

PRODUCT LIABILITY UNDER THE CONSUMER PROTECTION ACT 1999

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Product liability law in Malaysia is now entering into a new era with the recent introduction of the Consumer Protection Act 1999 (hereinafter referred to as the Act). Part X of the Act introduces a new system of liability in respect of loss or damage caused by defective products similar to the system available in the United Kingdom and other European countries. The new law offers the victims of defective products an additional remedy to existing remedies under the law of contract and tort of negligence. The purpose of this piece is to examine a new set of concepts introduced by the Act such as 'product,' 'producer,' 'defect' and the defences available to the defendant in order to assess the extent to which the new law realises its main objective to improve the substantive position of the victims of defective products.

INTRODUCTION

The Malaysian Parliament has recently passed the Consumer Protection Act 1999 (hereinafter referred to as the Act) with the aim of providing better legal protection to consumers. The Act covers most major areas of consumer protection including product liability which is contained in Part X of the Act.¹ Product liability is generally understood as referring

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¹ Other areas of consumer protection covered by the Act are: misleading and deceptive conduct, false representation and unfair practice, safety of goods and services, guarantees in respect of supply of goods and services and redress mechanism.

to the civil liability of a manufacturer or distributor for damage caused by a defect in the product. Under the existing law the victim of a defective product has to seek remedy either under the law of contract or tort of negligence which obviously is inadequate to protect them.²

The Act basically introduces a new system of liability in respect of death, personal injury and damage to property caused by defective products. Such a system is believed to overcome the problems inherent in contractual and negligence remedies and accordingly gives better protection to the consumer.³ However, as most of the provisions on product liability are based on Part 1 of the United Kingdom Consumer Protection Act 1987, the criticisms of the UK Act may equally apply to the new Act.⁴ This article aims to provide an overview of product liability law in Malaysia under the Act. All the important provisions of the Act will be considered in order to provide a fuller appreciation of the scope of protection offered, its adequacy and its weaknesses.

THE NATURE OF THE LIABILITY

It may be understood that the Act introduces a regime of strict liability for damage caused by a defective product although the phrase 'strict liability' does not appear in the Act. However section 68 (1) of the Act makes it clear that 'where any damage is caused wholly or partly by a defect in a product, the following persons *shall* be liable for the damage.'⁵ It can clearly be deduced from this provision that the liability can be imposed without contractual relationship and without proof of fault. 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.

It seems reasonably clear that the central tenet of the liability is the defect in the product unlike liability in negligence which is based on the conduct of the producer. The advantage of this approach for the

² The law of contract confines the remedy to the buyer and restricts the liability to the seller. A remedy for a non-contracting party under the law of negligence will depend on his ability to prove the manufacturer's fault. See *Daniels and Daniels v R. White & Sons Ltd.* [1938] 4 All ER 258; *Priest v Last* [1903] 2 KB 148; *Evans v Triplex Safety Glass Co* [1936] 1 All ER 283.

³ S.S. Rachagan (ed), *Consumer Law Reform: A Report*, (University of Malaya Press, Kuala Lumpur, 1992), para 1.11.1.

⁴ See for e.g. A. Clark, *Product Liability*, (Sweet & Maxwell, London, 1989); Bragate and Savage, "The Consumer Protection Act 1987," (1987) NLJ 929; J. Blaikie, "Product Liability: The Consumer Protection Act 1987 Part 1," (1987) JLSS 325.

⁵ Emphasis added. The section then lists down the persons to be held liable. See discussion *infra* at 5-9.

individual is that liability may be imposed by reason of the existence of a defect alone. However, the onus of proving that the product was defective still remains with the plaintiff, and this may create great difficulties for consumers especially in design defect cases. Similarly, proof of causation will remain a difficulty as in many cases the evidence used in establishing causation will bear a marked similarity to that adduced by consumers in the past to establish fault. This is particularly relevant in controversial areas such as litigation over allegedly defective drugs. In many cases, it may be difficult for the plaintiff to show that the illness was caused by the product, rather than by other genetic or environmental factors.

Furthermore, the concept of defectiveness under the Act, which is based on the vague concept of a consumer expectation test, may preclude the plaintiff's claim, and it has been subjected to considerable criticism.⁶ In addition, the availability of several defences makes it reasonably certain that liability under the Act is by no means absolute. Although the producer of a defective product is generally held to be liable, he may escape liability by proving one of the defences provided by the Act.⁷

On the other hand, it is undeniable that the Act does improve the position of the victim of a defective product in a number of ways. Most importantly, the Act provides new protection to the consumer in addition to the existing protection under the common law.⁸ The consumer, therefore, is in a better position than has hitherto been the case. The Act also facilitates the plaintiff procedurally by relieving him of the burden of proving fault. He still needs to prove that the defect caused his injury but not apparently that the producer caused the defect. Unlike contractual liability, liability under the Act cannot be limited or excluded by any contract term, any notice or other provisions.⁹ From another angle, the Act clearly provides a wide range of people who can be easily identified and are accessible against whom to pursue an action.¹⁰

PRODUCTS

What types of product are covered by the Act? This is one of

⁶ See section 67. G. Howells, "Europe's Solution to the Product Liability Phenomenon," (1990) 20 *Anglo-Am LR* 204; A. Stoppa, "The Concept of Defectiveness in the Consumer Protection Act 1987: A Critical Analysis," 12 *Legal Studies* 210.

⁷ Section 72.

⁸ Section 68(7) states, "This section shall be without prejudice to any liability arising otherwise than under this Part."

⁹ Section 71.

