

## The Consumer Expectation Test under the Consumer Protection Act 1999: A Viable Test for Determining the Quality and Safety of Products?\*

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### Introduction

Protection against sub-standard and unsafe products is one of the most important components in consumer protection law. The law recognises well the rights of consumers with regard to safety and quality of goods or products,<sup>1</sup> and the Malaysian Consumer Protection Act 1999 ("CPA") includes several sections relating to quality and safety of consumer products. It is a legitimate expectation of consumers that the products supplied to them are safe and measure up to certain standard of quality. However, in cases of product failure, the burden of proof is on a consumer to show the defective or unsatisfactory state of the product either in terms of quality or safety. The question then arises as to what criteria to apply to assess and determine the standard of quality and safety of products.

Over the years, various tests have been adopted by the legislators and the courts in the US, the UK and other Commonwealth jurisdictions in determining a product quality and safety standard. The consumer expectation test is one of the tests which have been widely applied particularly in product liability cases in the US and the UK.<sup>2</sup> The CPA also adopts this test, which judges the quality and safety standard based on the reasonable consumer's expectation about the product. Whether the test can provide a readily ascertainable objective standard against which the quality and safety of a product can be measured by relevant parties is highly debatable. Ascertaining what standard of quality or level of safety consumers might reasonably expect may prove it to be a vague test.

This paper seeks to analyse the application of the test in the main statute on consumer protection in Malaysia, the CPA. For a fuller appreciation of the test,

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\* A paper presented at the 5th Asian Law Institute Conference, May 22–23, 2008, Singapore.

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1 For example the law of sale of goods, tort of negligence, product safety and product liability.

2 The other popular test is the risk-utility test that is commonly used in deciding claims under the law of negligence. The test basically requires a balancing of the risks of the product against its benefits.

the paper attempts to examine the nature of the test, its origin, strengths and weaknesses. All relevant provisions of the CPA on the consumer expectation test will be considered in order to assess its viability in setting a proper standard of product quality and safety. Since case law on the subject has not yet developed in Malaysia, reference will be made to the application and development of the test in other jurisdictions, particularly the UK and the US.

The adoption of the test in the CPA is a natural result of adopting similar laws from other jurisdictions.<sup>3</sup> The question arises whether the test can really suit local circumstances where there exists a difference in socio-economic background which results in a different level of consumer knowledge and awareness. It is thus debatable whether the workability or otherwise of the test in other jurisdictions would produce a similar impact in the Malaysian context. This paper will also examine alternative tests which may seem to be more appropriate for Malaysia.

### Historical background of the test

The consumer expectation test owes its origin from the US. The test is historically rooted in implied contractual warranty. Tracing the development of the concept of "defectiveness" in strict product liability, Wade states:<sup>4</sup>

The initial approach to the problem was in the language of warranty cases. It was said that there was an implied warranty that the goods were of merchantable quality, or were suitable for the purpose for which they were sold. ... *The reasonable expectations of the buyer were utilised as guidelines in making the determination.*

The test is undoubtedly appropriate in deciding breach of warranty cases since the law of contract is essentially concerned with protecting justified expectations of a buyer, which can be ascertained from the terms of the bargain.

The test was later adapted to strict product liability cases<sup>5</sup> and due to its wide acceptance, the test was subsequently incorporated in the Restatement (Second) of Torts (1965). As a prerequisite to liability, s402A of the Restatement provides that a product must be "in a defective condition unreasonably dangerous to the user or consumer". Comment (i) to the section explains that the product is unreasonably dangerous if it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to

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3 For example the law on product liability which is contained in Part X of the CPA is based on Part I of the Consumer Protection Act 1987 (UK) which adopts the consumer expectation test in deciding defectiveness of a product.

4 Wade, "On the Nature of Strict Tort Liability for Products" (1973) 44 MissLJ 825 at 829. Emphasis added.

5 See *MacPherson v Buick Motor Co* 111 NE 1050 (NY 1916); *Escola v Coca-Cola Bottling Co* 150 P2d 436 (Cal 1944); *Greenman v Yuba Power Products Inc* 377 P2d 897 (Cal 1963).



its characteristics". This comment has been considered as the classic definition of the consumer expectation test.<sup>6</sup> Section 402A was originally intended to apply only to manufacturing defect cases, but was in due course applied to marketing defect and design defect cases too. The application of the test in latter cases has been subjected to severe criticisms<sup>7</sup> and as one commentator observes "more than anything else it was this unintended application of s 402A to the design context that gave the new product liability in the United States its explosive character".<sup>8</sup> Consequently, by the early 1980's the test had been replaced in most US jurisdictions by an approach of balancing product costs and benefits.<sup>9</sup> However some courts that have accepted the risk-utility test have not done so to the exclusion of the consumer expectations test.<sup>10</sup> In fact, recent trends indicate that many courts still prefer the consumer expectation test<sup>11</sup> while some others prefer the combination of the risk-utility analysis and consumer expectation.

The development of product liability law in the US had a great influence in the introduction of a system of strict liability for defective products in the European Union. The new system was introduced into member states through the implementation of the EC Directive on Liability for Defective Products.<sup>12</sup> The Directive adopts a variant of the consumer expectation test as a test in determining defectiveness under the strict liability rule. 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". However, it is generally believed that the introduction of the strict liability system and the adoption of the consumer expectation test would not lead to similar outcomes as in the US since it will be interpreted in a totally different legal environment.<sup>13</sup> The Directive has subsequently influenced the development of product liability law in other countries outside the EC, e.g. New Zealand, Australia, Japan and Malaysia.

6 Kennedy, JN, "The Role of the Consumer Expectation Test under Louisiana's Product Liability Tort Doctrine" (1994) 69 Tulane Law Review 117.

