

# CONSUMER PROTECTION IN THE SERVICE INDUSTRY UNDER THE CONSUMER PROTECTION ACT 1999

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## ABSTRACT

The Consumer Protection Act 1999 (CPA) that came into force on 15 November 1999 represents a milestone in consumer protection in Malaysia. It has several important provisions, some of which are more beneficial than those found in the law of contract and law of tort since its objective is specifically to protect the interest of consumers. The statute is applicable to both goods and services but the provisions on services are very important because previously the laws regulating the service industry seems to be left behind compared to goods. The aim of this article is to examine the workings of the CPA and its applications in the service industry. The protection available is highlighted and the shortfalls, if any, are examined in the light of consumer protection in Malaysia. The central discussion is on Part VIII which provides for four implied guarantees in respect of the supply of services namely, implied guarantee as to reasonable care and skill, implied guarantee as to fitness for particular purpose, implied guarantee as to time of completion and implied guarantee as to price. By the enactment of the CPA, it is hoped that all the shortfalls under the contract laws and the tort laws can be remedied.

**Keywords:** consumer protection, Consumer Protection Act 1999, supply of services, implied guarantees.

## INTRODUCTION

It has been recognised that consumers consume not only of products, but also of services and 57.9 per cent of the value of Malaysia's economic activities is performed by the services sector.<sup>1</sup> In the supply of services, consumers justly demand fair treatment and high standards in the whole range of services which include tailoring, hairdressing, motor repairing, house construction, transportation, recreation, hire purchase, insurance and banking.

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<sup>1</sup> Malaysian Economic Report 2008/2009, Ministry of Finance, <<http://www.treasury.gov.my>> viewed on 20<sup>th</sup> November 2009. Service sectors include communication, transport, storage, accommodation, real estate, business services, finance and insurance.

However, consumer services tend to be a neglected area compared to the attention paid to consumer goods. They are becoming important to consumers and have raised complicated legal issues. Unlike the supply of goods, in which the product quality can be assessed before a sale, a supply of services involves human activity that cannot be subject to such control. Furthermore, consumers often lack technical expertise and are therefore in a weak bargaining position. They are not in a capacity to discuss fully their requirements with service providers and thus can be at the latter's mercy. Unfortunately, a contract for the supply of services has never before been incorporated into a piece of legislation in Malaysia compared to the supply of goods. In addition, there are lots of obstacles under the existing laws of contract and tort that hinder the rights of consumers in bringing actions under these two branches of law. The laws that govern the transactions also vary according to the types of services. For example, the communication industry is governed by the Communication and Multimedia Act 1998, banking is governed by the Banking and Financial Institutions Act 1989, tourism by the Tourism Industry Act 1992 and education by the Education Act 1996.

The enactment of the Consumer Protection Act 1999 (CPA) is a positive development towards consumer protection. Part VIII provides for four implied guarantees in respect of the supply of services namely, implied guarantee as to reasonable care and skill, implied guarantee as to fitness for particular purpose, implied guarantee as to time of completion and implied guarantee as to price. Part IX on the other hand provides rights against the suppliers in respect of those guarantees. Nevertheless, Part IX is excluded from the discussion in this paper.

## **THE DEFINITION OF SERVICES**

Service is defined as includes;

any rights, benefits, privileges or facilities that are or are to be provided, granted or conferred under any contract but does not include rights, benefits or privileges in the form of the supply of goods or the performance of work under a contract of service;<sup>2</sup>

It is evident from the above definition that the term 'services' is defined broadly to include 'any' contract except in the two occasions mentioned above.<sup>3</sup> Therefore, there are two types of services that are clearly

<sup>2</sup> Section 3(1) of CPA.

<sup>3</sup> If compared with the definition of services in section 4(1) of the Competition and Consumer Act 2010 (Previously known as the Trade Practices Act 1974 (Australia) and section 2 of the Consumer Guarantees Act 1993 (New Zealand), CPA defines services broadly without mentioning any specific services as listed in these two legislations.

within the ambit of the CPA. Firstly, are services which produce tangible products such as a tailor who produces dresses or a dentist who produces dentures.<sup>4</sup> Secondly, are services associated with the supply of goods or materials which are normally provided by a skilled tradesman such as a plumber, an electrician and a repairer, all of whom will use some material article in addition to the skill they exercise.<sup>5</sup>

However, the definition clearly excludes services which are merely incidental to the supply of goods.<sup>6</sup> Understandably, the rationale behind this exclusion is that it has been covered under Part V and Part VI of the CPA which provides for better protection since the implied guarantee as to 'acceptable quality' is a strict liability. For example, if the car is still under the warranty of its manufacturers, there shall be an implied guarantee that it is of acceptable quality and if there is any defect the manufacturer is responsible to remedy it. In addition, section 37 also provides that there shall be implied a guarantee that the manufacturer will take reasonable action to ensure that facilities for the repair of the goods and the supply of spare parts are reasonably available for a reasonable period after the goods are so supplied. Thus, the consumers are well protected in this respect though the definition of 'services' clearly excludes this type of situation.

Nevertheless, the difficulties are where the transactions involve both, goods and services, since the task of distinguishing between them is not easy.<sup>7</sup> For example, a car rental services is covered as supply of goods.<sup>8</sup> The issue is what would happen if the dissatisfaction is not because of the car supplied but because of the service provided. By looking at the acceptable quality elements listed in section 32, nowhere is it mentioned that a satisfactory service is one criteria to determine the acceptable quality of the goods. Therefore, there is a possibility that it cannot be covered under supply of goods and the worst is it also cannot fall under the supply of services because it is a right in the form of supply of goods.

