

## Liability of Manufacturer for Goods under The Consumer Protection Act 1999: A Paradigm Shift

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### Abstract

The era of globalization and trade liberalization illustrates the emergence of opportunities and challenges. Liberalization of trade opens up economy and creates borderless world. It exposes nations to competitive market forces whereby manufacturers are free to market the goods produced to every part of the world. Open economy exposes consumer with defective goods on the market. This phenomenon shows that consumers are victimized by the process of trade liberalization which raises the question of manufacturers' liability for defective goods under the domestic law. Normally consumers are prevented from making a claim against the manufacturer due to the application of the doctrine of privity of contract under the contract of supply of goods in Malaysia. However, Part VII of the Malaysian Consumer Protection Act 1999 has introduced a new contractual liability on the manufacturer whereby consumers are given the right to make a claim against the manufacturer. The study is a doctrinal study which uses content analysis method which purports to analyze Part VII of the Act in providing protection to consumers. The analysis reveals the weaknesses of Part VII in ensuring proper protection for consumers in Malaysia.

**Keywords:** consumer, manufacturer, doctrine of privity of contract, Consumer Protection Act 1999 (Malaysia)

### 1. Introduction

The emergence of globalization and trade liberalization affected the trading process in Malaysia. The practice of trade liberalization in Malaysia had caused Malaysian to recognize that the world is no longer borders and markets are no longer confined. This is a complex international free trade era and it is a confusing environment for the Malaysian consumers. The Malaysian market is now wide open and local businesses have to compete with the multinational traders from around the world. Goods from all over the world can be obtained in local markets as a result of this new form of trade. Trade liberalization also leads to competition between the local businesses and traders from abroad who are more experienced and sophisticated. This competition affected the consumers in the sense that the manufacturers have to produce more competitive goods in order to compete in the market. The problem occurs when imported goods from abroad are sold to consumers at a lower price. This situation leads to the reduction of production cost by the local manufacturer so as to ensure lower price of the goods produced. The lower production costs will likely lead to production of low quality goods. The use of low quality goods by the consumers are harmful if the goods are defective. Hence, liability of manufacturers for goods arises in the event of defective goods produced by manufacturers. Therefore, the government is responsible for ensuring that trade liberalization is compensated by the sovereignty of consumers through effective protection.

In the era of globalization and trade liberalization, consumer protection is important to create a good economic structure, thus contributing to a better society (Sakina *et.al.*, 2007). Trade liberalization illustrates that market forces fail to provide protection to consumers. According to Ziegel (1973), trade liberalization leads to unfair bargaining power. It creates imbalance between consumers and traders in terms of negotiating power, the imbalance of information asymmetry on the technical components of an article and imbalance of material resources. The complexity of goods produced as a result of technology advancement leads to weak consumers being unable to assess the quality of the goods while the traders on the other hand in a better position because they have access to the information on the goods produced. This is a good example of market failure. Thus, the market failure requires government intervention (Rachagan, 1992). Government intervention is necessary to provide the best protection to the consumers. Therein lays the spirit of paternalism as a justification for government intervention. The enactment of Consumer Protection Act 1999 is a good example of paternalism in Malaysia.

### 2. Manufacturer's Liability In Malaysia Pre 1999

Generally, consumer who has problems in relation to goods will take an action under the law of contract This is due to the existence of contract between the seller and the buyer in the contract of sale of goods. Under the sale contract,

only the parties to the contract have the right to make a claim. This is due to the application of the doctrine of privity of contract which is well recognized in Malaysia. Thus, if the goods are defective, the buyer has no right to take an action against the manufacturer as the manufacturer does not have a contract with the buyer. The buyer can only take an action against the seller since the seller is the party to the contract. Similarly, the consumer does not have a contract with the manufacturer, therefore, if the goods are defective, consumer does not have the right to claim against the manufacturer. The consumer can take an action against the seller provided that the consumer is also a buyer. If the consumer is not a buyer, the consumer cannot take an action against both the seller as well as the manufacturer.

The discussion on the application of the doctrine of privity of contract will examine the application of such doctrine in England as it is a reflection of the application of the doctrine in Malaysia. This is due to the application of common law rule in Malaysia in matters relating to commerce. The doctrine of privity of contract is a fundamental principle under English law. It is based on the basic principle of contract that *"no one but the parties to a contract can be entitled by it, or bound by it."* (Beatson, 2002) It means that only the contracting parties are entitled to act upon the contract due to the existence of privity of contract. The doctrine highlights the principle that the third party does not have any rights upon the contract and the contracting parties are not entitled to put any responsibilities and obligations upon the third party (Alsagoff, 1996). In a contract of sale of goods, consumer non-buyer is considered as third party. This kind of consumer does not have the right to take an action since no contract exists between consumer and the seller. The same thing happens between consumer non-buyer and manufacturer. No contract exists between consumer and manufacturer and no privity exist between them. Thus, the consumer has no rights to take an action against the manufacturer for defective goods. From the discussion it is clear that the application of the doctrine becomes a barrier to claims made by the third party for defective goods. Figure 1 illustrates the application of doctrine of privity of contract in Malaysia. The application of the doctrine of privity of contract has become an impediment to a third party's claim under the contract law. It is clear that the application of the doctrine of privity of contract in the era of trade liberalization is not in favor of the consumer in the event of defective goods. Thus, consumer -non buyer is left without any remedies.

