INSTITUTING CONSUMER CLAIMS FOR DEFECTIVE PRODUCT AGAINST MANUFACTURERS UNDER THE MALAYSIAN LAWS

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Abstract

Prior to the promulgation of the Consumer Protection Act 1999 (CPA) in Malaysia, there are countless obstacles to bring action against manufacturer for defective product under the common law of tort. It was also almost impossible to impose direct liability on manufacturer based on contract due to the doctrine of privity of contract, which necessitates the claimant to have some sort of contractual relationship with the manufacturer, which are seldom. However, the enactment of CPA has brought some major changes in improving consumers' right against manufacturer. Nevertheless, the question remains on to what extent have CPA lessened the difficulties. This paper generally explores the possible grounds to hold a manufacturer liable for producing defective product under the CPA. The specific objective of this paper is to examine major challenges that may impede consumers' claim against manufacturer of defective product under contract, tort as well as the CPA. Recommendations for reform with respect to consumer claims against manufacturer of defective product may also be brought forth to enhance the consumers' rights and protections.

Keywords: Consumer Claims, Defective Products, Manufacturers Liability, Malaysian Laws

1.0 INTRODUCTION

The promulgation of the Consumer Protection Act 1999 (CPA) has brought some light to the consumers' claims in Malaysia. Prior to that, there have "countless" obstacles to bring action against manufacturer for defective product under the common law of tort. Similarly, it was also almost impossible to impose direct liability on manufacturer based on contract due to the doctrine of privity of contract, which necessitates a claimant to have a pre-existing contractual relationship with the manufacturer of the product in question. The enactment of CPA has brought some major changes towards improving consumers' right against manufacturer in cases of defective products. Nevertheless, the extent of such improvements is still vague.

1.1 Manufacturer

For the purpose of manufacturer's product liability, the category of "manufacturer" is not limited to manufacturer in the strict sense. Over the years, the genre of 'manufacturer" has been extended to erector, building contractor, assembler, supplier, repairer, distributor, installer, seller under hire-purchase as well as person doing work under contract (Salleh Buang, 1994). The continuing extension of what falls under this genre under the common law has finally ended when the Malaysian Consumer Protection Act 1999 (CPA) was enacted, which provides its clearer and definitive interpretation.

S.3 of CPA defines "manufacturer" as any person who holds himself out to the public as a manufacturer of the goods. This definition also includes stores such as Giant and Tesco, who use their own labels on certain products in their stores. For goods manufactured overseas, the importer will be considered as the manufacturer. Under S.68 (1)(a), Part X CPA 1999, liability for defective product can also be imposed on the 'producer'. The term "producer", albeit being used interchangeably with ''manufacturer', has a wider definition: it covers every person involved in the manufacturing process, pre-manufacturing activity as well as the processing of natural product (Naemah Amin, 1999). For the purpose of this paper, the scope will only be limited to the liability of the 'manufacturer'.

1.2 Defective Product

Literally, 'defective' means imperfect or incomplete product (Oxford, 1992). There is no statutory definition of 'defect' or 'defective' but inference may be made from the concept of 'merchantable quality' under the Sale of Goods Act 1957 (SOGA) and the concept of 'safety' under the CPA. The discussion on the 'defective' product or goods in this paper is confined to only physical aspect of the goods and no reference will be made to the defect in the title or ownership to the goods.

Under SOGA, defective goods are goods with 'unmerchantable' quality but the term 'unmerchantable' is not statutorily defined. Generally, it means that goods sold must be fit for particular purpose for which they are bought (Wu Min Aun, 1994). If they are defective for that purpose, they are unmerchantable. Lord Reid in *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31 observed at page 77 that,

> "…if the description of the goods was so general that the goods sold under it were normally used for several purposes then goods would be merchantable under that description if they were fit for any of the purposes."

However, a claim for breach of implied condition under S.16(1)(a) and S.16(1)(b) of the SOGA that the goods shall respectively be reasonably fit for its particular purpose and shall be of merchantable quality can only be made if certain requirements under the sections are fulfilled and most importantly, there must be a contractual relationship between the parties in the claim. So, it naturally means that SOGA can only be invoked by the actual buyer of the goods against the seller or retailer but not against the manufacturer. For that reason, it is necessary to turn to the definition of 'defect' under CPA, under which liability can be extended to the manufacturer.