7 See for e.g. Fischer, "Product Liability—the Meaning of Defect" (1974) 39 MLR 339; Keeton, "Product Liability and the Meaning of Defects" (1973) 5 St Mary's LJ 30.

8 Stapleton, J, *Product Liability*, London: Butterworths (1994), p 30.

9 Stapleton, J, *ibid*, p 236. This approach was subsequently adopted in the Restatement (Third) of Torts: Product Liability (1997).

10 This is known as the "twin tests" as it combines the consumer expectation and the risk-utility tests. See e.g. *Barker v Lull Engineering Co* 573 P2d 443 (Cal 1978); *Zimmer v Birnbaum* 758 So2d 714 (Fla 4th DCA 2000).

11 See *Hisrich v Volvo Cars of North America Inc* 226 F3d 445 (6th Cir 2000); *Jackson v General Motors Corp* 60 SW3d 800 (Tenn 2001); *Tran v Toyota Motor Corp* 420 F3d 1310 (11th Cir 2005).

12 Council Directive 85/374/EEC. It was implemented in the UK by Part I of the Consumer Protection Act 1987.

13 E.g. Griffiths, de Val, Peter, and Dormer, R, "Developments in the English Product Liability Law: A Comparison with the American System" (1988) 62 Tulane LR 353. The so-called "product liability crisis" in the US which is believed to have driven some firms out of the market and the non-availability of product liability insurance, has been identified as a result of the American legal environment. These include the nature of the Americans as a litigious society, the system of contingency fees, jury trial and the award of punitive damages.

## Consumer expectation test under the CPA

The consumer expectation test can be found in three important provisions of the CPA which deal with product quality and safety. It is a test to be used in deciding the acceptable quality of goods for the purpose of implied guarantees under Part V of the CPA.<sup>14</sup> Part III of the CPA which deals with criminal liability for manufacturing and supplying unsafe products also adopts the consumer expectation test in determining the reasonable safety standard. The application of the test in deciding defectiveness under the strict product liability rule which is contained in Part X of the CPA is perhaps the most contentious and thus it seems necessary that special treatment is given to this topic.

### *Acceptable quality*

Part V of the CPA deals with guarantees in respect of supply of goods to consumers.<sup>15</sup> It can be considered as a revised version of the implied condition in a sale of goods contract that can be found in most sale of goods legislation. However the protection of guarantees extends to a third party who is a mere user of the goods since the term "consumer"<sup>16</sup> refers to a person who "acquires or uses" the goods.<sup>17</sup> Part V also allows the claim for breach of certain guarantees to be taken against a manufacturer.<sup>18</sup> In other words, it sets aside the privity rule horizontally and vertically by allowing non-contracting parties to sue and be sued for breach of guarantees. Part V provides seven implied guarantees in respect of supply of goods to a consumer and the most important of all the guarantees is the guarantee requiring goods to be of acceptable quality. Section 32(1) provides that "where goods are supplied to a consumer there shall be implied a guarantee that the goods are of acceptable quality".

Section 32(2) states that goods shall be deemed to be of acceptable quality if they fulfil the following requirements:

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14 This Part is based on the Consumer Guarantees Act 1993 of New Zealand. The New Zealand Act on the other hand is taken in part from the Australian Trade Practices Act 1974, the UK's Supply of Goods and Services Act 1982 and Saskatchewan's Consumer Products Warranties Act 1977.

15 The term "supply" is widely defined in s 3(1) to include sale, exchange, lease, hire and hire-purchase.

16 A consumer is defined as a person who:

- (a) acquires or uses goods or services of a kind ordinarily acquired for personal, domestic or household purpose, use or consumption; and
- (b) does not acquire or use the goods or services, or hold himself out as acquiring or using the goods or services, primarily for the purpose of:
  - (i) resupplying them in trade;
  - (ii) consuming them in the course of a manufacturing process; or
  - (iii) in the case of goods, repairing or treating, in trade, other goods or fixtures on land.

17 It however does not extend to a bystander.

18 A "manufacturer" is widely defined in s 3(1) as a person who carries on a business of assembling, producing or processing goods, and includes own-branders and importer or distributor of imported goods.



- (a) they are fit for all purposes for which goods of the type in question are commonly supplied, acceptable in appearance and finish, free from minor defects, safe and durable; and
- (b) they meet the standard that a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard the goods as acceptable having regard to the nature of the goods, the price, any statements on the packaging or label, any representation made about the goods and all other relevant circumstances.

It is reasonably clear that whether the goods are acceptable in quality will be judged based on an overall assessment of the goods together with consumer knowledge and expectation of them. Thus it is not sufficient for the consumer to simply point to the specific aspects of quality on list (a) if such expectation is not reasonable based on the factors in (b). For example, it does not seem reasonable for a consumer to expect cheaper goods to have the same standard of quality as the more expensive goods would have.

Section 32 clearly adopts the reasonable consumer expectation test in determining the quality of acceptability of goods. The test may seem appropriate in a contractual setting between a buyer and seller where reasonable expectation of value for money and particularities of transaction are generated by the contract. The difficulty may arise when assessing the valid expectations of a mere user who is not aware of the particularities generated by the buyer's circumstances. A mere user generally cannot be regarded as having been "fully acquainted with the state and condition of the goods" to form an expectation. Similarly, since the guarantee can be enforced against a manufacturer, the question arises whether a consumer can have the same expectation of the quality standard as against the supplier. Arguably, certain factors in the measurement of the expectation of quality such as price<sup>19</sup> and representation may not be appropriate in the case of a manufacturer. The test may also provide little guidance in cases where the goods are unacceptable in quality due to safety reasons.<sup>20</sup> It may be argued that unsafe goods should be automatically regarded as unacceptable in quality but the application of the test may work against this argument.