Another problem is that the implied guarantee as to time of completion and implied guarantee as to acceptable quality in respect of

<sup>4</sup> Sections 60, 62 and 64 of CPA. These sections on remedies give a great reliance on the products resulting from the services. Section 54 provides a guarantee that any product resulting from the services will be fit for its purpose.

<sup>5</sup> Section 59 of CPA provides contracts of work and material.

<sup>6</sup> Section 3 of CPA.

<sup>7</sup> There are many tests laid down by the courts to differentiate between these two contracts such as in *Perlmutter v Beth David Hospital* (1955) 123 NE 2d 792, *Robinson v Graves* [1935] 1 K.B. 579 and *Lockett v A & M Charles Ltd* [1938] 4 All E.R 170.

<sup>8</sup> Under section 3 of CPA, the interpretation of supplier of goods includes to hire goods.

the installation provided in connection with the supply of goods are not provided under Part V of the Act.<sup>9</sup> For example, a consumer buys a sport-rim but it turns out that the rim is not properly installed or there is delay in the installation. The default is not as to the supplied sport-rims but as regards to its installation process. There are doubts whether these scenarios can fall under Part V in respect to the supply of goods and it definitely cannot fall under Part VIII in respect to the supply of services since this transaction is incidental to the supply of goods.

The position in the CPA is also different compared to the application of the UK Supply of Goods and Services Act 1982 (SGSA). This can be seen in *Gregg & Co (Knottingley) Ltd and Another v Emhart Glass Ltd*,<sup>10</sup> in which the Court incorporated section 13 of the SGSA which provides for an implied guarantee as to reasonable care and skill into the contract for sale of goods. In this case, the defendant supplied six machines for detecting imperfections in glass products. The defendant agreed to carry out a service of installation and after sales servicing and maintenance as an adjunct to the supply and delivery of those machines. The plaintiff argued that the defendant had breached his responsibility to investigate the faults and make necessary repair. The Court held that the implied term of reasonable care and skill as provided by section 13 of the SGSA can be incorporated into the contract for sale of goods and therefore the defendant was held liable.

This shows that even in the case of supply of services which is incidental to the supply of goods, the court will incorporate the implied guarantee as to reasonable care and skill to the contract. However, a similar approach cannot be applicable in the application of the CPA since the definition of services clearly excludes the benefit in the form of the supply of goods. Notably, there is no similar exclusion in the SGSA.<sup>11</sup>

Even though the rationale behind the exclusion is not to give a redundant protection in the case of contract in the supply of goods, there is no harm to include the benefits in the form of the supply of goods in the definition of services.<sup>12</sup> The consumers can have better protection

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<sup>9</sup> Section 53 and section 54 provide for these guarantees for supply of services but the same provisions are not available in Part V for supply of goods.

<sup>10</sup> [2005] All E.R. (D) 85.

<sup>11</sup> Section 12(3) of SGSA states that "a contract is a contract for the supply of a service for the purposes of this Act whether or not goods are also (a) transferred or to be transferred..."

<sup>12</sup> It is also in line with sections 59, 61 and 64(2)(c) of CPA which provide right and remedies for contract of work and material.

because it can be covered under both Parts and there is no room for the suppliers to escape their liabilities. By referring to the approaches of other jurisdictions,<sup>13</sup> most countries include a performance of work with or without a supply of goods in the definition of services<sup>14</sup> and the same approaches are preferable to be applied in the CPA.

Another type of services is pure services which do not produce any product or any materials. This type of services requires the expertise or skill of the providers and nothing more. Such services include the professional service of a lawyer, a doctor, a surveyor or a financial advisor. A consumer may also require services from the providers of cleansing, security, leisure, education, entertainment, transportation and many more. For the professional services, they are clearly excluded from the definition if they are governed by specific statutes such as the Architects Act 1967, the Dental Act 1971, the Legal Profession Act 1976, the Medical Act 1971 and the Nurses Act 1950.<sup>15</sup> These professions are governed by their own monitoring mechanisms. Unfortunately, no redress mechanism is available for consumers. As such, they are forced to seek recourse through the normal court system. Section 2 of the Consumer Guarantees Act 1993 (New Zealand) and section 4(1) of the Competition and Consumer Act 2010 (Australia) as well as section 61 of the Australian Consumer Law (ACL)<sup>16</sup> clearly state that work of a professional nature are included in the definition. The same approach is preferable to be adopted by the CPA for a better protection of consumers when deal with these professionals.

Consumers also have many complaints regarding medical services, unfortunately, they are excluded from the CPA.<sup>17</sup> Apart from that, there is doubt whether services such as beauty treatment, slimming salons and botched treatment that frequently cause problems to consumers fall under

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<sup>13</sup> Section 12(1) of the Supply of Goods and Services 1982 (United Kingdom), section 4(1) of the Competition and Consumer Act 2010 (Australia) and section 2 of the Consumer Guarantees Act 1993 (New Zealand).

<sup>14</sup> Nevertheless, the approach still raises the issue of proving the liability. For the supply of goods, the liability is in the form of strict liability but not in the supply of services. The task of distinguishing between these two contracts is inevitable. However, at least the consumers can get protection from both provisions and the supplier cannot escape from their liabilities.

<sup>15</sup> Section 2(2)(e) of CPA. The rationale is because these services are under the purview of the Ministry of Health.

