2007). Strict liability for defective products: Balancing of interests between consumers and producers. *Malaysian Journal of Consumer and Family Economics*, 10, 30-39.
- Amin, N., & Abdul, A. N. (2015). The liability of the producer of false halal products under product liability law. *Asian Social Science*, 11(15), 295-301.
- Arbour, M. E. (2014). Portrait of development risk as a young defence. *McGill Law Journal*, 59, 913-942.
- Brennan, M. T., & Thomson, A. R. (1990). Product liability and the medical profession. *Journal of the Royal Society of Medicine*, 83(12), 807-808.
- Cane, P. (2013). Public law in the concept of law. *Oxford Journal of Legal Studies*, 33(6), 649-674.
- Consumer Protection Act 1987.
- Consumer Protection Act 1999.
- Dobson, P., & Stokes, R. (2012). *Commercial Law*. London: Sweet & Maxwell.
- Elliott, C., & Quinn, F. (2005). *Tort Law* (5th ed). Great Britain: Pearson Education Limited.
- Fairgrieve, D., Howells, G., & Pilgerstorger, M. (2013). The product liability directive: Time to get soft. *Journal of European Tort Law*, 4(1), 1-33.
- Harbour, N. A. (2015). *Product Liability: A U.S. View*. United Kingdom: Bookboon.
- Hussin, R., Kader, S. Z., Yaakub, N. I., Rashid, R. A., & Malib, M. A. (2018). Preliminary examination of the regulatory regime to establish a foundation university in Turkey. *Journal of Legal, Ethical and Regulatory Issues*, 21(4), 1-6.



- Jenkins, D. M. (1971). The product liability of manufacturers: An understanding and exploration. *Akron Law Review*, 4(2), 135-201.
- Mackie, T. (2018). Proving liability for highly and fully automated vehicle accidents in Australia. *Computer Law & Security Review*, 34(6), 1314-1332.
- Mohaisen, A. Z., & Muttair, W. L. (2019). The administrative judge's role in filling the legislative gaps. *International Journal of Innovation, Creativity and Change*, 9(2), 17-27.
- Nahler, G. (2009). *Dictionary of Pharmaceutical Medicine* (2nd ed.). Vienna: Springer.
- Nelson, R. A., & Drews, J. N. (2008). Strict product liability and safety: Evidence from the general aviation market. *Economic Inquiry*, 46(3), 425-437.
- Olson v. Arctic Enterprises, Inc. 349 U.S. 761. District Court of the United States. 1972.
- Owen, D. G. (2007). The evolutions of product liability law. *Review of Litigation*, 26(4), 955-989.
- Parkinson, M. M. (2016). Corporate governance during financial distress – An empirical analysis. *International of Law and Management*, 58(5), 486-506.
- Pollard v. Tesco Stores Ltd & Anor. EWCA Civ 393. Court of Appeal of the United Kingdom. 2006.
- Priyatno, D. (2017). The alternative model of corporate criminal sanction management in Indonesia. *Journal of Legal, Ethical and Regulatory Issues*, 20(1), 1-11.
- Putra, A. P., & Zamroni, M. (2019). Legal protection for customers of non-bank product in Indonesia. *Journal of Legal, Ethical and Regulatory Issues*, 22(3), 1-11.
- Rajapakse, P. J. (2016). Contamination of food and drinks: Product liability in Australia. *Deakin Law Review*. 21, 45-70.
- Raposo, V. L., & Morbey, W. W. (2015). Product liability in Europe and China. *China Legal Science*, 3(3), 60-83.
- RocheFord, L. M. (2016). *Investigating and Defending Products Liability and Toxic Tort Claims*. United States: Jardine, Logan & O'Brien.



- Silberstein, S. (2004). *Consumer law in a nutshell* (4th ed). London: Sweet & Maxwell.
- Stolker, C. J. J. M. (1990). Objections to the development risk defence. *Medicine and Law*, 9, 783-790.
- Stuart, B. Q. C. (2001). The hepatitis C litigation: A green light for product liability claims. *Clinical Risk*, 7(4), 144-148.
- Szladits, C. (1966). Comparative aspects of product liability. *Buffalo Law Review*, 16(1), 229-249.
- Wu, S. S. (2016). Product Liability Issues in the U.S. and Associated Risk Management. In M. Maurer, C. Gerdes, B. Lenz & H. Winner. *Autonomous Driving: Technical, Legal and Social Aspects* (pp. 560). Berlin: Springer.