### *Product safety*

The general law on product safety in Malaysia is contained in Part III of the CPA.<sup>21</sup> Section 19(1) empowers the Minister of Domestic Trade and Consumer Affairs to make regulations prescribing the safety standards in respect of any

19 This is particularly relevant if the supplier overprices to such an extent that an expectation of quality will be raised.

20 See below for a detailed discussion on the issues of product safety.

21 This Part is based on the Trade Practices Act 1974 of Australia, the Fair Trading Act 1986 of New Zealand and Part II of the Consumer Protection Act 1987 of the UK.

goods or services.<sup>22</sup> Where no safety standard has been prescribed under this section, the person supplying or offering to supply the goods "shall adopt and observe a reasonable standard of safety to be expected by a reasonable consumer", having regard to the nature of the goods.<sup>23</sup> The section clearly adopts the consumer expectation test in determining a reasonable safety standard for the purpose of imposing criminal liability for supplying or offering to supply unsafe consumer goods. Safety is undoubtedly a variable and relative concept and regrettably the term is not defined in the CPA.<sup>24</sup> It is even more difficult when safety is to be judged according to the expectation of a reasonable consumer. Although s 21 lays down "all the circumstances"<sup>25</sup> that will be taken into account in determining a reasonable safety standard, they may prove to be of very little help in determining the level of safety that can reasonably be expected by a consumer.

One of the basic questions that may be raised in this regard is what is meant by "reasonable consumer"? Arguably, whether "reasonable consumer" is to be interpreted as a "reasonable man on the street" or a well-educated person, the same difficulty would arise in assessing their expectations since in most cases they often lack the knowledge and experience to ascertain the safety aspects of modern products. Thus it may seem superficial for the law to define "safety" by merely looking into the expectations of an ordinary consumer, and in doing so placing the entire general safety standard solely on those expectations. Nevertheless, the reference to a "reasonable consumer" suggests that it is an objective test and thus the subjective expectation of an actual consumer/victim will not be considered. Obviously, the mere occurrence of an accident does not satisfy the consumer expectation test simply because no reasonable consumer expects to be injured by a product. Similarly, the fact that there is a major gap in terms of knowledge, exposure and level of consumer awareness between rural and urban consumers in Malaysia may not be relevant under the test. On the other hand, since the law only requires a reasonable standard of safety, the court may need to resort to the risk-utility balancing process in determining the reasonable expectations of consumers. Consequently, the test is bound to produce inconsistent court decisions in comparable cases and this is perhaps undesirable in the context of criminal liability. Obviously, the test could not provide a readily ascertainable objective standard against which a supplier, manufacturer, enforcement officer and indeed a court can measure the reasonable safety of a product. It has been suggested that Part III of the

22 However this Part does not apply to healthcare goods and food. See s 19(6) of the CPA.

23 CPA, s 19(4). It is an offence under the CPA to supply, or offer to or advertise for supply or to import consumer goods which fail to comply with the reasonable safety requirement. See ss 20, 21 and 24 and the punishment in Part IV of the CPA.

24 In comparison, s 19(1) of the UK Consumer Protection Act 1987 states that "safe in relation to goods, means that there is no risk, or no risk apart from one reduced to a minimum ...".

25 These include the manner in which, and purposes for which, the goods are being or will be marketed, the get-up of the goods, the use of any mark in relation to the goods and instructions or warnings with respect to the keeping, use or consumption of the goods.



CPA should do away with the consumer expectation test and focus more on the condition of the product.<sup>26</sup>

### **Product liability**

Part X of the CPA introduces the system of strict liability for supplying a defective product that causes injury or property damage to buyers, users and bystanders.<sup>27</sup> This European Community style of strict product liability imposes primary responsibility for a product's failure on the producer<sup>28</sup> and focuses more on the product's actual performance than on the producer's care. Thus, a recovery will depend on the loss being attributable to a defect in the products when they were supplied to consumers. A product is considered to be defective "if the safety<sup>29</sup> of the product is not such as a person is generally entitled to expect".<sup>30</sup> It clearly adopts the consumer expectation test in deciding whether or not a particular product is unsafe and therefore defective. The reference to "a person" rather than "user" or "consumer" or "plaintiff" suggests that the test is less personal and more objective. Furthermore, it is the "general entitlement to expectation" that will be taken into account rather than the actual expectation. The standard can be higher or lower than the consumers' actual expectations. The section further sets out a list of circumstances which the judge may consider in deciding defectiveness, and this apparently confirms that the standard of safety is to be judged according to the objective criteria applicable to the circumstances of each individual case.

The relevant circumstances include (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.<sup>31</sup> However, they may prove to be of very little help in determining the level of safety that a person is generally entitled to expect. At the same time, if the consumer must establish the kinds of factors listed in the section to show the presence of a defect, it is difficult to see how this differs in any material respect from a fault-based negligence basis for

26 FOMCA, *Review of the Consumer Protection Act 1999*, 2006.

27 See generally, Naemah Amin, *Product Liability in Malaysia*, Sweet & Maxwell Asia (2007), chap 4.

28 A producer is widely defined in s 66(1) of the CPA to include a manufacturer, own-branders and importer.

29 "Safety" is defined to include safety with respect to products comprised therein; safety in the context of risk of damage to property; and safety in the context of risk of death or personal injury: CPA, s 67(4).

30 CPA, s 67(1). In comparison, s 3(1) of the UK Consumer Protection Act 1987 provides that "there is a defect in a product for the purpose of this Part if the safety of the product is not such as persons generally are entitled to expect."