<sup>16</sup> The ACL replaces the existing national, State and Territory laws on implied conditions and warranties with a single national system of statutory consumer guarantees. It is a schedule to the Competition and Consumer Act 2010, which is the new name of the Trade Practices Act 1974 (TPA).

<sup>17</sup> Section 2(2)(f) of CPA. A list of healthcare services is enumerated in section 3 of CPA.

the exception. The service providers will take advantage of the doubt and shield themselves behind this exception. The Ministry of Health has not come out with specific redress mechanism to help consumers in this respect and this makes the exclusion unsound.

The public authorities as well as private companies<sup>18</sup> provide utilities such as water and sewerage, electricity, telecommunications etc. to consumers. By virtue of a broad definition of services, the presumption is that they are covered under the CPA but without a clear provision the ambiguity remains. The problem has been raised in one New Zealand case, *Electricity Supply Association of New Zealand Inc v Commerce Commission*,<sup>19</sup> in which the High Court held that electricity and associated line function services were neither goods nor services for the purposes of the Consumer Guarantees Act 1993 (CGA). The decision cast doubt on whether other utility products and services were covered by the Act. In order to clear the doubt, the Consumer Amendment Act 2003 of New Zealand amends the definition of services to include a contract in relation to the supply of electricity, gas, telecommunications, water or the removal of waste water.<sup>20</sup>

Another limitation of the CPA is that it does not apply to a 'contract of services.' It is well settled that the expression refers to contract of employment which is distinguished from a relationship between independent contractor, entrepreneur and consultant, which are usually referred to as 'contract for service.' Thus, the services provided by an employee towards the employer and vice versa are excluded from the definition.<sup>21</sup>

## **STATUTORY GUARANTEES IN RESPECT OF SUPPLY OF SERVICES**

By the enactment of the CPA, four implied terms in respect of supply of services which are known as implied guarantees are codified in Part VIII. They are the implied guarantee as to reasonable care and skill,<sup>22</sup> implied guarantee as to fitness for particular purpose,<sup>23</sup> implied guarantee as to time

<sup>18</sup> Many utilities services have been privatised in Malaysia such as electricity, water, postal and telecommunications. However, they are still under the purview of the respective ministries.

<sup>19</sup> (1998) 6NZBLC 102.

<sup>20</sup> Paragraph (vi) of the definition of services.

<sup>21</sup> In the Australian case, *Concrete Constructions (NSW) Pty Ltd v Nelson* 92 A.L.R. 193, the High Court held that section 52 of the Trade Practices Act 1974 is only to protect consumer and therefore does not govern the relationship between the employer's foreman and their employees.

<sup>22</sup> Section 53 of CPA.

<sup>23</sup> Section 54 of CPA.

of completion<sup>24</sup> and implied guarantee as to price.<sup>25</sup> The same provisions are available in the New Zealand Consumer Guarantees Act 1993 (CGA),<sup>26</sup> Schedule 2 of the Competition and Consumer Act 2010 (CCA) which is known as the Australian Consumer Law (ACL),<sup>27</sup> the United Kingdom Supply of Goods and Services Act 1982 (SGSA)<sup>28</sup> and the Saskatchewan Consumer Product Warranties Act 1977 (CPW).<sup>29</sup> However, the words used in the various legislations are different from one another. In the SGSA the word used is 'term.' In the CPW the word 'warranties' is used and in the CGA, ACL and the CPA, the word used is 'guarantee.' Nevertheless, the assumption is they carry the same meanings.<sup>30</sup>

The word 'guarantee', however, is not defined in the CPA. It is not a legal term as is the word 'warranty' as the latter has specific meaning under the law of contract.<sup>31</sup> 'Guarantee' is a familiar word in consumer transactions and generally understood by laymen as a formal assurance or promise with regard to quality or standard. The same meaning is assumed to be intended for the purpose of the CPA.<sup>32</sup> Nevertheless, it is good if a clear definition is given for the said word. An attempt to define the word, though, has been made in article 4 of the Consumer Act of the Philippines in which guarantee means "an implied assurance of the quality of the consumer products and services offered for sale or length of satisfactory use to be expected from a product or other similar specified assurance." After taking consideration of both definitions from the laymen as well as the legal perspectives, it is recommended that the term guarantee is defined as "an implied assurance of the quality or standard of the consumer goods and services offered for supply to consumers."

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<sup>24</sup> Section 55 of CPA.

<sup>25</sup> Section 56 of CPA.

<sup>26</sup> Sections 28- 31.

<sup>27</sup> Schedule 2 Part 3-2, Division 1 of the ACL which are section 60 to section 63.

<sup>28</sup> Sections 13-15.

<sup>29</sup> Section 48.

<sup>30</sup> For further discussion on the word 'guarantees', see Stephen Weatherill, 'Consumer guarantees' (1994) 110 *L.Q.R.* 545.

<sup>31</sup> Warranty is defined as an agreement with reference to the subject matter of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to claim for damages, but not to the right to reject the goods and treat the contract as repudiated. See Roger Bird, *Osborn's Concise Law Dictionary*, 7th Ed, Sweet & Maxwell, 1983, p 343.

<sup>32</sup> Naemah Amin, 'Guarantees in a contract of supply of services to consumers' [2004] 5 *CLJ* xiv.

(i) Implied guarantee as to reasonable care and skill

Section 53 provides that where services are supplied to a consumer, "there shall be implied a guarantee that the services will be carried out with reasonable care and skill." The liability imposed on the service provider is actually nothing new because it only confirms and codifies the existing common law. However, there are several difficulties in the application of this implied guarantee.