¹⁰ See section 68 of the Act.

the most important questions to be answered since the scope of the Act depends upon the meaning given to 'product.' Despite the wide definition of 'product' provided by the Act, it certainly does not cover every product. In certain cases, the definition of product appears to raise some difficulties. 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 the Act, namely, goods and component parts and raw materials. Section 3 provides;

"'Goods' means 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 *choses in action*, including negotiable instruments, shares, debentures and money."

It is reasonably clear that only goods which are purchased for private and non-commercial purpose are covered by the Act. Thus most household items such as kitchen utensils, electrical appliances and toiletries are within the ambit of the Act. Goods also include articles fixed to the land such as air-conditioners, appliances and furniture. Although vessels and vehicles are included in the definition, injuries caused by major capital items such as ships and aircraft are not covered by the Act since they are normally bought for commercial purposes. Whether pharmaceutical products are included is not clear because the Act generally does not apply to healthcare services provided by healthcare professionals or healthcare facilities.¹¹ It may be argued however, that pharmaceutical products should be included in the scheme of product

¹¹ Section 2(2)(f).

liability since there is no specific provision in Part X for their exclusion.¹²

On the other hand human blood and organs and intellectual products such as letters, books, tapes, film and computer software¹³ are arguably excluded from the definition since they cannot be considered as 'goods' in a strict sense. The embodiment of animals, trees, plant and crops in the definition of goods seems to be irrelevant since there is no liability under the Act for agricultural produce, unless it has undergone an industrial process.¹⁴ Thus, potatoes in a natural state would be exempted, but not crisps; bananas but not fried-bananas; fresh meat, fish and chicken but not frozen meat, fish and chicken. This kind of exemption inevitably creates some anomalies. Taking into consideration the modern method of farming such as the use of fertilisers, pesticides, steroids, artificial insemination etc, this exemption may be difficult to be justified.

Component parts and raw materials which are comprised in other products are within the ambit of the Act. Thus, if a defective brake-cylinder or windscreen is installed in a car, the producer of these component parts will be liable under the Act if it caused injury. However, the manufacturers of a component may escape liability if they can show that the defect was not attributable to them but was wholly attributable to the producer of the subsequent product.¹⁵ In this respect, a product will also certainly include the materials used to construct a building. Thus, the producer of the bricks, cement, plasterboard and plumbing would be held liable under the Act if they prove to be defective. However, the Act does not apply to any materials incorporated in the building which is disposed of by the creation of interest in land.¹⁶ Thus, a person who buys a finished house, which is defective, has to seek remedy under other laws possibly in negligence.

¹² The exclusion of healthcare goods is clearly stated in section 19(6) for the purpose of Part 111 of the Act. Furthermore, taking into account that a drug-related tragedy initially provoked debate on the reform of product liability law in the USA and Europe, it would be very unreasonable if this product is to be exempted.

¹³ It is reasonably clear, however, that a distinction should be drawn between the intellectual contents of a physical product and the physical product itself. A product, like a book in its physical nature is undoubtedly within the definition of 'product'. See S. Whittaker, "European Product Liability and Intellectual Products," (1989) 105 LQR 125; J. Stapleton, "Software, Information and the Concept of Product," (1989) Tel Aviv University Studies in Law 147; S. Singleton, "Product Liability and Computer Software," (1992) PLI 114.

¹⁴ Section 68(5). Section 66(1) defines agricultural produce as any produce of the soil, of stock farming or of fisheries.

¹⁵ Section 72(1)(e).

¹⁶ Section 2(2)(d) states that the Act shall not apply in relation to land or interests in land.

WHO IS LIABLE?

The Act does not make every person connected with the product liable. The persons liable under the Act can be divided into two categories, namely the primary defendant and secondary defendant. The primary responsibility for damage caused by a defective product is placed on the primary defendant, in particular the 'producer'. The secondary defendant will only be liable in certain circumstances and that liability may be channelled back to the primary defendant. Section 68 (1) lists three principal persons who may be strictly liable under the Act;

- (a) the producer of the product;
- (b) own-brander;
- (c) Importer.

The Act makes it clear that the liability is primarily placed on the producer of the product. Section 66 (1) of the Act states;

"'producer', in relation to a product, means -

- (a) the person who manufactured it;
- (b) in the case of a substance which has not been manufactured, won or abstracted, the person who won or abstracted it;
- (c) in the case of a product which has not been manufactured, won or abstracted but essential characteristics of which are attributable to an industrial or other process been carried out the person who carried out that process."

The definition of 'producer' is apparently wide enough to cover every person involved in the manufacturing process, pre-manufacturing activity and the processing of a natural product. 'Manufacturer' of a component part will be jointly or severally liable under the Act.¹⁷ Hence, a person injured in an accident caused by a defective brake cylinder on a car may sue either the manufacturer of the brake or the manufacturer of the car or both of them.

Nonetheless, some confusion is cast on this point by section 66 (2) of the Act which provides that "a person who supplies any product in which products are comprised, whether by virtue of being component parts or raw materials or otherwise, shall not be treated by reason only of his supply of that product as supplying any of the products so comprised." It seems to suggest that a manufacturer of a finished product exculpates

¹⁷ See section 68(6).

liability for defects attributable to a component part. It is submitted however, that the provision is meant to protect the supplier of a product rather than to limit the liability of the manufacturers. Thus, if an accident occurred due to a defective brake on a car, the dealer of the car is only under obligation to identify the manufacturer or supplier of the car. He cannot be held liable if he fails to identify the manufacturer of the brakes.

