Strict Liability for Defective Products: Balancing of Interests between Consumers and Producers

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Abstract

A system of strict liability for defective products has been incorporated into Malaysian law through Part X of the Consumer Protection Act 1999 (hereinafter referred to as the CPA). It is aimed at providing better protection to the victim of defective or unsafe products. However the system is founded on the policy consideration that product liability law should maintain a fair, just and proper balance between the interest of the consumer and the interest of the producer. Consequently liability for defective products may be strict but not absolute. A producer may free himself from liability if he furnishes proof as to the existence of certain exonerating circumstances.

The aim of this paper is to examine whether the law is really able to strike a balance between commercial interests and consumer protection in the area of product liability. The main focus of the paper is the extent to which the principle of strict liability under Part X of the CPA realises its main objective to improve the substantive position of the victims of defective products, beyond that already afforded to them under the common law. All the defences available to the defendants in product liability claims will then be considered. The discussion will assess the extent to which those defences can be justified as a means of reducing or intruding upon the compensation rights of the injured persons.

Introduction

Liability for defective products or product liability generally refers to the civil liability of those involved in the production and distribution of products to buyers, users and bystanders for damage or injuries suffered because of defects in products. It has been developed as one of the important branches of consumer protection law in facing the unknown risks of modern technological production. With the main objective of compensation, product liability law seeks to provide redress for damage suffered by the victim of defective or unsafe products. Over the years product liability law has undergone rapid changes in many countries in different parts of the world. The concept of strict product liability is now an accepted part of the regime for consumer protection in most industrialized countries such as the USA, the EC, Australia and Japan. The adoption of similar concept in Malaysia brings our product liability law in line with the law in those countries.

The strict liability rule imposes the primary liability of losses caused by defective products on the producer who is the dominant link in the market chain. The producer is responsible not only for their production but also, through sales promotion activities, for creating consumer demand and expectations. Furthermore, he is the party best able to bear the liability since he can obtain insurance and pass on the increased cost of

premiums to his customers by way of an increase in prices. Under the rule, once the product is proven to be unsafe and it has caused personal injury or property damage to the consumers, the producer of the product will be strictly liable. Consequently, proof that he has taken reasonable care will not afford protection to the producer. However, the producer can still escape liability by relying on specific defences provided under the rule.

Background of Strict Liability Rule

The system of strict liability for defective product was first introduced in the USA[1] as a means of overcoming the problems inherent in contractual and negligence remedies.[2] However the Thalidomide tragedy in 1961 was a major impetus behind the call for the imposition of strict liability for defective products throughout Europe and in the UK in particular. The tragedy was a clear example of a catastrophic consequence of a defective product in which thousands of children all over the world were born with congenital disabilities after their mothers had taken the Thalidomide drug during pregnancy. More than 400 children in England alone were discovered to have been affected. The difficulties of proving negligence on the part of the company which had manufactured the drug gave rise to a wide public debate on the product liability issues.[3]

A serious study of the matter was nevertheless started only after 1970. Reform of the product liability law in the UK was considered by the English and Scottish Law Commissions[4] and the Royal Commission.[5] Both Commissions recommended the imposition of strict liability on the part of the producer of defective products after they came to the conclusion that the existing law was unsatisfactory. Their reports were also greatly influenced by proposed international agreements, namely, the Strasbourg Convention[6] and the draft EC Directive. The EC Directive on Liability for Defective Products[7] which was adopted on 25 July 1985 later became the major force for the adoption of strict liability for defective products in the EC.

It introduced the concept of liability without fault on the part of the producer as stated in Article 1 that 'the producer shall be liable for damage caused by a defect in his product'. Such liability has been described in the Preamble as 'the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production'. The United Kingdom became the first state to implement the Directive and this was achieved by Part 1 of its Consumer Protection Act 1987. Since Part X of Malaysian CPA is adopted from the UK Act, our product liability law is actually greatly influenced by the Directive. The Directive has also influenced the development of product liability laws in other countries outside the EC, for example New Zealand, Australia, Taiwan and Japan.