Firstly, the section does not elaborate on the degree of care and skill required. It is reasonable to assume that the standard of care and skill expected is similar to the standard required under the law of negligence. This has been confirmed in the New Zealand case of *Jetz International Ltd v Orams Marine Ltd*,<sup>33</sup> in which Lord Justice Cadenhead held that the statutory duty in section 28 of the CGA<sup>34</sup> is similar to that prescribed by the common law in contract and tort. Therefore, the CPA does not introduce any change to the law of negligence and no doubt the common law cases in this respect play important part in interpreting section 53. As such, the same problems which exist under the law of negligence will remain. The success of each case is objectively determined by the reasonableness of the supplier's conduct according to the ordinary level of skill, competence and diligence of other suppliers who are specialised in the same field.<sup>35</sup> The difficulty for consumers is that in many situations they are ignorant of the practice in the industry in order to successfully prove that the service is defective.

In order to overcome the problem in this respect, there are two suggestions; either to reverse the evidentiary burden to suppliers<sup>36</sup> or to introduce a new standard of skill in favour of consumers such as introducing the standard of 'acceptable quality'.<sup>37</sup> Consequently, consumers are only required to prove defective services whereby the burden is on suppliers to prove otherwise. The central argument is that it is extremely difficult for consumers to prove that suppliers are at fault in the case of damage

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<sup>33</sup> [1999] DCR 831.

<sup>34</sup> This provision under the CGA is similar to section 53 of the CPA and section 60 of the Australian Consumer Law.

<sup>35</sup> *Mc Nair J, Bolam v Friern Hospital Management Committee* [1957] 2 All E.R. 118 at 121, [1957] 1 W.L.R. 582 at 586; as approved in *Whitehouse v Jordan* [1981] 1 All E.R. 267 and also in *Caparo Industries PLC v Dickman* [1990] 2 W.L.R. 358.

<sup>36</sup> Review of the Consumer Protection Act 1999. Federation of Malaysia Consumers Associations, 2006/7, p 72.

<sup>37</sup> In respect of supply of goods, CPA has provided higher standard which requires the goods supplied should be of 'acceptable quality': section 32 of CPA.



whereas the latter with technical knowledge at their disposal can provide proof to the contrary more easily.

The European Commission<sup>38</sup> had proposed a directive<sup>39</sup> to reverse the burden of proof to the suppliers in which they are liable for physical injury and property damage caused by them unless they can prove the absence of fault.<sup>40</sup> This approach is preferable for consumers, if not better than strict liability approach. Unfortunately, due to lots of opposition, the directive was abandoned in 1994.<sup>41</sup> Thus, the same standard of reasonable care and skills is applicable and the problems remain. It is recommended that the abandoned proposal in the directive is taken up and adopted into the CPA. As such, there will be a significant increase in the legal exposure of suppliers of services and this will definitely benefit the consumers.

Alternatively, the courts can play a more active role to overcome the problems of proving reasonable care and skill by taking into account other surrounding factors rather than just by looking at the usual practice of the persons involved in the same industry. In *Jetz International v Orams Marine Ltd*<sup>42</sup> despite of the statement made by Lord Justice Cadenhead that the duty of care is similar to that prescribed by the common law in contract and tort, the judge went further by stating that this standard was not absolute and it could be ascertained from the surrounding circumstances. The Court had considered many factors including the economic background of the defendant and the fact that he had acquired a considerable source of revenue for the berthing and storage of the boats. Nowhere in the judgement did the Court look at the practice of other persons who were involved in the same industry. It shows that more factors should be taken into consideration rather than the standard of care of "a reasonable man."

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<sup>38</sup> Initially, the Commission had proposed to introduce the doctrine of 'strict liability' in the provision of services but due to lots of opposition, it had chosen to reverse the burden of the suppliers instead. See Trevor Fox, 'Draft EC council directive on the liability of suppliers of services: implications for aviation Insurers' (1993) *International Insurance Law Review*, Academic search premier, via, Lexis Nexis.

<sup>39</sup> Proposal for a council directive on the liability of suppliers of services, COM(90) 482 final, November 1990. It was an essential feature of the Directive that any person injured by the suppliers, not just the recipient of the service, has a right of action.

<sup>40</sup> Article 1 of the Draft Directive.

<sup>41</sup> There were powerful pressure groups in the service sectors, particularly in the medical and architectural professions, countering suggestions that legislation was needed in respect of services. For further comment on this Directive, see Geraint Howells and Stephen Weatherill, *Consumer Protection Law*, 2<sup>nd</sup> Ed, Ashgate Publishing Limited, 2005, pp 257 and 258.

<sup>42</sup> [1999] DCR 831, [1999] NZDCR 110.

This has been emphasised in the Australian case, *Panasonic Australia Pty Ltd v Burstyner*<sup>43</sup> in which the Federal Court held that the Court is the final arbiter of the standard of reasonable care based on the surrounding circumstances. The usual industry practice and the industry code of practice cannot be relied upon in imposing standards of reasonableness. This shows that the Court is flexible in determining the standards by looking at other factors rather than just by looking at the usual practice in the industry. This, at least, opens for more considerations in favour of consumers.<sup>44</sup>

Additionally, it also has been argued that the standard of reasonable care and skill is too lenient in which the supplier can escape liability by claiming that he has done his work with care and the failure is due to the fault of other people or a cause independent of human control.<sup>45</sup> This is because as long as the supplier has taken reasonable care and skill, other contributing factors for the defect are not relevant. Consequently, there is no guarantee that the service which has been done with care and skill, is of high quality and is safe.<sup>46</sup> For example, in *Wilson v Best Travel Ltd*,<sup>47</sup> the Court held that the defendant, a tour operator, was not liable for negligence because he had exercised reasonable care and skill by inspecting that the hotel had complied with local safety standards even though this was below British safety standards.