According to S.67(4)(a), (b) and (c) of the CPA, a 'defective product' can be simply defined as product that causes damage or injury to a person as a result of some defect in the product itself. Specifically, under Part X (Product liability), a product is defective "if the safety of the product is not such as a person is generally entitled to expect". According to Austin (2006), the types of defect that may hold a manufacturer liable may occur at any stage from designing, manufacturing and marketing of the product:

i) Design Defect

Commonly understood as design flaw, which is already in existence before the product is manufactured rendering the entire product line to be unreasonably dangerous such as collapsing crane and malfunctioning carburettor (Neoh, 2004). Similarly, it also applies to the way a product is packaged. For instance, a manufacturer can be held liable if a drug is supposed to be sold in childproof container but the manufacturer fails to do so and a child fatally takes the drug.

ii) Manufacturing or Production Defect

Occurs in situation where where the product is well designed but the way in which it was made, makes it unsafe due to ineffective quality control or wrong composition of raw materials used in the manufacturing process (Neoh, 2004). For instance, the kind of plastic used for a container is weak causing it to break once used.

iii) Marketing Defect

Happens when manufacturer puts wrong label or improper instruction for safe operation of the product or when the manufacturer fails to warn the consumers of the latent dangers in the product. Duty to warn arises when the risk of harm is known or ought to have been known, such as in the *Tylenol case* where a US manufacturer were found liable for failure to warn alcohol drinker of the danger of liver damage from ordinary doses of Tylenol (Salleh Buang, 1994). Other instances where the manufacturer were held liable are in *Vacwell Engineering v B.D.H. Chemicals [1971]* 1 QB 88, where there was a failure to give sufficient notice to consumer that the chemicals would explode when they come in contact with water, and *Distillers v Thompson [1971]* AC 458, where the manufacturer fails to warn pregnant women against taking *Thalidomite* drugs, which can cause birth defects in the infants.

Manufacturer should be liable for defective product not only because they produce the goods but also for the fact that they have control over the quality and safety of them. They are the one, who usually undertake the packaging, labelling as well as advertising to invite customers to purchase their products. There is a duty imposed on the manufacturer that the goods he sells measure up to any specific claims in the advertisement, especially if there is an express statement or assurance that can be construed as warranty.

At least the consumer can expect a warranty of reasonable fitness for ordinary use of the product (Atiyah, 1989).The reason to impose liability on manufacturer of a defective product can also be seen from a different angle. If no such liability can be imposed, there will be many victims of defective product, especially non-buyer users, who will be left uncompensated. Clear instances can be in the case of *Priest v Last* [1903] 2 KB 148, where a wife suffered from severe burn from a blast of a hot water bottle bought by her husband, and in *Frost v Aylesbury Dairy Co Ltd.* [1905] 1 KB 609, where a wife succumbed to contamination found in milk purchased by her husband.

2.0 CONSUMERS' CLAIM AGAINST MANUFACTURERS UNDER THE MALAYSIAN LAWS

Before CPA, a purchaser of a defective product has two choices of action. He may choose to bring direct claim against the manufacturer on the basis of negligence under the law of tort or alternatively he may pursue his claim based on contract against the retailer (Brave, 1983). Under the present Malaysian legal regime on consumer protection, if a defective product causes loss due to injury or damage, there are three bases on which a claim for compensation can be pursued namely for breach of contract, breach of tortuous duty of care or negligence as well as breach of implied provisions on product guarantee, product safety or product liability under the CPA.

2.1 Liability under Contract

A defective product may cause injury or damage, not only to the purchaser but also to a third party, who is a non-buyer consumer or a bystander. A non-buyer consumer cannot have legal protection under any contract of sale nor under the SOGA against the seller or supplier simply because there is no privity of contract between them. Under this doctrine of privity, only parties to the contract can claim against each other for any contractual breach. Similarly, manufacturers may also hide behind this doctrine, which strictly restricts actions by consumers of their products, be it a buyer or non-buyer purchaser, if they do not have any contractual relationship with the manufacturers. Under the doctrine of privity, which thrives under SOGA as well as under any other contract of sale, the retailer is responsible if the customer is injured by a defective product even though he is not the party at fault but rather the manufacturer. Unlike our United States counterpart, where 'leapfrog' action may be taken against manufacturers by both buyers or non-buyer consumers (Sakina, 2000), a product purchaser in Malaysia cannot bring direct action against the manufacturer under contract even though it is clear that the defect is due to the manufacturing fault.