The manufacturer of a finished product clearly includes someone who purely assembles components made by others, for example by mixing ingredients, or fixing a unit supplied in kit form.¹⁸ The assembler will be liable even though the defect in the component was the sole cause of the damage. On the other hand, there are other people who are directly connected with the product not covered by the Act. These include the designer and supplier of services such as installers, repairers, dry-cleaners etc. The designer, although involved in initial manufacturing process, can by no means be regarded as a manufacturer of the product. Similarly, the supplier of services merely supplies a service in relation to other people's products.¹⁹

The second paragraph of the definition of 'producer' covers those who mine or collect raw materials or other products of substance such as coal, gas, oil, ore or clay. It could also be extended to the extraction of sand, gravel and even of sea-salt from sea-water. The process of abstraction makes such a person a producer. Thus, for example, a mining company could be held liable if it supplies contaminated ore. Paragraph (c) extends the definition of 'producer' to include a person who carried out an industrial or other process which gave the product its essential characteristics. The difficulty may arise from the fact that the words 'industrial or other process' and 'essential characteristic' are undefined and inevitably their meaning will be open to interpretation in each case. Nevertheless, it can safely be said that the subsection covers such processes as refining oil or petrol, smelting ore, mixing cement and the most important, processing of food. Thus, a restaurant that cooks a meal that caused food poisoning will surely be liable under Part X of the Act.

Certainly, many difficulties in this provision arise when it is applied to food processors because primary agricultural produce is exempted. However, once the produce has undergone an industrial process, it becomes the liability of the processor including the defect which already existed prior to processing. Thus, if a fruit crop is sprayed with a harmful pesticide, and the fruit then canned, the canner is liable as an industrial processor, rather than grower of that fruit. The rationale is that those

¹⁸ Wright, *Product Liability: The Law and its Implication for Risk Management*, (Blackstone Press Limited, London, 1989), at 40.

¹⁹ However, he may be subject to the liability of supplier under section 68(2).

involved in processing should be expected to conduct the appropriate tests to ensure that hidden defects, howsoever caused, are detected.

Section 68(1)(b) applies liability to any person who, by putting his name on the product or using a trade mark or other distinguishing mark in relation to the product, has held himself out to be the producer of the product. This is perhaps one of the most significant extensions of liability under the Act. The provision is mainly intended to catch chain department stores and supermarkets that are generally economically powerful. 'Own branding' implies a greater acceptance by the retailer of responsibility for the goods. This is particularly relevant in relation to a product which is specially manufactured according to own-brander specification. An own-brander in this category has full control at least in choosing a reputable supplier.

Thus the imposition of strict liability on them is clearly justified, not only on the ground that they represent themselves as producer, but also on the ground that they normally have control over the quality and safety of the product. However, it remains open to argument whether liability can be imposed on an own-brander when there is a clear indication on the product that he is not the manufacturer. It is a well-known practice that most own-branded products have some indication, often in very small print, that someone else is the manufacturer. For example, although the product marks with a logo of X supermarket, the phrases 'specially made for X supermarket' or, 'packed for X supermarket by Y Ltd' also appear on the product. The phrase 'held himself out to be the producer' in the section provides no clear answer to this problem. It has been argued that the liability may depend on how the branding is perceived by the reasonable consumer.²⁰

Another significant extension of liability under the Act is the inclusion of importers. By section 68(1)(c) liability attaches to any person who has, in the course of his business, imported the product into Malaysia in order to supply it to another person. The provision is apparently intended to overcome the practical problem of suing the foreign producer in his own country.

The liability of the supplier under the Act is secondary in the sense that he is liable only when he fails to inform the injured person, within a reasonable time, of the identity of the producer, own-brander or importer or of the person who supplied him with the product.²¹ The term 'supplier' is defined in section 3(1) of the Act to mean "a person who, in trade supplies goods to a consumer by transferring the ownership or the

²⁰ Wright, *supra*, n. 18, at 42.

²¹ Section 68(4).

possession of the goods under the contract of sale, exchange, lease, hire or hire-purchase to which that person is a party." This provision can be considered as a 'blanket proviso' which is intended to ensure that the victim of a defective product always has an identifiable target or a means of finding the identity of the producer. This is particularly important in the case of an anonymous product, especially in relation to bulk-produced items such as nuts and bolts. Thus, the immediate effect of this provision appears to cause distributors and retailers to maintain full records of their sources. On the one hand it seems reasonable to impose only secondary liability on the supplier since the supplier continues to be strictly liable to the buyer under the Sale of Goods Act, 1957.

On the other hand, this provision may sometimes cause difficulties to the injured party. The supplier can discharge his liability simply by identifying his supplier. If his supplier is not the producer, own-brand or importer, the plaintiff has to make further inquiries until he can find the potential defendant. The case may be even worse if the person identified as a supplier is bankrupt or otherwise unable to satisfy any judgement. As a result, the injured party may be left uncompensated. Further, a supplier may also escape liability if the request to identify was not made within a reasonable period after the damage occurred. However, what is a 'reasonable period' is a matter to be decided by the court in regards to all the circumstances.

MEANING OF DEFECT

As opposed to liability in negligence which is concerned with the conduct of the manufacturer, liability under the Act focuses on the condition of the product. However, the product must be proved to be defective before liability can be imposed on the defendant. Thus, defectiveness becomes the key concept of the new product liability regime. However, what constitutes a defect? By what criteria is defectiveness to be judged? These are not simple questions. Clark notes that 'the problem of defining defectiveness has exercised the minds of legal scholars perhaps more than any other aspect of product liability law.'²² Nonetheless, the meaning of defect is stated in section 67(1) of the Act:

"Subject to subsections (2) and (3), 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."

²² A. Clark, *supra*, n. 4 at 25.

It is reasonably clear that the definition of "defect" in the Act is based on the concept of safety.²³ Hence, the Act has no application to safe but shoddy products. Nonetheless, safety is rather a relative concept. Inevitably there will often be scope for debate over questions of fact, degree and standard in deciding whether or not a particular product was unsafe and therefore defective. It is even more problematic when safety is to be judged according to what 'a person is generally entitled to expect.'