The second problem of section 53 is in respect of the contract of supply of work and materials. For example, in carrying out repair work, a mechanic may use certain spare parts. It is important to distinguish between the supply of goods and the part of the contract that relates to the skill exercised by the mechanic. If the reason for the consumer's complaint is related to the defective spare parts, the consumer will be able to invoke the implied terms of acceptable quality.<sup>48</sup> However, if the consumer's complaint is that the part has been badly fitted, the supplier is only liable for the failure to exercise reasonable care and skill which means the standard is lower than the liability in respect of goods. Nevertheless, sometimes it is extremely difficult to distinguish the source of the defect. For example, where a tyre blows out hours after being fitted on a car, it is

<sup>43</sup> (1993) ATPR 41-224.

<sup>44</sup> The same factors also have been taken into consideration by the judges when deciding cases on negligence. For example the defendant's incapacity or infirmity. *Mansfield v Weetabix Ltd* [1998] 1 W.L.R.1263.

<sup>45</sup> This will make the position is similar with the exceptions to right of redress in section 58 of CPA although the section does not apply to a guarantee of reasonable care and skill.

<sup>46</sup> Naemah Amin, 'Guarantees in a contract of supply of services to consumers' p xv.

<sup>47</sup> [1993] 1 All E.R. 353.

<sup>48</sup> Section 32 of CPA.

difficult to determine whether the defect lays in the tyre itself or whether it was the result of the mechanic damaging the tyre in the course of fitting.

The difficulty in this respect can be resolved if the standards of proof would be the same for both the supply of goods and services. Therefore, another suggestion is that for the supply of services, the same standard of acceptable quality should be applied rather than reasonable care and skill.

(ii) Implied guarantee as to fitness for particular purpose

Section 54 provides that:

Where services are supplied to a consumer, there shall be implied a guarantee that the services, and any product resulting from the services, will be –

- (a) reasonably fit for any particular purpose; and
- (b) of such nature and quality that it can reasonably be expected to achieve any particular result, that the consumer makes known to the supplier, before or at the time of the making of the contract for the supply of the services, as the particular purpose for which the services are required or the result that the consumer desires to achieve.

This implied guarantee is very significant in the service industry especially in respect of pure services since it supposedly provides more than what is provided under common law. Under section 53 of the CPA, the supplier is only liable for a failure to exercise reasonable care and skill and not to guarantee that a particular result to be achieved. It can be seen in *Thake v Maurice*,<sup>49</sup> in which the Court of Appeal held that there was no implied guarantee to ensure that a sterilisation by vasectomy would lead to sterility. Therefore, the surgeon was not liable when the patient became pregnant.

The CPA has clearly changed this common law approach in respect of pure services by imposing strict liability in situations where previously there would have no liability without proof of negligence. Therefore, it has been seen as providing a wide protection to consumers. Unfortunately, lots of pure services which are in fact professional services are outside the ambit of the CPA.<sup>50</sup> Therefore, this significant guarantee cannot be extended to services provided by professionals such as doctors, dentists and lawyers

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<sup>49</sup> [1986] 1 All E.R. 497.

<sup>50</sup> Section 2(2)(e) of CPA.

and as a result consumers will lose the advantage of this implied guarantee when dealing with these professionals.

There are also problems of interpretation in the application of section 54. Firstly is the interpretation of the word 'any particular purpose.' The issue is whether the guarantee as to fitness for particular purpose under section 54 extends to a failure to satisfy the common purpose for which a service is acquired. Comparing with the provisions related to the supply of goods, section 32<sup>51</sup> imposes a guarantee on the suppliers to provide goods which are fit for their common purposes. Section 33 on the other hand, imposes the implied guarantee as to fitness for 'particular purpose' that the consumer makes known to the supplier. From here, we can see that the word 'particular purpose' in section 33 does not cover common purpose which is already covered in section 32. However, the same interpretation cannot be applied to the supply of services since there is no obligation that a service be reasonably fit for the common purpose associated with such a service unless this obligation is read into section 54. Thus, it is submitted that in the absence of a separate provision requiring services to be fit for their common purpose, it is necessary to imply such a requirement into section 54.<sup>52</sup> Only then can a consumer can get benefit from this section which provides for strict liability.

Secondly is the interpretation of the phrase 'make known' whether it includes 'impliedly' make known to the suppliers. This is because in many situations, a consumer fails to inform a supplier his intended outcome and therefore he cannot invoke this guarantee if it only includes 'expressly make known.' In this respect, it appears that the guarantee makes no significant practical difference compared with the results under common law and under the law of contract where the contractual agreement by the parties are important to determine the liabilities.<sup>53</sup>

The problem with this approach is that the consumer must know exactly what he or she wants and negotiates with the supplier for that end

<sup>51</sup> Section 32 provides that the goods shall be deemed to be of acceptable quality if they are fit for all the purposes for which goods of the type in question are commonly supplied.

<sup>52</sup> Section 29 of the Consumer Guarantees Act 1993 (New Zealand) also provides for the same guarantee and it has been submitted that the phrase 'particular purpose' also includes common purpose.