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[1] The landmark decision in the US was that of the California Supreme Court in *Greenman v Yuba Power Product Inc.* (1963) 377 p.2d..697. See generally, Howells.1992. *Comparative Product Liability.* Dartmouth Publishing: Aldershot. Chapter 13.

[2] The doctrine of privity of contract prevents third party from suing on the contract and in tort, the proof of negligence is not easy.

[3] See generally, H.Teff and C. Munro.1976. *Thalidomide: The Legal Aftermath.* Saxon House.

Strict Liability under Part X of the CPA

Section 68(1) of the CPA provides that 'where any damage is caused wholly or partly by a defect in a product, the following persons *shall* be liable for the damage'.[8] It is clearly understood from this provision that the liability can be imposed without proof of fault. There is also no requirement for a contractual relationship between the parties since a claim can be made by 'a person who suffered the damage', who is not necessarily the buyer.[9] Thus, to succeed in a product liability claim, the plaintiff has only to prove damage, defect in the product and the causal link between the two. Unlike liability in negligence which is based on the conduct of the producer, the main focus of the strict liability rule is the defect in the product. The advantage of this approach for the plaintiff is that liability may be imposed by reason of the existence of a defect alone. For example, if a consumer is supplied with contaminated food and it causes injury to him, the producer of the food will be strictly liable under Part X. The issue of how the food has became contaminated or whether a risk of contamination can be discovered or avoided is irrelevant.

Part X however does not cover every product. Section 66 defines 'product' as 'any goods and, subject to sub-section (2), includes a product which is comprised in another product, whether by virtue of being a component part or raw material or otherwise.' In this definition two types of products are clearly covered by Part X, namely, goods and component parts and raw materials. 'Goods' are defined in s 3(1) to mean 'goods which are primarily purchased, used or consumed for personal, domestic or household purposes, and includes:

(a) goods attached to, or incorporated in, any real or personal property;
(b) animals, including fish;
(c) vessels and vehicles;
(d) utilities; and
(e) trees, plants and crops whether on, under and attached to land or not, but does not include *chooses in action*, including negotiable instruments, shares, debentures and money.'

It is reasonably clear that the definition covers all consumer goods including articles fixed to the land such as air-conditioners, furniture, etc. and utilities such as water and electricity. Although vessels and vehicles are included in the definition, injuries caused by major capital items such as ships and aircraft are not covered since they are normally bought for commercial purposes. By virtue of s 68(5) fresh or unprocessed agricultural produce are excluded from the strict liability rule.[10] Thus oranges in a natural state would be exempted, but not orange juice; apples but not apple pies; fresh meat, fish and chicken but not frozen meat, fish and chicken. The main reason for the exemption is to protect farmers and fishermen who are mostly in business in a small way with little net revenue.

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4 The Law Commission and the Scottish Law Commission, *Liability for Defective Products*, HMSO Cmnd. 6831.

5 The Royal Commission Report on Civil Liability and Compensation for Personal Injury (1978) Vol.1, HMSO Cmnd. 7054.

6 The Strasbourg Convention on product liability in regard to personal injury and death was adopted by the Council of Europe in 1977 and was opened for signature in January 1977. However, it was not signed by the UK.

7 European Directive (85/374/EEC) 25 July 1985.

8 Emphasis added. The section then lists down the persons to be held liable.

9 Section 68(2) of the CPA.

Obviously therefore Part X does not make every person connected with the product liable. The primary responsibility for damage caused by a defective product is placed on the producer of the product.[11] This is in line with one of the policy considerations in introducing strict liability, namely, to place the responsibility for damage caused by a defective product on the persons;

(a) who created the risk by supplying the defective product for commercial purposes;
(b) who are in the best position to exercise control over the quality and safety of the product;
(c) who can most conveniently insure against it.[12]

The producer is widely defined to cover every person involved in the manufacturing process, pre-manufacturing activity and the processing of a natural product.[13] The producer also includes someone who purely assembles components made by others, for example by mixing ingredients, or fixing a unit supplied in kit form.[14] However the designer and supplier of services such as installers, repairers, dry-cleaners and others. although directly connected with the product are not within the definition of a 'producer'.