31 CPA, s 67(2).

establishing liability. Furthermore, each factor is not free from ambiguities and uncertainties of interpretation.<sup>32</sup>

A number of cases decided in the UK may shed some light on how the courts will apply the consumer expectation test in deciding product liability cases. In *A & Ors v National Blood Authority & Ors*,<sup>33</sup> the blood which had been transfused into the claimants was contaminated with the Hepatitis C virus. The defendant alleged that, although the risk of virus had been known to the medical profession, it was impossible to detect at the time of infection and therefore the most that the public could have legitimately expected was that all reasonable precautions would be carried out, and not that the blood would be 100% clean. In rejecting this argument, Burton J said:<sup>34</sup>

I do not consider it to be arguable that the consumer had an actual expectation that blood being supplied to him was not 100% clean, nor do I conclude that he had knowledge that it was, or was likely to be, infected with hepatitis C. It was not seriously argued by the defendants ... that there was any public understanding or acceptance of the infection of transfused blood by Hepatitis C. Doctors and surgeons knew, but did not tell their patients unless asked, and were very rarely asked ...

I do not consider that the legitimate expectation of the public at large is that legitimately expectable tests will have been carried out or precautions adopted. Their legitimate expectation is as to the safeness of the product (or not).

Accordingly, the blood products were defective because the public at large was entitled to expect that the blood transfused to them would be safe. Burton J also 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. In performing this function the court will act as an informed representative of the public at large. The court also rejected the avoidability of the risk of harm as a relevant circumstance to be considered in deciding defectiveness because to decide otherwise would be contrary to the basic tenet of the strict liability rule.

The same line of judgment can be seen in the Court of Appeal case of *Abouzaid v Mothercare (UK) Ltd*.<sup>35</sup> In this case a "cosytoes" cover fixed by elastic straps

32 For e.g. a consideration as to the "time of supply" raises questions of how durable a person is entitled to expect a product to be. See generally, Malkin, IR, and Joan, E, "Product Liability under the Trade Practices Act—Adequately Compensating for Personal Injury?" [1993] *Torts Law Journal* 63; Hammond, M, "The Defect Test in Part VA of the Trade Practices Act 1974 (Cth): Defectively Designed?" [1998] *Torts Law Journal* 29.

33 [2002] 3 All ER 289. For a commentary of the case, see Howells, G, and Mildred, M, "Infected Blood: Defect and Discoverability—A First Exposition of the EC Product Liability Directive" (2002) 65 *MLR* 95; Williams, JM, "Product Liability—Hepatitis Litigation" (2001) 3 *JPLI* 238; Hodges, C, "Compensating Patients" (2001) 117 *LQR* 528.

34 *Ibid*, at paras 55 & 56.

35 [2001] 3 *CL* 109.



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. The court held that the product was not safe despite the expert's report that no manufacturer in 1990, the date of manufacture of the product, could reasonably have been aware of the hazard until the present accident occurred in 1999. Pill LJ held that "the product was defective because it was supplied with a design which permitted the risk to arise and without giving a warning that the user should not so position himself that the risk arose. Members of the public were entitled to expect better from the appellants". The judge also held that public expectation of the level of safety of the product would not have changed between 1990 and 1999. It was also the court's view that in deciding the issue of defectiveness under the UK Consumer Protection Act 1987, it is irrelevant whether the hazard which causes the damage has come, or ought reasonably to have come, to the attention of the producer before the accident occurs.<sup>36</sup> In other words the consideration of the reasonableness of a defendant's conduct and expectation has no place in the strict liability rule.

On the other hand in *Richardson v LRC Products Ltd*,<sup>37</sup> in holding that the alleged broken condom was not defective within the meaning of the UK Consumers Protection Act 1987, Kennedy J said that "No-one has ever supposed that any method of contraception intended to defeat nature will be 100% effective. This must particularly be so in the case of a condom where the product is required to a degree at least to be, in the jargon, 'user friendly'." It seems clear that the judge has decided based on the reasonableness of the expectation that consumers are entitled to demand from the manufacturer. Similarly, in *Bogle & Ors v McDonald's Restaurants Ltd*,<sup>38</sup> the spillage of hot drinks served by the defendant had caused serious injuries to the claimants. They argued that the hot drink was defective because it was too hot and served in the cups with lids which came off easily. However, it was held that the safety of the hot drinks served by the defendant was such as persons generally are entitled to expect since the temperature at which the drink was served was acceptable, given that customers would not have wanted to drink it at lower temperatures and the design of the cups was also reasonable because the lids had to be easily removable for customer's easy use. The court seems to adopt the risk-utility consideration in deciding the legitimate expectation of consumers.

The recent case of *TESCO Stores Ltd & Anor v Pollard*,<sup>39</sup> illustrates the application of the consumer expectation test in a case of non-compliance with a technical product standard. In this case, although the TESCO bottle's "squeeze and turn" cap did not meet the British standard for child resistant closures, it was held

36 Ibid, see the judgment of Chadwick LJ, para 44.

37 [2000] Lloyd's Rep Med 280.

38 [2002] EWHC 490.

39 [2006] EWCA Civ 393. In this case, a child had been seriously injured when he swallowed some dishwasher powder sold in a bottle which bore a "child-resistant closure". The mother alleged that the bottle was defectively designed since it was easily opened by her child.

not defective based on the consumer expectation test. The Court of Appeal was of the view that members of the public were unlikely to have any idea as to what safety standard the product they were buying had been designed. Accordingly, they would be entitled to expect only that a child resistant closure would be more difficult to open than an ordinary screw top though not as difficult as it would have been if the British standard torque measure had been complied with. It was also the court's view that the consumer expectation test was not equivalent to a warranty by a manufacturer that its product met particular safety standards. This case shows that the test has been construed in a way which is prejudicial to the consumer in cases of non-compliance with a technical product standard in particular and design defects cases generally since consumers are unlikely to possess the necessary technical knowledge to form any rational expectation. On the other hand, it may be argued that the test should focus on the expectation of performance rather than the technical consideration of the product.<sup>40</sup>