<sup>53</sup> In *Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners* [1975] 3 All E.R. 99; [1974] 3 All E.R. 666, the Court held that the designers of a warehouse floor were taken to have impliedly warranted that the floor would be reasonably fit for the use of fork-lift trucks. The circumstances showed that the customer had made it clear that such trucks would be used and the defendant knew what the customers required.

result. All too frequently, consumers are unsure what they want or forget to make known their desires to suppliers because sometimes they think that things can go without saying. In addition, if the phrase 'particular purpose' also includes 'common purpose', one may wonder how a consumer is to make the common purpose known in all occasions. For example, a consumer who has his car tuned should obtain relief if the car is not tuned for normal driving, even though it was never expressly stated. Therefore, in order to overcome the problems of interpretation, the suggestion is to follow the provision in section 61 of the Australian Consumer Law which is set out in Schedule 2 of the Competition and Consumer Law 2010 to include the phrase 'expressly or by implication' so that a consumer can rely on this guarantee even though he has impliedly make known his desire to a supplier.<sup>54</sup>

Another shortfall of this guarantee is 'reasonableness,' being the key factor in determining its application. The Courts have to determine whether the services are 'reasonably' fit for any particular purpose and of such nature and quality that it can "reasonably" be expected to achieve any particular result. Again, this principle merely restates the common law principle. To quote Lord Denning's reasoning in *Greaves & Co. (Contractors) Ltd*:<sup>55</sup>

It has often been stated that the law will only imply a term when it is reasonable and necessary to do so in order to give business efficacy to the transaction; and indeed, so obvious that both parties must have intended it..... In the great majority of cases it is no use looking for the intention of both parties. If you asked the parties what they intended, they would say they would never give a thought; or if they did, the one would say that he intended something different from the other. So the courts imply- or as I would say, impose a term such as is just and reasonable in the circumstances...<sup>56</sup>

Consequently, if a consumer asks a supplier to perform certain services and he has made known his intended results, the liability of the supplier is only to perform services which are reasonably fit for that particular purpose. If that particular purpose is a 'folly' one, the supplier can exclude liability by claiming that he has done whatever is reasonable expected from him. As such, this guarantee does not put liability on suppliers to guarantee the result in all situations. It seems unfair to the

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<sup>54</sup> Review of the Consumer Protection Act 1999. Federation of Malaysia Consumers Associations, 2006/7, p 74.

<sup>55</sup> *Greaves & Co. (Contractors) Ltd v Baynham Meikle & Partners* [1975] 3 All E.R. 99.

<sup>56</sup> [1975] 3 All E.R. 99.

consumers because they have told the suppliers their intended outcomes and usually the price has been fixed based on their expectation.

It can be seen in one New Zealand case, *W v L*,<sup>57</sup> in which the defendant, a surgeon specialising in plastic and reconstructive surgery, made several representations that the operation would enhance the plaintiff's breasts to approximately a size "C". The plaintiff was dissatisfied with the result and the defendant claimed that the size of the breasts was the best he could obtain. The plaintiff had another operation with another surgeon and only then she discovered that the implants were under filled and this was the reason why she could not get the expected outcome. In this case, she succeeded in her action to claim damages under sections 28 and 29 of the New Zealand CGA.<sup>58</sup> This case shows that there was no difference in proving guarantees under both sections because it was not a duty of the suppliers to guarantee the desired result unless there was the element of negligence.

Therefore, it is submitted that the position in section 54 is similar to section 53 in which the element of 'reasonableness' is the key factor to determine suppliers' liabilities. Therefore, the proposal is to delete the word reasonable from section 54 and the suppliers would be liable if they have agreed to provide services which have been clearly made known by the consumers, doesn't matter how 'folly' the desires are. Only then can this guarantee benefit consumers above what has been provided by common law or contract law.

In addition, section 54 provides that even where the consumer has made known his particular purpose for which he requires services, it does not automatically follow that the guarantee applies to the transaction if the circumstances show that the consumer does not rely on the supplier's skill or judgment<sup>59</sup> or it is unreasonable for the consumer to rely on them.<sup>60</sup> Therefore, reliance has to be proven before this guarantee can be invoked. Nevertheless, reliance can be easily assumed in consumer transactions<sup>61</sup> especially in a situation where a supplier is an expert in that field of services and a consumer engages his services for that expertise.<sup>62</sup>

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<sup>57</sup> [1997] DCR 588.

<sup>58</sup> Sections 28 and 29 of CGA are similar to sections 53 and 54 of CPA.

<sup>59</sup> Section 54(2)(a) of CPA.

<sup>60</sup> Section 54(2)(b) of CPA.

<sup>61</sup> *Grant v Australian Knitting Mills Ltd* [1936] A.C. 85.

<sup>62</sup> This is also a reason why the phrase make known should also include "impliedly make known" so that it is easier to prove reliance later on.

However, there are situations where the element of 'reliance' is hard to prove. For example where a consumer himself is an expert in that particular field of service or it is performed according to a consumer's exact instruction or a supplier makes it clear that the outcome of the services may not achieve the result the consumers' desire. This position is similar to the common law approach in *Young & Marten Ltd*,<sup>63</sup> in which the Court held that when the plaintiff had specified tiles made by only one manufacturer this can exclude the warranty that it must be reasonably fit for use. A clear explanation also can be seen in the illustrations by Du Parcq J in *GH Myers & Co v Brent Cross Service Co*<sup>64</sup> that if a man goes to a repairer and says 'repair my car, get the parts from the makers and fit them.' In such a case it is clear that the person ordering the repairs is not relying upon any warranty, except that the parts used will be parts ordered and obtained from the makers. On the other hand, if he says, 'Do the work and fit any necessary parts,' he does not put any clear stipulation and therefore shows that he relies on the repairer. In this situation, the repairer will be liable for the work done.<sup>65</sup>

Despite these hindrances, the good part of the section is that it reverses the burden of proof in respect of reliance to the supplier. It means that it will not be necessary for the consumer to allege reliance but it is for the supplier to allege it in his defence and prove that there was no reliance or that the reliance was unreasonable. This will encourage the suppliers to actively take responsibility to disclose the likely outcome of their services and the consumers are equipped with the fullest information before committing to the transaction.