2.1.1 Vertical Privity

Because of the fallacy of the vertical privity, the initial action has to be against the retailer or seller who has actually contracted with the buyer, who has to first show breach of any express terms regarding the fitness and quality of the product, or in the absence of it, breach of implied term under S.16(1)(a) and S.16(1)(b) of SOGA. Once the retailer has put the matter right as between him and the customer, he may then make a similar claim, in turn against the manufacturer, for redress or indemnity (Atiyah, 1989). If another supplier is involved, the liability against the manufacturer may be imposed through third or fourth-party proceedings, which however may not always work. If one of the intermediaries is insolvent, cannot be found or identified, only carries on business overseas or has gone out of business, the manufacturer will escape liability (Atiyah, 1989). The chain of claim will also break if there is any exclusion clause excluding the liability of any of the intermediaries (Sakina, 2001). Damages can be claimed from the manufacturer if there is a break in the chain of claim.

2.1.2 Horizontal Privity

Horizontal Privity defeats a non-buyer user's claim against the seller. As a result, there is no means for a non-buyer consumer to impose liability on the manufacturer through the seller under the law of contract. Horizontal privity only allows the privy or the party to the contract to claim any rights: only the buyer may bring the legal action against the seller (Sakina, 2001). However, in England, there have been several attempts to create exceptions to the limitation enabling a third party to bring action against the seller as follows:

(i) Upholding contracts for beneficiary or contract for the benefit of third party as trust. In *Les Affreteurs Reunia S.A. v Leopold Walford (London) Ltd.* [1919] AC 801, the court was willing to infer that there was an intention to create trust merely based on the intention to confer the benefit to third party. Nevertheless, this inclination was rejected in most of the succeeding cases unless there was clear evidence that the parties intended for a trust to exist. If the approach in the Walford case were to remain and since all consumers are beneficiary to a product, they should be able to bring action for defective product against the seller, who is in turn, will bring action against the manufacturer.

(ii) Extending the contractual privity to the agency relationship between the buyer and the third party. In other words, the third party has to establish that the buyer is acting as his agent in dealing with the seller as in *Daly v General Steam Navigation Co. Ltd.* (1980) 2 Lloyd's Rep 415.

However, the exceptions and alternatives to overcome horizontal privity are not adequate to assist a non-buyer consumer in bringing action against the seller. The path is even harder for him to impose liability on the manufacturer, where he is to confront another obstacle of vertical privity.

2.2 Liability under Torts

Under torts, the law relating to product liability where there was negligence of manufacturer to ultimate consumer bloomed from a Scottish case of *Donoghue v Stevenson* [1932] AC 562, where the plaintiff became ill as a result of drinking a bottle of ginger beer purchased by his friend which was contaminated by a decomposed snail. He succeeded in his action against the manufacturer who bottled the drink and recovered a sum of damages. As per Lord Atkin …"*The 'ultimate purchaser or consumer' can be identified in relation to neighbour principle*". According to His Lordship, neighbours are

> "*persons who are closely and directly affected by my act that I ought to have them in contemplation as being so affected when I am directing my mind to the acts or omission which are called in question.*"

This landmark case laid down the foundation for the rule that a manufacturer owes a duty of care to the ultimate consumer in relation to the condition of his product (Wu Min Aun, 1994). A comparable Australian case, *Grant v Australian Knitting Mills* [1936] AC 85 followed suit when a man contracted dermatitis because of excessive sulphites in underwear, manufactured by the defendant. He succeeded in his action against the manufacturer for the tort of negligence due to the absence of any instruction to wash before use.

The principle under *Donoghue v Stevenson* establishes that there is a duty of care on the part of manufacturer to ultimate consumer of his product. It also wrecked the stumbling blocks created by both vertical and horizontal privity. Unlike actions under contract, which is only 'friendly' to actual buyer of a product in action against the seller, action under tort of negligence are available to both buyer and non-buyer user of product or "ultimate consumer" as dubbed by Lord Atkin (Brave, 1983). The action may be against anybody in the chain of distribution including the manufacturer. Basically a manufacturer of products owes a duty of care towards the consumer as long as,

> "…he intends them to reach the ***ultimate consumer*** in the form in which they left him and there is no reasonable possibility of ***intermediate examination***, and with the knowledge that the absence of reasonable care in preparation or putting up the product will result in injury to the consumer's life or property, owes a duty to the consumer to take reasonable care".