The cases so far decided in the UK illustrate different approaches taken by English judges in applying the consumer expectation test in deciding the product safety standard. *A & Ors* and *Abouzaid* represent a view that the strict liability rule is different from negligence liability. Thus the consumer expectation test should be interpreted in favour of consumers whenever they can show that they had no legitimate expectation due to lack of information and publicity about risks. While other cases indicate that the consumer expectation test is unable to stand on its own and will necessarily fall back on a risk-utility analysis. In this regard, it has been correctly argued that "the actual language of the consumer expectation test is simply a semantic veneer covering what is in reality a cost-benefit test".<sup>41</sup> Although a cost-benefit approach has not been overtly adopted in those cases as Lord Griffiths has correctly predicted, English judges according to him "would as an educated response to the facts of a particular case undertake a balancing exercise of an analogous kind".<sup>42</sup> Nonetheless, the different approaches taken by the courts would inevitably lead to unpredictability and inconsistency of decisions in comparable product liability cases. One commentator rightly concludes that "the concept of defectiveness cannot be appreciated by means of restructured theoretical categories such as that of strict liability. The evaluation of defectiveness is in fact fundamentally a matter of judicial interpretation of facts".<sup>43</sup> However, it is reasonably clear that the consumer expectation test only provides a minimum

40 This is the approach taken in many American cases. See e.g. *Hisrich v Volvo Cars of North America, Inc* 226 F3d 445 (6th Cir 2000).

41 Clark, A, *Product Liability*, London: Sweet & Maxwell (1989), p 37. Clark has also noted that "the distinction between a cost-benefit approach and a consumer expectations approach may really be one of style rather than substance".

42 Griffiths, de Val, Peter, and Dormer, R, "Developments in the English Product Liability Law: A Comparison with the American System" (1988) 62 Tulane LR 353 at 382.

43 Stoppa, A, "The Concept of Defectiveness in the Consumer Protection Act 1987: A Critical Analysis" (1992) 12 Legal Studies 210 at 226.



standard of acceptable level of safety and it is definitely not a threat to become in practice, the very standard of absolute manufacturer liability.

### The consumer expectation test: strengths and weaknesses

The consumer expectation test appears to produce some exceptionally plaintiff decisions in the US mainly due to the fact that the issue is determined by juries.<sup>44</sup> Since juries would place themselves as reasonable consumers in a similar circumstance, they have the tendency to favour the injured party simply because they would not have expected the product to have caused the injury. Judges, on the other hand, would be more objective in their approach and consider consumer expectations on the basis of reasonableness. It is now obvious that the consumer expectation test has produced a different result when it is applied by a judge rather than a juror. Despite an attempt by Burton J in *A & Ors* to interpret the test in the light of the real spirit of strict product liability, the subsequent cases do not seem to support his approach.<sup>45</sup> Thus, various criticisms on the adoption of the consumer expectation test in the Directive and the UK Consumer Protection Act 1987 remain relevant to be considered in determining the viability of the test.<sup>46</sup> The test is undoubtedly appropriate in cases of non-complex and well-known products such as food, kitchen utensils and toiletries. Since the products are relatively simple and they are quite known to most consumers regardless of their background and the consumers can also be expected to be aware of the inherent dangers of these products, consumers' reasonable expectations may easily and fairly be determined.

It is generally accepted that the consumer expectation test will work reasonably well in cases of manufacturing defect where the product was not produced as intended,<sup>47</sup> for example the presence of an unintended ingredient or foreign object in the product. In such cases, the products should be considered to be unsafe because the ordinary consumer would not reasonably expect such forms of contamination.<sup>48</sup> As one commentator observes:<sup>49</sup>

44 Howells, G (ed), *The Law of Product Liability*, London: Butterworths (2000), p 230.

45 *Bogle & Ors v McDonald's Restaurants Ltd* [2002] EWHC 490; *TESCO Stores Ltd & Anor v Pollard* [2006] EWCA Civ 393. See also earlier cases of *Worsley v Tambrands Ltd* [2000] PIQR 95; *Richardson v LRC Products Ltd* [2000] Lloyd's Rep Med 280; *Foster v Biosil Ltd* (2001) 59 BMLR 178.

46 See e.g. Clark, A, *Product Liability*, London: Sweet & Maxwell (1989), chap 2; Stoppa, A, "The Concept of Defectiveness in the Consumer Protection Act 1987: A Critical Analysis" (1992) 12 Legal Studies 210; Stapleton, J, "Product Liability Reform—Real or Illusory?" (1986) 6 OJLS 392.

47 Griffiths, de Val, Peter, and Dormer, R, "Developments in the English Product Liability Law: A Comparison with the American System" (1988) 62 Tulane LR 353; Stoppa, A, "The Concept of Defectiveness in the Consumer Protection Act 1987: A Critical Analysis" (1992) 12 Legal Studies 210.

48 Kennedy, JN, "The Role of the Consumer Expectation Test under Louisiana's Product Liability Tort Doctrine" (1994) 69 Tulane Law Review 117 at 141.

49 Hermann, "The Consumer Expectation Test—Application of a Difficult Standard for Determining Product Defects" (1991) 41 Fed'n Ins & Corp Couns Q 251 at 260.

The consumer expectation test is easily applied in manufacturing defect cases in which the thrust of the evaluation is whether the product failed to meet the standards of the manufacturer itself for quality and performance. The analysis in these cases is akin to that for express or implied warranties and thus, fits within the conceptual framework from which the consumer expectation test was derived.

In other words, in manufacturing defects, the manufacturer's own product specifications provide an adequate benchmark against which consumer expectation can be measured.