Damage is defined in s 66(1) of the CPA as meaning 'death or personal injury, or any loss of or damage to any property, including land, as the case may require'. Obviously death and personal injury are the most important and serious consequences that may be caused by a defect in the product which strict liability rule mainly aims to compensate. They may be recoverable under the existing law of damages for personal injuries and death which is contained in the Civil Law Act 1956.[15] Part X however restricts recovery of damages for loss and damage to property. Based on s 69(1), there are three types of irrecoverable property damage under Part X, namely, the defective product itself, a component part comprised in the defective product and commercial property.

The Meaning of Defect

Liability under Part X focuses on the condition of the product. However, the product must be proved to be defective before liability can be imposed on the producer. Thus, defectiveness becomes the key concept of the strict liability rule. Section 67(1) of the Act states that 'there is a defect in a product for the purposes of this Part if the safety of the product is not such as a person is generally entitled to expect'. It is reasonably clear that the definition of 'defect' is based on the concept of safety. Section 67(4) states that safety in relation to a product shall include:

(a) safety with respect to products comprised therein;

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[10] 'Agricultural produce' is defined in s 66(1) as 'any produce of the soil, of stock-farming or of fisheries.'

[11] Section 68(1) of the CPA. Another party may be sued under Part X is own-brander and importer.

[12] The Law Commission and Scottish Law Commission, para 23.

[13] Section 66(1) states "producer", in relation to a product, means - (a) the person who manufactured it; (b) in the case of a substance which is not manufactured but is won or abstracted, the person who won or abstracted it; (c) in the case of a product which is not manufactured, won or abstracted but essential characteristics of which are attributable to an industrial or other process having been carried out, the person who carried out that process.

[14] See the definition of 'manufacturer' in s 3(1) of the CPA.

[15] Section 70 of the CPA specifically states for the application of this general law for the purpose of product liability claim under Part X.

(b) safety in the context of risk of damage to property; and
(c) safety in the context of risk of death or personal injury.

Part X clearly adopts the consumer expectation test in determining defectiveness. Safety is to be judged according to what 'a person is generally entitled to expect'.[16] The application of the consumer expectation test in determining product safety standard can be illustrated in a number of cases decided under the CPA of UK. In the case of *A and Others v National Blood Authority and others*,[17] the contaminated blood was held to be defective as the judge was satisfied that "the public at large was entitled to expect that the blood transfused to them would be free from infection". Burton.J in this case held that the issue of safety should be judged not based on actual expectation of the public but on their entitlement to expectation and this is the matter to be decided by the court. Similarly in *Abouzaid v Mothercare (UK) Ltd.*,[18] the Court of Appeal held that the pushchair's cover was defective since the consumer is entitled to expect that the product to be safely designed. On the other hand, in *Bogle and others v McDonald's Restaurants Ltd*,[19] the court was satisfied that the safety of the hot drinks served by McDonald was such as persons generally are entitled to expect despite the fact that the spillage of hot drinks had caused serious injuries to many customers.

Obviously safety is a variable and relative concept and thus there will often be a scope for debate over questions of fact, degree and standard in deciding whether or not a particular product was unsafe and therefore defective. Section 67(2) states that "all relevant circumstances shall be taken into account", including:

(a) the manner in which, and purposes for which, the product has been marketed;
(b) the get-up of the product;
(c) the use of any mark in relation to the product;
(d) instructions for or warnings with respect to doing or refraining from doing anything with or in relation to the product;
(e) what might reasonably be expected to be done with or in relation to the product; and
(f) the time when the product was supplied by its producer to another.

In *A and Others v National Blood Authority and others*[20], it was held that the avoidability of the risk of harm is not a relevant circumstance in deciding the issue of defectiveness. However the existence and adequacy of any instruction or warning with regard to the correct usage of the products is a very relevant factor to be considered. In *Worsley v Tambrands Limited*,[21] the plaintiff suffered from Toxic Shock Syndrome (TSS) after using the defendant's tampons. In accepting the defendant's submission that there was no case to answer under the CPA, the Court held that the warning of the association between TSS and tampon use on the outer packaging of the product and some detail of the risk in the leaflet inside the