The phrase 'Intermediate examination' does not denote actual examination or examination by the consumer. In Evans v Triplex Safety Glass Co, Ltd. [1936] 1 All ER 283 for instance, the manufacturer of non-splinterable windscreen was held not liable as there was ample time on the part of the suppliers to have examined it during fitting. In Kubach v Holland [1937] 3 All ER 907, it was held that where it is reasonable to expect someone to inspect the goods in instances where the manufacturer has issued a warning that tests should be carried out before use, the manufacturer may subsequently not be regarded as the cause of the damage. In cases where the consumer does discover the defect himself but proceeds with the purchase and use, the court could find no liability on the part of manufacturer or a reduction of the amount of damages can be made for contributory negligence (Cooke, 2003). There is also an uncertainty as to whether or not the manufacturer may exclude liability for damages, personal injury or death due to the defect caused by the goods through notice or warning. In United Kingdom, S.2 of the Unfair Contract Terms Act 1977 states that if negligence is provable, there can be no exclusion of business liability by way of contract or notice: the question of reasonableness of the notice does not arise. This clear stand should be adopted by Malaysia.

2.2.1 Challenges in proving causation or fau*lt*

Before CPA, tort of negligence is the only mean available to a non-buyer user to claim remedy against the manufacturer for defective product that caused him damages or injury. According to (Brave, 1983), for a claim to succeed, the claimant has to prove three elements:-

(i) the manufacturer owed him a duty of care;
(ii) there was a breach of that duty due to a defect in the product; and

(iii) injury or damage has been suffered as a result (causation).

In actuality, to establish all these elements especially causation is very tricky, unless *res ipsa liquitor applies* (Salleh Buang, 1994). 'Res ipsa liquitor' means the thing speaks for itself. If it applies, Court will be prepared to infer that the defendant was negligent without hearing the details as to what the defendant did or did not do especially if the defect occurred under the exclusive control of the defendant such as during the manufacturing process although the damage happens long after the product leaves the factory (Cooke, 2003). The accident must also be of the sort that does not happen without negligence of the manufacturer such as a thermos that explodes when it is filled with hot water.

The hurdle of proving causation is clearly illustrated in most tobacco or cigarette lawsuits. For example, in *Cipollone v Liggett Group Inco* (1988) 828 F 2d 335, although the claim was successful on the first instance, it was reversed on appeal. The defendant cigarette company contended that the health warnings required by Federal Cigarette Labelling and Advertising Act of 1965 on the cigarette packet protect them from liability for death from cancer of the plaintiff's wife who had puffed on 30 cigarettes a day for over 40 years (Salleh Buang, 1994). However, such health warnings did not pre-empt a claim by a widow for the death of her husband in *Claire Dewey v Brown & Williamson Tobacco Co (1990)*577 *A 2d 1239*. The problem faced by the plaintiff was of course to prove causation in which she failed. Apart from having to prove causation, the plaintiff will also be facing with manufacturer's complete defences of *volenti non fit injuria (which means* the claimant voluntarily agrees to undertake the legal risk of harm at his own expense) and contributory negligence such as where excessive smoking can be established as in the *Cippollone* case.

In cases where the consumer wishes to allege that a product, be it genetically modified food, cigarette, drug or certain chemical substance caused him or her cancer, expert evidence and research may be required, which will turn out to be very costly. To add salt to the wound, medical science may not be able to specifically isolate the cause of the disease or link negligent conduct of the manufacturer to the disease. Besides, lack of financial resources, consumer knowledge and awareness may also be the reasons why a consumer decides not to bring action. If an article was not defective when it was first released into the market and there was no reason for the manufacturer to suspect that it would become otherwise, he may also avoid liability for subsequent incurrence of flaw as can be seen in *Smith v Inglish Ltd [1978] 83 DLR 215*. The manufacturer will also not be liable for subsequent flaws introduced in the process of marketing by another person such as the supplier or retailer. In *Kubach v Hollands [1973]* 3 *All ER 907* for instance, where the manufacturers sold chemicals to the second defendants with an express warning that the chemicals had to be tested before use. The second defendants sold the chemicals to a school teacher but failed to convey the same warning. The plaintiff, a student was injured when the chemical exploded in a school experiment. Her action against the first defendant (the school) failed but the action against the second defendants was successful.