On the other hand, the test appears less appropriate when applied to design defects which generally refer to the defect in a whole run of products. It may be caused by the choice of inappropriate materials, product formula ingredients or specifications, or failure to incorporate sufficient safety features. This kind of defect normally can be found in high-tech products such as chemicals, vehicles, drugs and medicines. Difficulty arises when assessing the valid expectations of the consumer in this regard since the consumer would have no idea how safe the product could be made to be to form any expectations. For example, the consumer might not have specific safety expectations about the design of the landing gear of an airplane or the workings of an air bag system. The same argument applies where a new product is involved and no expectation of safety has developed. Arguably, a person is generally entitled to expect that the product has been designed and manufactured as safely as possible and they should be properly warned of any possible danger. However, this would not necessarily be accepted by the court as the level of safety which a person is generally entitled to expect if it is found to be unreasonable.

The test also means that proper warnings will often be sufficient to exculpate producers from liability. In the English case of *Worsley v Tambrands Ltd*,<sup>50</sup> 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 UK Consumer Protection Act 1987, 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 packaging were adequate. The product therefore did not have a defect within the meaning of Part 1 of the Consumer Protection Act 1987. This case illustrates that the consumer expectation test has been construed in a way which is prejudicial to the consumer where a warning has been given.<sup>51</sup> Even the "strict" approach taken by the judge in *A & Ors* does not seem to help the victim of a defective product in this regard since the case provides a possible escape route for the

50 [2000] PIQR 95.

51 However, the case has been criticised for the failure of the court to distinguish between the claim in negligence and under the strict liability rule. Freeman, R, "Strict Product Liability Laws—Consumer Protection Act Provisions Fail to Assist Claimants in Three Recent Cases" (2001) 1 JPIL 26.



producer by giving adequate warnings and the presence of other publicity concerning risks. This may cause unfairness to certain groups of consumers, particularly a child, idiot, illiterate or a person who does not understand the language in which the instructions or warnings are written.

The consumer expectation test has also been criticised for its failure to protect the consumer adequately in cases of patent danger.<sup>52</sup> Many products, by their nature, are dangerous, for instance, knives, fireworks and hot drinks. Applying the consumer expectation test to such cases is likely to exempt its producer from liability. Such products cannot be considered to be defective since the consumer could not have expected them to be safe<sup>53</sup> irrespective of whether the manufacturer could have eliminated the risk cost-effectively. Problem may also arise when applying the test to cases where the defective products caused injury to bystanders, who may have no knowledge of the existence of the product and therefore have no expectations regarding its safety. The standard of safety which is based on general expectations of a person may not be applied fairly to bystanders, particularly in cases where the user or buyer has been informed about possible risks of the product, thus rendering the product not defective from their perspective. The question has also been raised on how the test is to be applied in cases involving vulnerable groups such as children, the elderly and disabled persons.<sup>54</sup> Obviously if the product is meant to cater for the groups' special needs, a person is generally entitled to expect that the product is rendered safe for their use. It is also perhaps a valid expectation of consumers generally that producers should pay attention to the particular requirements of these vulnerable groups.<sup>55</sup> However the judgment in *TESCO Stores Ltd & Anor v Pollard*,<sup>56</sup> does not seem to support this argument. The fact that the victim was a 13-month-old baby had not been given any special consideration by the court in this case.

It is reasonably clear that there are many deficiencies of the consumer expectation test. The test suffers from ambiguity and uncertainty of interpretation and practical implications. Although the test purports to effectuate the safety expectations of the ordinary consumers, it generally fails to explain how those expectations are to be ascertained. The test will ultimately depend on a particular judge's concept and understanding of what may be or should

52 Stoppa, A, "The Concept of Defectiveness in the Consumer Protection Act 1987: A Critical Analysis" (1992) 12 Legal Studies 210; J Stapleton, "Product Liability Reform—Real or Illusory?" (1986) 6 OJLS 392.

53 *Bogle & Ors v McDonald's Restaurants Ltd* [2002] EWHC 490. See also the American case of *Vince v Esther Williams All-Aluminium Swimming Pool Co* 69 Wis2d 326 (1975) (Supreme Court of Wisconsin).

54 Howells G, and Weatherill, S, *Consumer Protection Law*, Ashgate (2005), p 245.

55 Note that the EC Directive on General Product Safety 2001/95/EC requires that "the categories of consumers at serious risk when using the product, in particular children, should be taken into account" in deciding whether a product is safe.

56 [2006] EWCA Civ 393.

be in the consumer's mind. It has been rightly assumed that the decision founded on the consumer expectation test "conceals a decision of policy, based upon the subjective view of the judge".<sup>57</sup> In the European context, it has been observed that "there is an obvious danger that courts in different legal systems will apply the test in an inconsistent manner as a result of their various legal traditions and the socio-economic conditions which influence their expectations of safety."<sup>58</sup> The same observation applies to other countries which adopt the test including Malaysia. One would hope that the court will not lower the expectations of Malaysian consumers simply because they are not comparable to those of consumers in developed countries.

### Alternatives tests

The following discussion highlights other tests that have been applied by courts, particularly in the US in deciding product liability cases. These may be considered as alternatives or approaches complementary to the consumer expectation test.

#### *Risk-utility test*

Risk-utility or cost-benefit analysis is a traditional test used in deciding liability under the law of negligence. The test involves balancing the costs associated with a product against its benefits. The application of the test in strict product liability cases focuses on the condition of the product rather than the conduct of the person who caused the defect. Under the risk-utility test, a product is considered to be unsafe if the risk of the product or an allegedly dangerous characteristic of the product is greater than its utility. In weighing risk against utility, several factors will be taken into consideration such as product cost, the foreseeability of the danger, its utility to the user, the availability of a substitute product and other relevant factors.<sup>59</sup> Notably, the consumer expectations of the danger of the product form one of the factors in the risk-utility analysis.<sup>60</sup> The test is particularly relevant in a case involving a high risk product such as drugs. Many drugs are generally known to carry side-effects. In such cases, 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.

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57 Griffiths, de Val, Peter, and Dormer, R, "Developments in the English Product Liability Law: A Comparison with the American System" (1988) 62 Tulane LR 353 at 379.