At first sight, the test appears to be subjective since it is based on a particular person's expectation. Thus, the individual consumer's personal knowledge, experience or lack of the same and sensitivity, ought to intrude into the question of defect. However it is the general expectation that will be taken into account and not on actual expectation. Can a car be considered defective when a warning buzzer, which is supposed to indicate that seat belts were unfastened, fails to operate and results in serious injury? The ordinary person ought to be aware of the danger of not wearing a seat belt. Arguably a person is generally entitled to expect that the product has been designed and manufactured as safely as possible and he should be properly warned of any possible danger. Therefore, ascertaining what a person is generally entitled to expect may prove to be a vague test.

The Act clearly adopts the consumer expectation test in determining defectiveness. However, it has been argued that, in many cases, the consumer expectation test will be unable to stand on its own and will necessarily fall back on a risk-utility analysis.²⁴ It has been further argued that 'the actual language of the consumer expectation test is simply a semantic veneer covering what is in reality a cost-benefit test.'²⁵ This is particularly relevant in a case involving a high risk product such as drugs. Many drugs are generally known to carry side-effects. Thus, it seems very unreasonable for a person to be generally entitled to expect such drugs to be safe. In such a case the court will have to consider the overall social costs created by the product balanced against the social benefits conferred by the use of the product. However, this balancing process may sometimes produce anomalies and result in injustice to an injured party.²⁶

²³ Section 67(4) states that safety in relation to a product shall include - (a) safety with respect to products comprised therein; (b) safety in the context of risk of damage to property; and (c) safety in the context of risk of death or personal injury.

²⁴ A. Stoppa, *supra*, n. 6, at 215-217.

²⁵ A. Clark, *supra*, n. 4, at 37.

²⁶ Thalidomide, for instance, which only carries a risk of harmful side-effect to a small percentage of persons might not be treated as defective since its purpose is to relieve the prolonged agony of diseases like cancer and leprosy.

The consumer expectation test has also been criticised for its failure to protect the consumer adequately in a case of patent danger.²⁷ Many products by their nature are dangerous, for instance knives and dynamite. Applying the consumer expectation test to such a case is likely to exempt its producer from liability. Such products cannot be defective since the consumer could not have expected them to be safe. The test also means that proper warnings will often be sufficient to exculpate producers from liability. Nonetheless for the purpose of determining what 'a person is generally entitled to expect,' section 67(2) lays down guidelines and 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
- (e) the time when the product was supplied by its producer to another.

These guidelines apparently confirm that the standard of safety under the Act is to be judged according to objective criteria applied to the circumstances of each individual case. In deciding what a person is generally entitled to expect, the court has to have regard to the circumstances in which the product is marketed. Undoubtedly, the manner in which the product is marketed has an immediate impact on the public's expectation. These include advertising, packaging and labelling. The inclusion of 'get-up' seems to be irrelevant since it refers to the general presentation and packaging which, it may be argued is part of the marketing process. The reference to 'the use of any mark' would obviously include such things as the use of the SIRIM mark.

The subsection also permits regard to be given to the existence and adequacy of any warning. In one sense, the consideration of adequate warnings is identical in cases of negligence. Presumably the court will

²⁷ A. Stoppa, *supra*, at 6, p 210; J. Stapleton, "Product Liability Reform - Real or Illusory?," (1986) 6 OJLS 392; G. Howells, *Comparative Product Liability*, (Dartmouth Publishing Co., Aldershot, 1993), at 11.

use the same method as in negligence in deciding 'failure to warn' cases under the Act. For example, in deciding how much information a manufacturer should provide, the court may resort to the negligence concept of reasonableness. On the other hand it may be argued that since the Act is not intended to create absolute liability, a person cannot expect that the manufacturer will warn him of every conceivable danger. It has been argued that the definitions of 'defective' are capable of being construed in a way which is prejudicial to the consumer where a warning has been given.²⁸ This is particularly relevant in a case involving a child, idiot, an illiterate person or a person who does not understand the language in which the instructions or warnings are written. Thus, a more valid view seems to be that in deciding the issue of defectiveness the court should focus attention on the product itself rather than on any warning given.²⁹

The manufacturer's expectation about the use or misuse of the product is also relevant in deciding defectiveness. This factor is closely related to the issue of adequate instructions and warnings accompanying the product. It is highly possible that a product used for a wholly unexpected purpose will not be found defective merely because it proves to be unsafe for that purpose, for example, where a screw-driver is used as a chisel or microwave oven is used to dry a cat. It has been noted that the Act uses the expression "reasonably be expected" which seems to be a narrower concept than "reasonable foreseeability."³⁰ Thus, a manufacturer may argue that he might foresee that a warning would be disregarded, but that he did not expect it to be disregarded. As a result the consumer can only expect the product will be safe as long as he does not misuse the product.

It is anticipated that consumer expectations of a product may change as technology and standards change. Thus the time of supply is relevant in deciding defectiveness, with the result that accepted safety standards at the time the product is put into circulation ought to be taken into account. This subsection allows factors such as wear and tear to be considered. Account must also be taken of natural deterioration in the case of perishable goods such as food. However, the main point to note is that the relevant time is the time of supply by the producer and not the subsequent time of supply to the ultimate consumer.

This is further emphasised by section 67(3) which states that "nothing in this section shall require a defect to be inferred from the mere fact that the safety of a product which is subsequently supplied is greater

²⁸ A. Clark, "Strict Liability for Product Defect: The 'Failure to Warn' Issue," (1983) JBL 130.