The second defendants then sought indemnity from the manufacturer. The court held that they were not entitled for indemnity as they were given adequate warning by the manufacturer but chosen to ignore it. This can also be a defence to the manufacturer under product liability. Another defence for the manufacturer is to avoid liability is to show that he has taken all reasonable care in manufacturing the product by using 'foolproof' process: in the sense that it was "as near perfect as human ingenuity could devise". This can be seen in *Daniels & Daniels v R White & Sons Ltd and Tabbard [1938] 4 All ER 258*. In *Davies v New Merton Board Mills Ltd. [1957] 2 QB 368*, it was further held that if the product is used in a manner it was not intended or designed for, the manufacturer may also escape liability. To make matters worse to the consumer, a witty manufacturer may also try to exclude his liability for negligence through exclusion clause leaving the consumer at the losing end.

2.3 The Position under the CPA

A consumer under may seek a remedy against the manufacturer S.3(1) of CPA when there is any breach of provisions on the product guarantee, product safety or product liability by making a complain to the Tribunal of Consumer Claims.

2.3.1 Product Guarantee

S.50 of CPA guarantees that the goods purchased by a consumer shall have an "acceptable quality". The meaning of "acceptable quality" may be considered as a reworking of the "merchantable quality" under the SOGA: the term "acceptability quality" only provides one small advantage to the consumer that if the goods have more than one purpose, they must be fit for all purposes for which they are supplied (S.32(1)(a)(i) CPA 1999).

According to Sakina (2000), other considerations are more or less the same when deciding merchantable quality under SOGA.

According to S.32(2)(b), acceptable quality is tested not only by reference to the goods but also to the consumer's expectation: whether "*a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defect, would regard the goods as acceptable*." For the purpose, factors to be taken into considerations are as follows:

i) the nature of the goods;
ii) the price of the goods;
iii) any statement made about the goods on any packaging or on label;
iv) any representation about the goods by the supplier or manufacturer; and
v) all other relevant circumstances.

Although the SOGA's concept of 'merchantable quality' still remains in the backdrop, according to Wu Min Aun (1999), further complications may be caused by the introduction of new criteria for testing "acceptable quality" by reference to both the goods and the consumer. The consumer's right of redress against the manufacturer under S.50, which are relatively similar as those under torts, may be removed if the manufacturer can prove that the failure is due to,:-

i) An act, default or omission of, or any representation made by a person other than the manufacturer (S.51(a))
ii) A cause independent of human control occurring after the goods have left the control of manufacturer (S.51(b)).

S.38 of CPA states that if there is an express guarantee given by manufacturer of goods supplied to consumer, it is binding on the manufacturer. Read together with S.50(d) and S.52(2) of the Act, the manufacturer is liable to pay damages to the consumer in case of failure of goods to comply with an 'express guarantee' given by them. Since in retail sale the goods are usually supplied by a retailer rather than the manufacturer, this provision may not be extensively invoked unless there is a link between the manufacturer and consumer through a warranty document (s.38(3) & (4)). Most express guarantees or warranties, which are in the form of a written warranty or guarantee card, are actually designed to limit the right of the buyer against retailer and manufacturer. The warranty card may stipulate an obligation on the part of the manufacturer to repair certain defects in the goods or replace it within a specified period. If such an express warranty exists, the consumer may only commence legal action after he has initially demanded the manufacturer to remedy the failure and they have refused or not succeeded to remedy such failure within a reasonable time (S.52(2)). Such a warranty is in truth acts as a limitation clause in favour of the manufacturer.

S.35(5) warrants for express warranty in relation to the supply of goods from retailer to consumer, or in promotion of the goods. Since the term "promotion" is not statutorily defined, it may refer to the act that induces persons to acquire the goods by informing them the existence and qualities of the goods (Wu Min Aun, 1999). It may also include advertisement in the media. Thus, an advertisement assuring that a certain product such as weight loss drink will reduce a person's weight for at least a kilogram per month or a money back guarantee may also amount to a guarantee by the manufacturer. The CPA would have afforded better protection to the Malaysian consumers if the guarantee is extended to cover goods supplied by manufacturer to a wholesaler or retailer, who then supplies them to the consumer as provided under S.74G of the Australian Trade Practices Act 1974. Under this provision of the Australian equivalent legislation of CPA, all express and implied warranties as between the retailer and the manufacturer will extend to also protect consumer, who may sue the manufacturer directly in the event of any default.