[16] By contrast, Article 6(1) of the Directive states that 'a product is defective when it does not provide the safety which a person is entitled to expect
[17] [2002] 3 All ER 289.
[18] [2001] 3 CL 109. In this case a "cosytoes" cover fixed by elastic straps injured the plaintiff's eye when one of the straps sprung back while he was helping his mother to fix it to his brother's pushchair.
[19] [2002] EWHC 490
[20] [2002] 3 All ER 289.
[21] [2000] PIQR 95.

packaging were adequate. The product therefore did not have a defect within the meaning of Part 1 of the UK CPA. This case illustrates that the definitions of 'defective' has been construed in a way which can be prejudicial to the consumer where a warning has been given.

Nevertheless, the main hurdle to a successful claim under Part X is to establish a causal link between the defects in the product and the injuries suffered by the consumer. This is particularly obvious in cases involving adverse health effects of certain products such as a drugs, cigarettes, Extremely Low Frequency (ELF) radiation, etc. Since the injury can be a cumulative effect of prolonged, undiagnosed exposure, or can take years to develop, causation issues can be clouded by other factors such as intervening health factors. Additionally, it may take years for a health effect of the defect in the product, such as certain side effects of a drug to be medically or scientifically recognized.

This difficulty can clearly be illustrated in the English case of *XYZ and others v Schering Health Care Ltd.*[22] In this case a group of women filed an action against manufacturers of different brands of the oral contraceptive (Femodene, Marvelon, Minulet and Mercilon) in respect of side-effects allegedly suffered as a result of taking the so-called 'third-generation' combined oral contraceptive pills (COC3s). The alleged side-effects were various types of cardio-vasculour injuries such as deep vein thrombosis (DVT), pulmonary embolism, strokes and others. However, after a detailed analysis of scientific studies and evidence, the court found that there was no proof that the drug carrying excess risk of venos-thromboemolism and the product, therefore, was not defective and was not the cause for the alleged side-effects.

Defences

The seventh preamble of the EC Directive provides that, there should be 'a fair apportionment of risk between the injured person and the producer [so that] the producer should be able to free himself from liability if he furnishes proof as to the existence of certain exonerating circumstances'. Consequently liability for defective products may be strict but not absolute. There are certain defences available to any person who is sued under the strict liability rule which may be seen as a mean of achieving some sort of balance between consumers' needs and producers' fears.

Section 72(1) of the CPA states that, 'in any civil proceeding under this Part against any person in respect of a defect in a product, it shall be a defence for that person to show;

(a) that the defect is attributable to compliance with any requirement imposed under any written law;
(b) that he did not at any time supply the defective product to another person;
(c) that the defect did not exist in the product at the relevant time;
(d) that the state of scientific and technical knowledge 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 defect if it had existed in his product while it was under his control;
(e) that the defect –
    (i) is a defect in a product in which the product in question is comprised therein (the "subsequent product"); and
    (ii) is wholly attributable to –
        (A) the design of the subsequent product;

[22] [2002] EWHC 1420.

or

(B) compliance by the producer of the product in question with instructions given by the producer of the subsequent product.'

Basically the defence of compliance with legal requirements will only be available if the defendant had no choice in the matter because he was under a legal obligation to comply, such as standard specifications made under the Standards of Malaysia Act 1996. In practice the defence seems to have a very limited application, and is probably confined to those cases where the legal requirement is itself inadequate because it is misconceived or outdated.[23] The defence that the producer did not supply the product is intended to exclude a person who is not responsible for a product being on the market. It is clearly unfair and unreasonable that strict product liability be imposed on the producer in a country like Malaysia which has the reputation of being a market for counterfeiting. The defence that the defendant did not supply the product will be very significant in protecting the original producer. However, it may not be enough for the original producer to say that he did not supply the counterfeit product. He must be able to prove that his products are distinguishable, whether by obvious or clandestine means. Since 'supply' is defined in s 3(1) to mean 'to supply or resupply by way of sale, exchange, lease, hire and hire-purchase', the producer of promotional gifts, free samples, demonstration models and trial products will also be protected by the defence.