²⁹ *Ibid.*

³⁰ Savage and Bradgate, *supra*, n. 4, at 956.

than the safety of the product in question." Thus, the standard of safety of a car produced in 1980 cannot be judged according to the standard exhibited in the latest model. Without this provision, producers would constantly have to recall and modify older products every time they introduced a safety improvement.

RECOVERABLE DAMAGES

Defective products may cause various types of loss and damage, ranging from the trivial to the catastrophic, and it is the main aim of product liability law to compensate those losses. Damage is defined in section 66(1) of the Act 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 risks of a defective product. Thus law should treat death and personal injury more seriously than any other losses due to the nature of the injury and its fatal consequences. Recoverability of such losses has long been established under the existing law which is unaffected by the Act and unlikely to create a difficult problem.³¹

Many doubts and uncertainties appear to be raised from the issues of recovery of damage to property and in particular economic loss consequential upon such damage. It reasonably clear however that damages under the Act covers 'any loss of or damage to any property including land.' This would clearly include any physical damage to or destruction of moveable or immovable property and any loss of them. Thus, presumably the owner of expensive missing jewellery or valuable documents may claim damages against the producer of a defective carrier bag or briefcase. Similar action might be brought against the manufacturer of a defective burglar alarm which failed to operate and caused the theft of household contents.³² The inclusion of damage to land would cover, for example, damage to soil by a defective weedkiller or fertiliser.³³

However, a claim for damage to property other than the defective

³¹ See the Civil Law Act 1956 and section 70 of the Act. Generally the recovery of compensation for loss and damage under the Act will be governed by the general rules governing the recovery of damages in tort. It should be noted, however, that the problems of causation arising in negligence with regard to foreseeability of the type of damage, or manner of its infliction, or whether it was within the foreseeable risk, may not be so relevant under the Act because the Act only requires proof that damage was wholly or partly caused by a defective product.

³² Notably, however, the difficult issue of causation which may be raised from such a claim.

³³ *Blaikie, supra*, n. 4, at 329.

product itself is restricted by section 69(1)(c) which states;

“Where any damage is caused wholly or partly by a defect in a product, the liability of the person liable for the damage under section 68 shall not include the loss of or damage to - any property which at the time it is lost or damaged is not

- (i) of a description of property ordinarily intended for private use, occupation or consumption; and
- (ii) intended by the person suffering the loss or damage mainly for his own private use, occupation or consumption.”

Hence, if a defective electrical appliance damages a private house, the loss would be recoverable, but not if it burns down a factory. Similarly damage caused to a private car by a defective accessory or replacement part can be claimed but if the same part damaged a company car, it is irrecoverable under the Act. It is reasonably clear that the Act draws a distinction between damage to private property and damage to commercial property and there are obviously strong reasons for excluding damage to the latter. First, business organisations can be expected to insure against damage to their property and spread the cost of the insurance to their consumers, whereas individuals might not hold or be able to afford extensive cover. Second, damage to commercial property such as a factory and machinery can be very extensive and such a claim would be very onerous for the producer. Further, the Act, as its name implies, is designed to protect ‘consumers’ and in the context of the Act this means private consumer.³⁴

However, although the distinction between private property and business property may be attractive in theory, it may not be so easy to apply in practice. In view of this, it is conceivable that certain products can be both ordinarily intended for private use and for commercial use, for example a personal computer and a car. In determining whether a particular property is private property, the Act requires that at the time of damage the property must fulfill two conditions. First, the property must be ‘ordinarily intended for private use, occupation or consumption.’ Thus, if damage is caused to a heavy goods vehicle belonging to an enthusiast as part of a private collection, it cannot be recovered because that would be a type of property not ordinarily intended for private use.³⁵

³⁴ See the definition of consumer in section 3(1).

³⁵ Wright, *supra*, n. 18, at 54.

Secondly, the property must be "intended by the person suffering the loss or damage mainly for his own private use, occupation or consumption." Therefore, if a personal computer which was originally bought for private use but later is used for business purposes and subsequently damaged by the insertion of a defective disk, such damage is not recoverable under the Act because the question of whether the property is private or business property will be judged 'at the time it is lost or damaged.'

Although the Act clearly refers to a plaintiff's private use and occupation, arguably it should also include use and occupation by his family. However, it remains to be seen whether it extends to other relatives. Will it apply to a private house which is used for charitable purposes for instance, as a home for the elderly? Can the owner claim damages if the house is burned down due to a defective air-conditioner? No doubt it might be argued that the answer lies in the word 'mainly', and the property must mainly be used for personal purposes. Thus, such damage, albeit to private property, may not be recoverable under the Act.

Section 69(1) also provides;

"Where any damage is caused wholly or partly by a defect in a product, the liability of the person liable for the damage under section 68 shall not include the loss of or damage to -

- (a) the defective product;
- (b) the whole or any part of any product which comprises the defective product."

It is perfectly clear that the Act does not cover damage to the defective product itself which may give rise to two situations. First, a mere defect in quality which renders the product useless or valueless, for example, a toy which easily breaks without any apparent reason or a new television set which has no sound.³⁶ This kind of loss is considered as mere loss of bargain or expectation as a result of buying a product which may be safe but shoddy. This category is undeniably within the province of sale of goods law and thus it should continue to be governed by it.³⁷

Second, the defective product itself is damaged due to a defect

³⁶ Damage to the defective product itself is generally categorised as purely economic loss and irrecoverable in the law of negligence. See *Murphy v Brentwood District Council* [1991] 1 AC 398; *D&F Estates v Church Commissioners* [1988] 2 All ER 992; *Department of the Environment v Thomas Bates & Son* [1990] 2 All ER 943.