2..3.2 Product Safety

The provisions regarding product safety under Part III of CPA, imposes duties and liabilities on 'supplier'. 'Supplier' under S.3 means a person who in trade supplies goods to consumer by transferring the ownership or possession of the goods under a contract of sale, exchange, lease or hire-purchase to which that person is a party. Thus, a manufacturer is not a supplier for the purpose of this Act if he merely supplies goods to a retailer for resale. However, S.20 may still catch the manufacturer since it provides that "no **person** must supply, offer to supply or advertise for supply any goods or services which do not comply with safety standards".

In cases where no safety standard set has been set, S. 21 prohibits similar actions for any goods which are "not reasonably safe" having regards to the manner and purpose for which the goods are being marketed, the get-up of the goods, the use of any mark in relation to the goods and instructions or warning in respect of storage, use or consumption of the goods. The term "person" used in both S.20 and S.21 implies that the prohibition may apply to a manufacturer as well. Besides, according to Wu Min Aun (1999), it is a common practice that even though the manufacturers do not supply directly to the ultimate consumers, they do advertise their product directly to the consumers through brand name in the media. Such advertisement may be considered as an offer to supply the products to the public. This fact may be supported by an inference that when purchasing, the consumers usually regard themselves as buying from the manufacturer, not the vendor or retailer. Thus, a manufacturer has a duty to observe the safety standard provided under Part III for the purpose of preventing the risk of injury to the ultimate consumers.

The possible application of the law on product safety can be seen from an Australian case, *Clarke v Pacific Dunlop Ltd (1989)* ATPR 40-983 where a manufacturer who incorrectly labelled a batch of children's night dresses was held to be in breach of a provision of the Trade Practices Act 1974 which is similar to the local Act. The prescribed standard required the garments to be labelled with the words "Warning. High Fire Danger. Keep Away From Fire" but through negligence of its staff, the label attached read "Style to reduce Fire Danger". After being alerted by officers of Federal Bureau of Consumer Affairs, the manufacturer recalled the garments. Similar order can be made under S. 23(1) CPA 1999 besides order to stop the supply or offer to supply of the goods, its advertisement, disclose to the public information relating to it, repair or replace the goods or a refund. 900 out of 1400 of the garments were recovered. To mitigate the consequences of the error, it also placed advertisement in several major newspapers referring to the incorrect labelling and giving appropriate warning. Nevertheless it was held to be guilty of an offence under the Act.

2.3.3 Product Liability

The aim of CPA, which is based on consumerism, is to provide better legal protection to consumers. It introduces strict liability for defective product. Although the term "strict liability" does not appear anywhere in the CPA, inference to it can be made when S.68 (1) clearly provides that amongst the person who shall be liable where any damage is caused wholly or partly by a defect in the product is the manufacturer. According to Naemah Amin (1999), product liability is generally referred to the civil liability of a manufacturer or distributor for damage caused by the defect in the product. Liability can be imposed without contractual relationship and proof of fault. The claimant only has to prove three things: the damage, the defect in the product and the causal link between the two. The CPA does not require for proof that the defect is caused by the producer or manufacturer. However, the onus of proving the defect in the product may create great difficulties for consumers especially in design defect cases and similarly, proof of causation will remain as difficult as establishing fault under tort especially in case of allegedly defective drugs: it is not easy to show that the illness was caused by the consumption of drug and not by other genetic or environmental factors.

A manufacturer may also escape liability if he can show that the defect was not attributable to him but to the producer of subsequent product (S.72(1)(e)). In this respect, a product will also include the material used to construct a building and thus, the manufacturer of the bricks, cements, plasterboard and plumbing materials may alternatively be held liable under the CPA if the products are proven 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 the land (S.2(2)(d)). Therefore, a purchaser of a completed house, which is found to be defective because of low quality materials in the bricks, has to seek remedy under other laws, possibly in the torts of negligence or under the Housing Developers Act (Amendment) 2002.

2.3.4 Challenges under CPA

Even though CPA was legislated to protect the consumers' interest, it does not guarantee that a consumer's legal action against the retailer and manufacturer will be trouble-free. Besides the limitations and the defences available to the supplier or manufacturer under S.68(4) and S.72(1) may defeat a consumer's claim, a few interpretation issues and the nature of CPA itself may also impede its effective implementation.