58 Howells G, and Weatherill, S, *Consumer Protection Law*, Ashgate (2005).

59 Wade, "On the Nature of Strict Tort Liability for Products" (1973) 44 MissLJ 825, listed seven factors to be weighed in the risk-utility analysis. These factors were subsequently adopted by practically every state in the US.

60 Wade defines consumer expectations as follows, "the user's anticipated awareness of the dangers inherent in the product and their avoidability due to the general public knowledge of the obvious condition of the product or the existence of suitable warnings or instructions." See Wade, *ibid*, p 837.



The risk-utility test has been considered as providing a more systematic and structured approach to the analysis of product liability claims. In the US, the test is mostly applied in complex design cases.<sup>61</sup> In the European context, Howells observes that many people feel that the risk-utility based approach would be more favourable to the plaintiffs and this is evident by the adoption of the said approach in the EC Directive on General Product Safety.<sup>62</sup> However, this balancing process may sometimes produce anomalies and result in injustice to an injured party. Thalidomide,<sup>63</sup> for instance, which only carries a risk of harmful side-effects to a small percentage of people, might not be treated as defective since its purpose is to relieve the prolonged agony of diseases like cancer and leprosy. Clark considers the test as "complex calculations" that may challenge the ability of the court to arrive at a proper conclusion.<sup>64</sup> On the other hand, it has been argued that the balancing process can be simplified by relying on each court's particular notion of the respective factors that ought to be ascribed to the risks and benefits of the product to the society.<sup>65</sup>

### *Reasonable alternative design test*

The availability of a reasonable alternative design is one of the factors to be considered in the risk-utility balancing test. Wade's proposal that "the manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility" and "the availability of a substitute product which would meet the same need and not be unsafe" should be taken into account in deciding the product safety standard.<sup>66</sup> The proposal was subsequently adopted in the Restatement (Third) of Torts: Product Liability (1997). Section 2(b) provides that a product "is defective in design when the foreseeable risk of harm by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe". However the test has been criticised particularly by consumers' advocates for making plaintiffs' cases more difficult to be proven.<sup>67</sup> To establish a defective design under the test, the plaintiffs have a heavy burden of proof as they have to demonstrate a reasonable alternative

61 See e.g. *Knitz v Minster Mach Co* 432 NE2d 814 (Ohio 1982); *Montag v Honda Motor Co Ltd* 75 F3d 1414 (10th Cir 1996); *Pruitt v General Motors Corp* 86 Cal Rptr 2d 4 (Cal 1999).

62 Howells, G, (ed), *The Law of Product Liability*, London: Butterworths (2000), p 33.

63 Thalidomide is a drug that inspired the introduction of strict product liability rule in the UK and other European countries. See generally, Teff, H, and Munro, C, *Thalidomide: The Legal Aftermath*, Saxon House (1976).

64 Clark, A, *Product Liability*, London: Sweet & Maxwell (1989), p 33.

65 Stoppa, A, "The Concept of Defectiveness in the Consumer Protection Act 1987: A Critical Analysis" (1992) 12 Legal Studies 210 at 216.

66 Wade, "On the Nature of Strict Tort Liability for Products" (1973) 44 MissLJ 825 at 836.

67 Ross, K, and Bowbeer, H, "American Product Liability Law Undergoing Revision" [1994] ConsumLJ 96; Stocker and Levine, "The Reasonable Alternative Design Test: Back to Negligence?" [1997] ConsumLJ 41.

design that can reduce or eliminate the foreseeable risks of harm posed by the defendant's product. In other words, the plaintiff must show that some modified version of the product would have avoided his or her injury at a cost that is reasonable. One way to satisfy this requirement is by comparing the defendant's design choice with those of other manufacturers of a similar type of product. If it could be proven that there are other design choices (by other manufacturers) which would have enabled the plaintiffs to avoid the injury in question, then that will prove there is a defect in the defendant's product design and such product is not reasonably safe. Unfortunately, it will be difficult for the test to be applied in cases involving new products where no other alternative design has yet been developed.

The test has generally failed to gain acceptance and was rejected in many jurisdictions in the US for "placing a very difficult burden on plaintiffs".<sup>68</sup> On the other hand, the test may potentially work in favour of the plaintiff. In the American case of *Halliday v Sturm, Roger & Co Inc*,<sup>69</sup> the plaintiff's three-year old child died after he accidentally shot himself with a handgun. Realising that her claim against the manufacturer of the gun would fail under the consumer expectation test since the gun worked as expected by any ordinary consumer, the plaintiff instead alleged that the handgun was defective because any of the several alternative safety designs would have prevented the death of her child at a reasonable increase in the product's cost. However, this argument was rejected by the Court of Appeal of Maryland and the court reaffirmed the state's adherence to the consumer expectation test for design defect claims. This case illustrates the possible usefulness of the reasonable alternative design test in cases of obvious danger which are not practically covered by the consumer expectation test.

### *Twin tests of risk-utility and consumer expectation*

In view of the shortcomings of the consumer expectation test, it has been suggested that a dual-approach or multi-factor test ought to be adopted in solving some of the problems in product liability litigation, whereby in simple and straightforward cases, the consumer expectation test is more appropriately applied, while in more complex cases, recourse will have to be made to the risk-utility analysis.<sup>70</sup> The court may also decide by referring to both consumer expectation and the risk-utility analysis at the same time. This is known as a twin test or two-prong test of product defects. The test has been

68 E.g. *Potter v Chicago Pneumatic Tool Co* 694 A2d 1319 (Conn 1997); *Delaney v Deere & Co* 999 P2d 930 (Kansas 2000); *Green v Smith & Nephew AHP Inc* 629 NW2d 727 (Wiscon 2001).

69 784 A2d 1178 (Maryland 2001).