³⁷ See the Sale of Goods Act 1957 and Part VI & VII of the Act.

in its component parts, for example, a defective tyre which bursts and damages the car. This kind of damage also is irrecoverable under the Act if, arguably, a component part had been originally comprised in the product. However, damage to the car may be recovered if the tyre was a replacement because it had not been 'comprised in the car.'³⁸ On the other hand, it would be an anomalous position if recovery for the damaged property had to depend on whether the component part was a replacement or was bought separately from the 'basic product.' This provision may also be interpreted to cover damage caused by containers, packages or pipe in which products are supplied and distributed. The Act further requires that the person suffering the loss must have an interest in the damaged property.³⁹ However this requirement may not be so relevant since the ambit of liability under the Act is already regulated by the requirement that the person proves that he has suffered damage.⁴⁰

DEFENCES

It is a matter of policy that product liability law should maintain a fair, just and proper balance between the interest of the consumer and the interest of the producer. It may be impossible, and perhaps undesirable, that this objective can be achieved if an absolute liability is imposed on the producer whereby he cannot exonerate himself in any circumstances. On the other hand, legislation is likely to have little effect if the right of a producer to be protected by certain defences outweighs the interest of the aggrieved consumers whom the law is intended to protect.⁴¹ Nevertheless section 72(1) of the Act provides five specific defences in product liability claims.⁴² The burden of proof is on the person proceeded against to establish that either of the following defences applies to him;

³⁸ It should be noted that under the law of negligence damage within a defective product, that is caused by the component part, may fit into the category of physical damage to other property and therefore be recoverable. See e.g. *MS Aswan Engineering Establishment Co. Ltd. v Lupdine Ltd.* [1987] 1 All ER 135.

³⁹ Section 69(2)(3)

⁴⁰ G. Howells, *supra*, n. 6, at 48.

⁴¹ Obviously the availability of certain defences may reduce or intrude upon the compensation rights of the injured persons and thus their existence, particularly the development risks defence, under the UK Act has been subjected to a considerable degree of criticism. See A. Clark, *supra*, n. 4, Chapter 6; G. Howells, *supra*, n. 22, at 39-40; C. Newdick "The Development Risk Defence of the Consumer Protection 1987," (1988) CLJ 455; S. Whittaker "The EEC Directive on Product Liability," (1985) 5 Yearbook of European Law 233; J. Stapleton, *supra*, n. 27, at 392.

⁴² General defences under the tort of negligence such as *volenti non fit injuria* and contributory negligence may also be raised by the defendant.

- (a) Compliance with mandatory regulations;
- (b) Producers did not supply the product;
- (d) The defect did not exist in the product at the relevant time;
- (e) The development risks defence;
- (f) The component manufacturer's defence.

The producer may escape liability if he can prove that 'the defect is attributable to compliance with any requirement imposed under any written law.' However this defence will only be available if the defendant had no choice in the matter because he was under a legal obligation to comply. The defence would apply if for example, a regulation specifies that a certain additive must be used in a certain food and that additive causes a defect in the food. Accordingly, compliance with a voluntary code of practice or relevant standard adopted by industry or trade associations or testing houses, for example SIRIM, may not be enough.⁴³ On the other hand, it will be strong evidence that the state of the art or the state of scientific and technical knowledge has been complied with.

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. Even in such a case the difficulty may still arise in establishing a direct causal link between the mandatory regulation and the defect. Thus, if a regulation for children's nightwear specifies that it must be made of non-flammable material, but the garment causes dermatitis, the producer could only escape liability if the irritant was an inevitable result of the process of making the material non-flammable. However, if there are other factors which contribute to that effect, the defence may not be available.

It may be argued that the term 'any written law' in the defence refers to statutory provisions or delegated legislation of the Malaysian parliament only. Therefore, compliance with the regulations of other countries is not covered by the defence in respect of products distributed in Malaysia. This is particularly relevant with regard to imported goods and thus the importer must make sure that they comply with local regulations. It should be noted that most regulations only impose minimum standards, such as minimum strengths or maximum heats and other ranges of specifications within which the product must comply. The defence appears to apply only if, taking this discretion into account, it is still impossible to produce a safe product. Obviously, if a majority of manufacturers of a type of product provide a level of safety well above

⁴³ It is notable however that under Rule 22 of the Electricity Supply Regulations 1990, all electrical appliances must be sent to the SIRIM for testing and certification before they are distributed for sale.

that demanded by the legal minimum, this defence cannot be relied upon by the defendant. It may also be argued that if the product complies with the mandatory standard and is not safe, the manufacturer should not market it, and this should not provide him with a defence. In other words the onus to market a safe product should always remain with the manufacturer.⁴⁴

The Act also provides a defence that the defendant 'did not at any time supply the defective product to another person.' The key word in this defence is the word 'supply', which is defined in section 3 to include the selling, hiring, exchanging and leasing of the goods. This defence is clearly intended to exclude a person who is not responsible for a product being on the market. Thus, it would apply where thieves steal the products from the producer and supply them to the consumer. It will also cover all injuries to employees or others caused by a product during the manufacturing or packaging, occurring on the employer's premises, since the products were not yet supplied.⁴⁵ However if the injury was caused by the defective component part, the employees may claim compensation under the Act against the component manufacturer.

However promotional gifts and free samples are not included within the definition of 'supply' and the producer therefore can rely on this defence. Similarly the defence may exempt most products on trial, although they may have left the manufacturer's premises and therefore have been 'supplied' in a strict sense, for example where the products have been sent to a scientific or other institute to carry out tests. Therefore, a bystander who is injured by a trial product, for example, when a defective car crashes on a test drive may not be able to claim against the producer.