Section 58 also provides several defences that hinder the effectiveness of section 54 in giving protection to consumers. It provides that if the failure is due to the act, default, omission or any representation made by a people other than the supplier<sup>66</sup> or a cause independent of human control<sup>67</sup> no right of redress can be taken against the supplier. The issue would arise if the work is subcontracted to the sub-contractors and the default is caused by them. The consumer cannot obtain relief from the supplier because of the exceptions in section 58 which provides exceptions in a situation if the failure is due to other people.<sup>68</sup>

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<sup>63</sup> [1969]1 A.C 454.

<sup>64</sup> [1934] 1 K.B. 46.

<sup>65</sup> [1934] 1 K.B. 46 at 55.

<sup>66</sup> Section 58(a) of CPA.

<sup>67</sup> Section 58(b) of CPA.

<sup>68</sup> Nevertheless, the consumer can sue the sub-contractor because he is also a supplier as defined in section 3 of CPA.

Notably, there are no similar exceptions in respect of guarantee as to reasonable care and skill as has been provided under section 53; meaning that the supplier will be responsible if he fails to exercise reasonable care and skill even though the failure is due to the default of other people such as his sub-contractor.<sup>69</sup> These exceptions make the protection under section 54 weaker compared to the implied warranty provided under section 53 and also under common law. In *Stewart v Reavell's Garage*,<sup>70</sup> the Court held that the defendants were liable for the failure caused by their sub-contractor. In this case, the particular purpose of the work which the plaintiff contracted to have done was obvious, namely, to be provided with an efficient braking system for his Bentley car, which was a car specially designed for speed, and therefore required a braking system adequate for such speed. The Court held that the repairers were under a duty to provide good workmanship, materials of good quality and a braking system fit for its purpose, and not merely to employ competent sub-contractors. Unfortunately, the same decision cannot be achieved under the CPA because of the exceptions in section 58. The similar provision is also not provided in the Australian ACL and CCA. Therefore, it is submitted that the exceptions should be taken out from the CPA in order to impose stricter liability on the suppliers.

(iii) Implied guarantee as to time of completion

Among consumer complaints in the service industry is delayed performance. Section 55 provides a guarantee that the services are to be carried out within a reasonable time where the time is not determined by the contract, or left to be determined in a manner agreed by the contract, or left to be determined by the course of dealing between the parties.

This usually occurs in the repairing and maintenance industries where the extent of the work needed cannot be determined accurately without further and proper inspection as well as depending on the availability of the spare parts that need to be replaced. In this situation, the repairer has to carry out work within a reasonable time.

What constitutes a reasonable time is a question of fact.<sup>71</sup> The court has to consider the nature of the work to be carried out, the availability of the necessary materials for completing the work, the general customs of the trade under consideration and the time taken by a reasonable competent

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<sup>69</sup> In addition, section 53 of CPA does not require personal performance of the services by the suppliers which means that it allows the supplier to subcontract the services.

<sup>70</sup> [1952] All ER 1191.

<sup>71</sup> Section 14(2) of the Supply of Goods and Services Act 1982 (United Kingdom) clearly states that it is a question of fact. Even though, section 55 of CPA is silent on the meaning of unreasonable time, the same test is arguably applicable.



supplier in that particular circumstance to carry out that particular work. In *Charnock v Liverpool Corporation*,<sup>72</sup> the plaintiff sent his car for repair after being involved in accident, and it took eight weeks to be completed. The evidence showed that a reasonable time for carrying out the repairs should not exceed five weeks and therefore the court awarded damages as compensation for the cost of hiring a replacement car for three weeks.<sup>73</sup>

However, there are exceptions in section 58 which provides that there is no right of redress against the supplier if the failure is caused by an act, default or representation made by a person other than the supplier or a cause independent of human control. Thus, if the delay is due to consumers' procrastination or the imposition of unreasonable conditions by the consumers, the suppliers will not be in breach of this guarantee. In this respect, it appears that the guarantee does not impose a new liability and merely restates the principles under common law.<sup>74</sup>

Similarly, if the delay is caused by the sub-contractor, the same rule is applicable. This exception seems unreasonable since it is the supplier who engages that particular subcontractor and he should be responsible for his decision. Notably, there is no similar exception available under the UK SGSA as well as section 62 of the Australian ACL. Therefore, there are strong arguments to take out the exceptions from the CPA.

(iv) Implied guarantee as to price

The price can be easily determined prior to the contract in the sale of goods as opposed to services since in the latter the exact cost can only be determined after the completion of the work. Thus, section 56 of the CPA provides that the consumer shall not be liable to pay more than the reasonable price for the services. However, the problem is that the burden is on consumers to prove what amounts to a reasonable price which is a question of fact depending on the circumstances of each particular case. If the consumer feels that the price is too high the onus will be on him to find expert evidence to substantiate his claim. Nevertheless, if the price has been fixed under any written law, the reasonable price shall be

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<sup>72</sup> [1968] 3 All E.R. 473.