The producer may also be exonerated from liability if he can prove that the defect did not exist in the product during the course of production and when the product was supplied by him to another person. This defence, which may be the most important defence in practice, protects the producer where the defect is due to mishandling, poor fitting, servicing, transporting, adjusting or faulty installation or repair. In other words it excuses the producer who can prove that the defect was not caused by his fault. Since every person in the chain of distribution is entitled to plead this defence, including the person who may be at fault, it may result in the loss having to be borne by the injured party. It may be argued that in the system of strict liability, those losses should be borne by the producer rather than the consumer and that the producer should be responsible for his product supply chain. The component manufacturer's defence under s 72(1)(e) is clearly in line with the basic rule of product liability law whereby the liability will only be imposed if the product is defective. The component manufacturer who produced a product which was originally not defective cannot be considered responsible for the subsequent defect in the product when it has been comprised in the final product.

The Development Risks Defence

Of all the specific defences available under the strict liability rule, the most important and the most controversial is the development risks defence. It is founded on the notion that a person can never be blamed for not knowing what has been at the time unknown. As Denning LJ in *Roe v. Minister of Health*,[24] stated that, 'we must not look at the 1947 accident with 1954 spectacles'. Thus if a drug, for example, Viagra, is found to

[23] Notably under s.75AL of the Australian Trade Practices Act 1974 the state should take the responsibility to compensate the injured party in such cases.

[24] [1954] 2 QB 66.

cause heart attack, then it may be considered to be defective at the moment it was supplied. However, it may be open to the producer to argue that the causal connection between the drug and the disease was not scientifically discoverable at the time the product was supplied to the public. The defence undeniably would be of particular importance to high-technology industries such as pharmaceutical, chemical, aerospace and motor vehicles. The defence has been included in the UK law and the majority of EC countries. As a developing country, Malaysia cannot afford to have a law on product liability which is stricter than the law applicable in developed nations and thus the defence has been made available to protect local as well as foreign producers.

In theory the defence has no place in strict product liability in which liability will be determined by judging the product and not the reasonableness of the producer's conduct. Thus whether the producer did not know or could not have known about the defect is irrelevant. On the other hand, it would be unjust to impose liability on the producer who would be powerless to avoid liability since the defects were not capable of being discovered at the time of production. It is also feared that the incentive to be inventive would be curtailed if liability were to be found even though the defects in the products were not reasonably discoverable, whereas innovation and technological change are very important in reducing risks of modern developments. Furthermore there are risks in new products that cannot be foreseen however careful the producer is, and that these are inevitable risks which the public must accept in the face of technological advances. It appears that the consumer interest in having new products put on the market at acceptable prices has to be balanced against the consumer interest in seeing that the victims of defective products receive compensation for their injuries.

The defence has been raised by the defendants in *A and Others v National Blood Authority and Others*[25]. They argued that the risk of blood infected by hepatitis C was unavoidable risk which was unable to be discovered by means of accessible information. However, the defence has been given a very strict interpretation by the judge and it was held that once the existence of a risk of hepatitis infection in blood was known, the defence ceased to be available, even if the risk could not be avoided. In other words, the defence is only applied to cases of absolutely unknown and undiscoverable risks of defect in a product. It should be noted however, the decision is based on Article 7(e) of the EC Directive which provides a defence where 'the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to allow the existence of the defects to be discovered.' It clearly provides a narrow test based upon the simple concept of discoverability. The Article is not concerned at all with the conduct or knowledge of the individual producer.

Section 72(1)(d) of the CPA on the other hand, introduces the less demanding concept of expectancy as the phrase 'may reasonably be expected' clearly adopts the standard of reasonable discoverability.[26] This may mean that the defendant will not be liable for his failure to discover the risk which is not reasonably discoverable and which therefore has not been

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[25] [2002] 3 All ER 289.

[26] The wording of s 72(1)(d) is taken from section 4(1)(e) of the UK Act but the word 'reasonable' is not found in the UK provision.

[27] Naemah Amin. 2003. "Strict Liability For Infected Blood Transfusion". In Issues in Medical Law and Ethics Eds. Puteri Nemie and Abu Haniffa. Law Centre: IIUM, 110-117.