70 Stoppa, A, "The Concept of Defectiveness in the Consumer Protection Act 1987: A Critical Analysis" (1992) 12 Legal Studies 210 at 216. Clark also considers the test "to be a worthwhile replacement for an exclusive cost-benefit or consumer expectations test and could provide a workable interpretation of the definition of defect under the 1987 Act". See Clark, A, *Product Liability*, London: Sweet & Maxwell (1989), 40.



adopted by many courts in the US as a practical solution to rectify the flaw in the consumer expectation test in design defects cases. The Supreme Court of California in *Barker v Lull Engineering Co*,<sup>71</sup> in adopting a combination of consumer expectation and risk-utility tests decided that a finding of design defect may result from a demonstration either that the product failed to perform as safely as an ordinary consumer would expect under normal operating circumstances, or that the risks inherent in the product's design outweigh the benefits of that design. The court in this case had contemplated the product to be found defective under either test. The court also held that the defendant should bear the burden of proof under the second prong.

In utilising this test, the court has discretion to choose whether the two tests should be considered alternatively or together on equal footing. In most American cases the consumer expectations test has been treated as a primary and independent theory that sometimes needs to be supplemented by risk-utility considerations.<sup>72</sup> In other words, a risk-utility analysis only plays a subsidiary role for the purpose of determining the expectations of consumers in cases where the latter test provides inadequate basis for assessing liability such as cases involving bystanders, children, obvious dangers and complex products. It may be argued that the same result could be obtained by placing the risk-utility analysis as the main test since what a consumer would reasonably contemplate is one of the factors to be considered in weighing the risk and utility of the product.<sup>73</sup> It appears that the consumer expectations and the risk-utility analysis are complementary to each other and may be seen as an effective and workable approach in determining a reasonable safety standard.

## Conclusion

The consumer expectation test which originated from the law of warranty continues to be a relevant and viable test in deciding the quality of products within a contractual setting. Clearly an agreement between the parties will provide the best basis for ascertaining expectations. Therefore, the application of the test in determining the acceptability quality of goods under s 32 of the CPA appears to be appropriate. Although there seems to be a problem in applying the test to non-buyers, it may be considered as marginal and will not create difficulty in practice since the buyer's expectation can be taken as a guide in determining the expectations of mere users. Similarly, the same expectations can be enforced against manufacturers although they

71 573 P2d 443 (Cal 1978). See also *Radiation Technology v Ware* 445 So2d 329 (Fla 1984); *Soule v General Motors Co* 882 P2d 298 (Cal 1994); *Delaney v Deere and Co* 999 P2d 930 (Kansas 2000); *Zimmer v Birnbaum* 758 So2d 714 (Fla 4th DCA 2000).

72 E.g. *Delaney v Deere and Co* 999 P2d 930 (Kansas 2000); *Hansen v Baxter Health Care Co* 764 NE2d 35 (Ill 2002).

73 See Comment (e) of the Restatement (Third) of Torts: Product Liability (1997) which demotes the consumer expectation test to a subsidiary role in a design defect case.

are not contracting parties since reasonable consumer expectations could be derived from the express warranties and the commercial advertising of the manufacturer.

On the other hand, consumer expectations are not the right measure to judge product safety standard for the purpose of Part III of the CPA. Safety is a relative concept which requires an objective standard for its measurement particularly in the context of criminal liability. Section 19(4) provides no such standard. Not only is the "reasonable standard of safety to be expected by a reasonable consumer" rather low and very minimum, it also fails to provide any guidance as to the general safety standard that the manufacturer or supplier is bound to meet. The standard can only be set and accurately measured by reference to specific regulations on a different type of product. However the development of law on product safety in Malaysia is rather slow.<sup>74</sup> Consequently a general safety standard which can provide an ascertainable objective standard against which a supplier, manufacturer, enforcement officer and a court can measure the reasonable safety of a product is keenly awaited. This arguably can only be served by replacing the consumer expectation test with a more explicit test which focuses on the condition of products and in this respect the approach adopted by the EC Directive on General Product Safety 2001 may provide some guidance.<sup>75</sup>

In the context of product liability, the consumer expectation test is an appropriate analytical means to determine the safety standard in cases of manufacturing defects or even design defects involving simple and familiar consumer products. However, in complex design defects or complex and sophisticated products, the consumer expectations test is not a viable test for its failure to provide enough guidance to the court as to how it should go about determining precisely what a consumer is entitled to expect from a product. On the contrary, any attempt to formulate an ascertainable objective standard of safety is bound to fail since the CPA is not intended to provide absolute standards of safety. It also seems impractical and almost impossible to determine in advance for all conceivable products, the standards of safety that the whole range of consumers is entitled to expect. Furthermore, there is no standard test which can cover all kinds of products and all sorts of defects.<sup>76</sup> Thus the phrase "all relevant circumstances" in s 67(1) will provide an opportunity for the Malaysian courts to adopt a multi-factor test in deciding defectiveness. After all the evaluation of whether the product is defective or otherwise is in fact a matter of judicial interpretation of facts. It can safely

74 Nearly ten years after the introduction of the CPA, the power conferred on the relevant authority to enact specific law on product safety under s 19(1) has not yet been exercised.

75 It is to be noted that "the safety which consumers may reasonably expect" is the last factor in the list of considerations to be taken into account in deciding the conformity of a product to the general safety requirement under the Directive.

76 Griffiths, de Val, Peter, and Dormer, R, "Developments in the English Product Liability Law: A Comparison with the American System" (1988) 62 Tulane LR 353 at 379.



be concluded that despite its vagueness, the consumer expectation test may still be a useful guide in an appropriate situation. Most importantly, unlike the risk-utility test which assesses the product defect from a manufacturer's viewpoint, the consumer expectation test considers the consumer viewpoint. Hence any attempt to abandon the consumer expectation test altogether may prove to be misconceived.