Although the theory of this defence seems straightforward, a defendant may face difficulties of proof in practice. It may not be enough for him to say that he did not supply the product, and that someone else did. This is particularly important with regard to counterfeit products which are widely marketed in Malaysia. Difficulties arise when the imitated or counterfeited products cannot be distinguished from the original products. Although generally the producer of original products cannot be said to be the producer, own-brander or importer of counterfeit products and thus is *prima facie* not liable, it may still be necessary for him to ensure that his

⁴⁴ In any event, if a producer consciously manufactures a dangerous product, he may be liable in negligence notwithstanding compliance with regulations. See the judgement of Megaw L.J in *Albery and Budden v BP Oil Ltd. and Shell UK Ltd.*, The Times, 9 May 1980 and reproduced in part in J. Miller and B. Harvey, *Consumer and Trading Law Cases and Materials*, (London, 1985), at 156.

⁴⁵ It should be noted that the injured employees may claim remedies under other legislation, such as the Factory and Machinery Act 1967.

own products are distinguishable, whether by obvious or clandestine means. Where the product itself no longer exists, for example when it is totally destroyed in the explosion, this defence would be almost impossible to establish.

It is the defendant who has to establish this defence and the victim of a defective product will benefit if the former fails to do so. However, if the defence is successfully established, the victim will be left uncompensated. It is not possible for the plaintiff to sue the supplier or importer, let alone the manufacturer, because any person involved in counterfeiting products will be subjected to criminal charge⁴⁶ and in many cases they are not capable of being traced. Thus, as long as Malaysia does not have strong protection for intellectual property rights, neither a producer of an original product nor a victim of a counterfeited product would be fully protected or benefit from a new product liability law.

The producer may be further exonerated from liability if he can prove 'that the defect did not exist in the product at the relevant time.' 'Relevant time' refers generally to the time the product was supplied.⁴⁷ It is reasonably clear that the producer is only liable for defects which occurred during the course of production. 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. It will also cover the defect which is caused by the failure of a third party to pass on instructions for use or warnings; or where the third party has removed a warning label.

It will not however provide a defence against latent defects which are not known or manifest, for these defects would have been in existence at the time of the product was put into circulation. In fact it may not be easy in practice for the producer to establish that the product was not defective when it left his hands. It may not be enough for him to say that the wear and tear caused the defect because a product can be defective if it is not reasonably durable. Thus the producer ought to have quality control evidence of the state of his product on release. In order to rely

⁴⁶ See the Patent Act 1983 and the Copyright Act 1987. Despite the existence of these legislation, piracy and counterfeiting are rampant in Malaysia. This is mainly due to poor enforcement. See S. Reiss, "International Copyright Protection: The State of the Malaysian Laws in Perspective," (1986) *Journal of Malaysian and Comparative Laws* 107 and Workmens' Compensation Act 1952.

⁴⁷ However, relevant time in relation to electricity means the time at which it was generated, being a time before it was transmitted or distributed. See section 72(2)(a). In other words, the Act only covers defects due to the process of generation of electricity for instance, the supply of excessive voltage of electricity to a domestic consumer but not damage caused by disruption in the supply through breakdown in the distribution system or damage resulting from a failure to supply.

successfully on the defence, it may also be important for a producer to keep detailed records on the design and manufacturing process as well as records of instructions, warnings, service schedules, recommendations, and use-by dates which were issued with the product.⁴⁸

By virtue of section 72(1)(e), the component manufacturer may not be liable for the defect in the end-product if he can prove;

“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;
 - (b) compliance by the producer of the product in question with instructions given by the producer of the subsequent product.”

This defence is clearly in line with the basic rule of product liability law whereby the liability will only be imposed if the product is defective. Thus, 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 due to the design or process of manufacturing of the latter. In other words, the component product is not defective in the first place. Thus, a component manufacturer of nuts and bolts is not liable for an accident caused by the shearing of the bolt if the producer of the finished product had subjected it to a stress that it was not designed to bear. He may also argue that the bolt which failed was made that way as specified by the manufacturer of the finished product.

However to succeed on the first part of the defence, the component manufacturer must show that there would have been no defect or failure in his product if the subsequent product had been properly designed and manufactured. He may need to carry out exhaustive testing on a finished product in order to establish this fact. The component manufacturer may still be liable jointly with the finished product manufacturer if it can be proved that the component partly contributed to the failure. It may be even more difficult to establish that the defect was wholly attributable to compliance with instructions given by the producer of the subsequent product. The component manufacturer who has some involvements in design decisions, for example collaborative research and

⁴⁸ Wright, *supra*, n. 18, at 61.

development, may not be able to plead this defence.⁴⁹ Thus, it may still be important for the component manufacturer to supply with his products full product specifications and warnings and be particularly aware of the uses to which his product is put.

THE DEVELOPMENT RISKS DEFENCE

Section 72(1)(d) of the Act allows the person proceeded against a defence if he can show 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.”

This is known as the “development risks defence” which is sometimes used interchangeably with the ‘state of the art defence.’ However, a more tenable view is that these terminologies represent separate concepts as far as the Act is concerned. As Clark writes;

“...[t]he term state of the art could be used to connote a product which is not defective when judged against the prevailing safety standards at the time when it was put into circulation; in contrast, the term development risks is used in situations in which the product is defective when put into circulation, but the manufacturer has the defence that existing knowledge made the defect not reasonably discoverable. Thus, state of the art arguments relate to the questions of defectiveness, while development risks issues arise later, as a defence to a finding of defectiveness.”⁵⁰

Thus, a product manufactured ten years ago without special safety devices, such as a child-proof top on a bottle or a child-central lock on a

⁴⁹ Wright, *supra*, n. 18, at 66.