[28] Section 70(4).

guarded against. Based on the present wording of s 72(1)(d), it is perhaps difficult to confine the defence to cases of absolutely unknown and undiscoverable risk.[27] However the burden of proof is on the producer to establish that the defect was unforeseeable and not reasonably discoverable while under his control on the basis of the most advanced available accessible scientific and technical knowledge.

Other Defences

In addition to specific defences under s 72(1), other general defences under the law of negligence can also be raised by the producer since a claim under Part X will be treated as a claim under the law of tort.[28] Where damage is caused partly by a defect in the product and partly by the consumer's own fault, the defence of contributory negligence may be available. Notably, contributory negligence is not strictly a defence but an apportionment of liability.[29] However, the defence must be pleaded and the burden of proof is on the defendant. The defence requires the defendant to prove on the balance of probabilities that the plaintiff failed to take reasonable care for his own safety. It is particularly relevant in cases involving the misuse of a product, disregard for any warning, notice or continued use of the product with knowledge of its defect. It should however, be noted that this defence is closely connected with the issue of causation and the meaning of 'defective'. Thus, for example, if a product is rendered dangerous only because it was handled in an improper or otherwise unforseeable manner, it is simply not 'defective' in any relevant sense. On the contrary, if a passenger of a car who has failed to wear a seat belt, suffers serious injury due to an accident which was caused by a defective tyre, the question of contributory negligence may be raised.

Another possible defence under the tort of negligence for the producer is that the victim voluntarily assumed the risk, generally known as the defence of *volenti non fit injuria*.[30] Unlike contributory negligence, which only operates to reduce damages according to the degree of fault, *volenti* is a total defence. Nonetheless, in the context of product liability, this defence may be raised in conjunction with a defence of contributory negligence such as misuse of a product or the ignoring of warnings or instructions. However, for the defence to operate there must be a full appreciation of the existence and extent of the risk and a meaningful opportunity of avoiding it. Thus, a cigarette manufacturer can argue that a smoker who is suffering from lung cancer has no action against him since the sufferer has consented to incur the risk by ignoring a world wide warning on the effect of smoking.

Conclusion

Strict liability for defective under Part X of the CPA is undoubtedly a major legislative reform in the field of consumer protection generally, and product liability in particular. The rule has been perceived as having made it easier for plaintiffs to prove their cases, as they no longer have to prove fault by the producer. However Part X obviously does not remove all barriers to successful product liability claims. The cases so far decided in the UK show that the main hurdle to win product liability battle is to prove the defect in the product and the causal link between

[29] See s 12 of the Civil Law Act 1956.
[30] This maxim basically means 'to him who is willing no harm is done'.

the defect and the injury suffered. It appears that proof of causation remains a difficulty as in many cases the evidence used in establishing causation is no different from that adduced by consumers in the past to establish fault. In addition, the availability of certain defences may to some extent undermine the effectiveness of the strict liability scheme and consequently may turn away the aggrieved consumer whom the law originally intends to protect.

Nonetheless, the unfavourable aspects of the strict liability rule for consumers may be justified by the very basic nature of the liability itself which has never been intended to impose an absolute liability. Furthermore if one considers that the bulk of the cost would ultimately be borne by the public at large, it seems to be unjust and inappropriate social policy for a producer to be held liable in a situation where he is powerless to avoid liability. It must be remembered that the burden of proof is on the producer to establish any of the relevant defences which may not be easy in all cases. There have not been many reported cases brought under the UK Consumer Protection Act nearly eighteen years after its introduction. Malaysian consumers would probably take a longer period than that before realising their rights and starting to enforce them. Furthermore most claims under Part X need to be brought to the ordinary court since the Tribunal for Consumer Claims does not deal with cases of personal injury or death which are the main concern of the strict liability rule.[31] Without the availability of a class or multi-party action in Malaysia, it may not easy for the victims of defective products to file a case. It appears that the question as to whether the law is able to strike a balance between the interests of consumers and the interests of the producers in the Malaysian context cannot be judged by looking at the liability system per se. Thus the actual effect of the strict liability system on the consumers as well as on the producers remains to be seen.

[31] Section 99(3) of the CPA.