<sup>73</sup> The Court rejected the defendant's argument that their labour force was under strength due to the shortage of staff, the holiday period and too many works under manufacturer's warranty that need to be given a priority.

<sup>74</sup> *Charnock v Liverpool Corporation* [1968] 3 All E.R. 473, p 478. Lord Salmon stated that if the delay was caused by a supervening event, the defendant can be excused from the liability.

as prescribed under the written law<sup>75</sup> such as when the government has already fixed the ceiling price for the services.

The consumer has been placed at great inconvenience if the supplier has the goods in his possession and refuses to release them until the payment has been made. Another difficulty is that section 56 limits the right of consumers to claim redress in which it only allows consumers to refuse to pay more than the reasonable price.<sup>76</sup> The word 'refuse' can give rise to different interpretations. Does it mean that a consumer should challenge the price immediately if he thinks it is unreasonably high and should not make any payment until a reasonable figure is agreed? If this is the interpretation of the word 'refuse,' section 56 is totally impractical. This is because, once the consumer has paid for the work done, the supplier can argue that the consumer has agreed on the price and thus lose his right of redress under section 56.<sup>77</sup> Furthermore, in real life, the consumer cannot simply walk away by refusing to pay for the work done. For example, the garage will have a lien over the consumer's vehicle unless the consumer pays the bill. This will leave no option to the consumer except to pay for it and by doing this no further action can be taken against the supplier since the consumer has been deemed as accepting the said price.

On the other hand, if the word 'refuse' means that the consumer should pay the bill but has a right to bring the case to the Tribunal for Consumer Claims later to claim for the differences between the paid price and the reasonable amount, the consumer is still not in a better position.

This is due to the limitation in section 56(3) in which it clearly states that the consumer has no other right of redress provided in Part IX. It means the consumer cannot claim damages in respect of any additional loss suffered such as mental distress, economic loss such as to pay interest if loans are taken to pay for the bill and any other expenses in bringing the case either to the court or the Tribunal. Putting this limitation in section 56(3) will not encourage consumers to bring further action and consequently will not curtail the unethical conduct of suppliers in respect of price. Notably,

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<sup>75</sup> Section 56(4) of CPA.

<sup>76</sup> Section 56(2) of CPA.

<sup>77</sup> Margaret Griffiths & Ivor Griffiths, *Law for Purchasing and Supply*, 3<sup>rd</sup> Ed, Financial Times Prentice Hall, 2002, p 125. According to Griffiths, the consumer should not pay a price that he has to pay until a reasonable figure is agreed. If he does pay, this will be construed as a contractual agreement and he will not be able to have the contract reopened in the absence of duress.

there is no similar limitation in section 15 of the UK SGSA. Therefore, the suggestion is to take out the limitation in subsection (3) from the CPA.<sup>78</sup>

Another issue in respect of price is that it should be distinguished with the word 'estimate' which is commonly used in repair industry since the actual price cannot be determined before the work done. The CPA is silent on this respect and therefore, further provisions should be provided to solve this matter. Similarly, if the price is already determined by the contract, this guarantee has no application as it doesn't matter how unreasonable the agreed price might be.<sup>79</sup> It shows that the implied guarantee provided by the CPA is very limited and only applicable in the absence of contractual agreement. Therefore, the enactment of the CPA does not provide solutions to the consumers' problems in the contract law.

## **EXCLUSION CLAUSES**

Section 6 of the CPA provides that the implied guarantees shall have effect notwithstanding anything to the contrary in any agreement; meaning that any attempt to contract out any of the implied guarantees provided by the CPA is void.<sup>80</sup> In addition, it is an offence for a supplier to contract out of any provision in the CPA.<sup>81</sup>

This provision gives some protection to consumers especially in respect of negligence because section 53 provides that there shall be an implied guarantee that the services will be carried out with reasonable care and skill. Therefore, any attempt to exclude liability of negligence is subject to section 6 of the CPA. Unfortunately, the CPA does not cover all types of services. There are several types of services which are outside the ambit of the CPA, such as healthcare services and services provided by professionals who are regulated by specific written law. In these situations, the common law rules of incorporation and construction that continue to pose lots of problems are still applicable.

## **CONCLUSION**

The CPA is the most important consumer legislation that has been legislated in Malaysia. By providing a set of statutory guarantees which relate to consumer services indicates the Parliament's recognition of the

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<sup>78</sup> Review of the Consumer Protection Act 1999. Federation of Malaysia Consumers Associations, 2006/7, p 75.

<sup>79</sup> Section 56(1)(a) of CPA.

<sup>80</sup> Section 6(1) of CPA.

<sup>81</sup> Section 6(2) of CPA and subject to punishment under section 145 of CPA.

rights of consumers in the service industry which has contributed to the Malaysian economy. Its existence is not to deny the importance of the existing laws such as the law of contract and the law of tort, but to strengthen the protection given to consumers. Part VIII of the CPA provides a good protection in the form of 'implied guarantees.' Section 53 provides the implied guarantee as to reasonable care and skill. Sections 55 and 56 impose liabilities on suppliers to provide services within reasonable time and impose reasonable charge.

The existence of provisions relating to services in the CPA undoubtedly gives major impact to consumer protection in the service industry. Nevertheless, co-operation from the consumer organisations, traders as well as consumers is essential to assist the service industry in achieving a higher standard of services as well as to provide for comprehensive consumer protection.

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