⁵⁰ A. Clark, *supra*, n. 4, at 151. See also Taschner, “European Initiatives: The European Communities” in C.J. Miller, *Comparative Product Liability*, (London, 1986), at 1. It is noticeable that ‘state of the art defence’ is a standard term used in the American product liability law despite the suggestion that it ought to be abandoned since ‘its meanings are so diverse and so often confused.’ See Wade, “The Effect in Products Liability of Knowledge Unavailable Prior to Marketing,” (1983) 58 NYUL Rev. 734 at 751.

microwave oven, cannot be considered to be defective since it complied with the state of art, in terms of reasonably expected safety, at the time it was put into circulation. On the other hand, if a drug, for example whooping cough vaccine, is found to cause brain damage, then it may be considered to be defective at the moment it was put into circulation. However, it may be open to the producer to argue that the causal connection between the vaccine and the disease was not scientifically discoverable at the time the product was put into circulation, and that is the development risks defence.

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.⁵¹ Thus whether the producer did not know or could not have known about the defect is irrelevant. It may be argued on behalf of consumers that the introduction of strict product liability without the development risks defence is one way to prevent Malaysia from being a dumping place for unwanted goods imported from developed nations. Obviously most Malaysians are not willing to see their country become a testing ground for untried products. The availability of the defence may be seen as providing manufacturers or importers with an unnecessary protective shield for marketing defective products, for which liability would otherwise be imposed.

However, there would appear to be a number of practical and policy considerations which support the availability of the defence under the Malaysian product liability law.⁵² In the first place 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 generally known that 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 as the country heads further into an era of industrialisation. Undoubtedly society is more advanced and even safer as a result of technological development.

Malaysia is still in the process of developing its own advanced technology by encouraging research and development in any possible area. Thus the imposition of liability without the development risks defence may discourage innovation in manufacturing industry and even perhaps

⁵¹ The defence is clearly recognised in the tort of negligence. See *Roe v Minister of Health* (1954) 2 QB 66; *Vacwell Engineering Co. Ltd. v B.D.H Chemicals Ltd.* [1971] 1 QB 88; *Independent Broadcasting Authority v EMI Electronics Ltd. and BICC Construction Ltd.* [1980] 14 BLR 1 *Thompson v Smiths Shiprepairers (North Shields) Ltd.* [1984] 1 All ER 881.

⁵² It is notable that the defence has been included in the UK law and the majority of EC countries.

stifle research. The defence would be of particular importance to high-technology industries such as pharmaceuticals, chemicals and aerospace which the country may develop in the future. Those industries are highly likely to contain unknown hazards and have always been subjected to continuous technological improvements. It is reasonably clear therefore 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 is only applied to cases of unknown and undiscoverable risks of defect in a product and it ceases to be available after the date at which the existence of the defect could have been discovered. However, the Act introduces the less demanding concept of expectancy which is more close to negligence principles. As the wording "may reasonably be expected" clearly imports an element of reasonableness. The Act, therefore, covers the risks of defects which are absolutely undiscoverable⁵³ as well as reasonably undiscoverable.⁵⁴ The reference to "a producer of products of the same description" may be seen as introducing an element of subjectivity into the defence. On the other hand it will provide courts with an ascertainable standard against which the producer should be judged.⁵⁵ However, difficulty may arise where there is no other 'producer of products of the same description as the product in question.' A problem also arises over the application of the defence to 'other defendants' who are not the manufacturer and not involved in any research activities. On what standard should they be judged? Does the same standard apply to a small-scale business and a giant company? In fact, many questions remain unanswered since the proper meaning of the defence itself is not clear.⁵⁶ It may be anticipated, however, that the defence will be of limited application in practice and may only be raised by the defendant in very exceptional circumstances.

⁵³ It is a risk which only becomes apparent as a new product is used and causes injury, for e.g. the adverse side effects of a drug which only affect the user's offspring and later generation.

⁵⁴ Reasonably undiscoverable risks may include a risk which can only be discovered by extraordinary means, for example the unexpected reaction when chemicals interact with one another, which could only be discovered if all technical tests which are expensive and time - consuming were used, or all literature on the subject in the world were consulted.

⁵⁵ Newdick, "The Development Risk Defence of the Consumer Protection Act 1987," (1988) CLJ 456.

⁵⁶ Ibid. See also A. Clark, *supra*, n. 4 chapter 6, J. Stapleton, *Product Liability*, (Butterworth, London, 1994), chapter 10.

CONCLUSION

The introduction of a new system of liability for injury caused by a defective product into the law of Malaysia through Part X of the Consumer Protection Act 1999 is undoubtedly a major legislative reform in the field of consumer protection generally, and product liability in particular. The Act may be perceived as having made it easier for plaintiffs to prove their cases, as they no longer have to prove fault by the manufacturer. Since the new law focuses more on the actual performance and condition of the product than on the manufacturer's care, it may be easier for the plaintiff to assemble sufficient evidence of defect than when trying to prove negligence. Undoubtedly, therefore, the Act has made a significant change in concept. However, whether this change in concept can be translated into a corresponding change in practice is questionable.

The Act obviously does not remove all barriers to successful product liability claims. There, in fact, remains ample scope for argument over whether a product as designed and marketed is 'defective' and over issues of causation and available defences. Furthermore, being a statutory scheme covering a major area such as product liability, the Act has to define its own boundaries of application. This is done by a new set of concepts, such as 'product', 'producer' and 'defect'. Each of these concepts, however, carries with it uncertainties and ambiguities which are capable of being resolved only after litigation. Thus, until case law is built up, no one can be sure whether the Act can really achieve its main objective to provide better protection to the consumer. Despite the shortcomings in the Act there are, arguably, numerous occasions in which the Act will be of use to the victims of injuries caused by defective products. The real effect of the new law, therefore, is yet to be seen.