2.3.4.1 Interpretation

The test of defectiveness under Part X of the act is based on a vague safety concept as under Part III.

There will always be a scope for a 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.' (S.67(2)). Superficially, the test appears to be objective since it is based on a particular person's expectation. However, it is the general expectation that will be taken into account and not an actual expectation of a consumer (Amin, 1999). Thus, it may preclude a plaintiff's claim. It has also been argued that, the consumer expectation test will be unable to stand on its own and needs to fall back on risk-utility test or cost-benefit test especially in case involving high risk product. In such cases, the court will have to consider the overall social cost created by the product and balance it against the social benefit conferred by the use of the product. If the utility of the product is higher than the risk, the product is not defective even though it results in injustice to an injured party. Thalidomide, for instance, which 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 prolonged agony of diseases like cancer and leprosy.

The consumer expectation test has also been criticized for its failure to protect consumer adequately in the event of patent danger. Many products such as knives, dynamite, and pistol are by their nature, dangerous. Applying the consumer expectation test to those products is likely to exempt the producers from liability altogether since such product cannot be defective as the consumer could not have expected them to be safe. The time of supply is also relevant in deciding defectiveness (S.67(2)(f)). The relevant time would be the time of supply by the producer and not the subsequent time of supply to the ultimate consumer. This factor allows factor such as wear and tear and natural deterioration of perishable goods. The accepted safety standard may also be changed from the time when the product was first put into circulation and yet the product would not be considered as defective for the purpose of product liability. Otherwise, the producer would constantly have to recall and adapt older product every time a safety improvement is introduced (Amin, 1999).

2.3.4.2 Supplementary Nature of CPA

By virtue of S.71, liability of a person under Part X to the victim who has suffered damages because of the defective product cannot be limited or excluded by any contractual term, any notice or other provisions. Contrary to SOGA, there is also a clear no contracting out provisions under S.6. Accordingly, all the provisions in the CPA are supposed to be incorporated into 'consumer's contract' (S.2(1),(2)). This will lead to a fallacy that consumer in Malaysia is fairly protected under the law. However, there is a big issue as to the application of the whole Act itself: S.2(4) provides that it shall be supplemental in nature and without prejudice to any other law regulating contractual relationship. This leads to a question. .."In the event of a conflict between the CPA and the Contract Act 1950 or the SOGA in a consumer contract, which legislation shall prevail?" There are obvious discrepancies between the CPA and the SOGA with regards to privity and the application of exclusion clause, which can only be resolved after litigation. Until a common law principle has been laid down on this via courts' decisions, it is not clear whether CPA can really achieve its principal objective to provide better protection to consumers.

3.0 Conclusion

The underlying doctrines for the Contracts Act 1950 and SOGA 1957 are freedom of contract and privity, thus they only deals with right of buyer and seller. To impose liability on a manufacturer, who is not privy or a party to the contract, is a long and tedious process which may involve 3rd party or 4th party proceedings. The claim may also halt in the middle of the way if there is break of the chain of claim in which a manufacturer may escape liability altogether. Thus, it is best for Malaysia to adopt the leapfrog action as practiced in the United States. The alternative action against the manufacturer under tort of negligence is not without difficulties where the burden on the plaintiff to prove causation is great especially in alleging that a particular product causes some kind of illness such as cancer. Thus, the enactment of the CPA 1999 is very much applauded.

The CPA, which is generated from consumerism, has moved beyond tort and contract to protect consumers including non-buyers for losses or injuries suffered due to defective products. CPA provides a larger platform for the victim to prove his case: only three things must be proven namely the damage, the defect in the product and the causal link between the two without having to prove fault or negligence on the part of the manufacturer. Theoretically, CPA has made significant improvements in the area of consumer protections but the question remains whether it can be translated into corresponding positive changes in actual practice. Furthermore, the inconclusive meaning of "defective product" under CPA and the requirement for "consumer expectation" test, may turn out to be prejudicial to the consumer.

Thus, in interpreting and determining whether a product is defective under the CPA, the tribunal or the court should put greater emphasis on the product itself than on the question of what a reasonable consumer is entitled to expect. In the end, it may be concluded that the existence of the CPA may still be inadequate to protect the Malaysian consumer until and unless the weaknesses of the Act are remedied. In order for CPA to become an effective tool to balance the interest of the consumers and those in the chain of distribution, the loopholes under the CPA must be looked into where reforms to the Act itself are duly necessary.

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