### **3. Manufacturer's Liability Post 1999: A Paradigm Shift**

In the context of supply of goods, the contractual liability arises when the goods supplied by the manufacturer are defective, thus the supplier has a right to claim against the manufacturer for breach of contract. On the other hand, if the goods are used by consumer non buyer, the claim can only be made against the supplier and not the manufacturer as the contract exist between supplier and consumer non buyer and not the manufacturer. This explains the application of the doctrine of privity of contract in the law of contract in Malaysia. This is the drawback of the doctrine whereby it clearly denies the right of third party having an interest in the contract of supply of goods. Due to this drawback, the Malaysian government has enacted a new Act in 1999 known as Consumer Protection Act 1999 (CPA 1999) in order to protect consumer in the contract of supply of goods in Malaysia. A consumer as a third party who is not recognized under the Malaysian law of contract is given the right under CPA 1999 to take an action against the manufacturer for defective goods in the contract of supply of goods. The right automatically eliminates the application of the doctrine of privity of contract which has been the backbone in the contract of supply of goods in Malaysia. This recent development in Malaysia witnesses the doctrine of privity of contract had been abolished by the provisions under Part VII CPA 1999 which is intended to protect the consumers. The provisions under Part VII appear to empower the consumer to make a claim against the manufacturer for defective goods. Part VII which reads 'rights against manufacturers in respect of the guarantees in the supply of goods' directly abolished the application of the doctrine of privity of contract in commercial transactions in Malaysia. It appears to expand the rights of consumers for making claims against the manufacturer in respect of defective goods in Malaysia.

### **4. The Protection Under The Consumer Protection Act 1999 (CPA 1999)**

With the enactment of CPA 1999, consumer now has a right to take an action against the manufacturer in the event of defective goods irrespective of the non-existence of contract between consumer and manufacturer. Part VII of the CPA 1999 has introduced 'contractual' liability on the manufacturer. This is a new liability that has never been introduced under any law of Malaysia. According to section 3 of CPA 1999, 'supply', in relation to goods, means 'to supply or resupply by way of sale, exchange, lease, hire or hire purchase.' Pursuant to section 3 of CPA 1999, the manufacturer is defined as 'a person who carries on a business of assembling, producing or processing goods ...'

From the definitions given, the manufacturer is not a party in the contract of supply of goods to consumers. Therefore, claims by consumer against manufacturer in the contract are prevented by the application of the doctrine of privity of contract. However, the introduction of rights under Part VII had waived the application of the doctrine of privity of contract and imposes direct liability against the manufacturer. This is a paradigm shift in issue relating to consumer rights of redress against manufacturer in Malaysia.

#### 4.1. Rights of Redress Against The Manufacturer under Consumer Protection Act 1999

Rights of redress against the manufacturer is been provided under Section 50 of the CPA 1999. The rights of redress are given if the manufacturer fails to comply with the implied guarantee as to acceptable quality, description, repairs & spare parts and express guarantee of manufacturer.

Despite the rights conferred, Section 51 however, provides for the exception to the rights of redress against manufacturer. In the event of harm to consumer due to defective goods, manufacturer will simply escape liability by relying on this provision. Section 51 provides that no right of redress against the manufacturer if the goods fail to comply with the implied guarantee under section 50 due to '(a) an act, default or omission of, or any representation made by, a person other than the manufacturer; or (b) a cause independent of human control, occurring after the goods have left the control of the manufacturer' Based on section 51, if these things occur, the consumer will be left without any contractual remedies. This exclusion clause is seen as a tool of oppression of the consumers as it enables the manufacturers to escape liability. (Yates, 1967) Therefore, this provision should be abolished as its existence directly weakens the consumer protection in Malaysia which is the main objective of the CPA 1999.

#### 4.2. Abolishing the Exception under Section 51 Consumer Protection Act 1999

According to the definition of manufacturer under section 3 of CPA 1999, the manufacturer is in a business to manufactured goods. Thus, the manufacturer should be responsible for the goods manufactured by him. The views of international scholars demonstrate the need to place liability on the manufacturer if the goods are defective. The complex manufacturing and packaging process is also one of the reasons why manufacturer should be held liable in the event of defective goods. Nowadays, goods are manufactured and packed with specific techniques only known by the manufacturer. The advanced packaging techniques do not allow suppliers to check whether the item is suitable for a particular purpose. Thus the responsibility of ensuring that an item is suitable for a particular purpose must be placed on the manufacturer. *Gordon v M. Hardy* (1903) 6 F. (ct. of Cess), 210 explains this argument. The case was decided in Scotland which involved the sale of canned salmon. Plaintiff has obtained food from vendors. Her son ate the food and died because of the defect in the food. The Court held that the seller was not liable as the seller is not able to review salmon contained in the tin. The liability should be placed on the manufacturer since the manufacturer is aware of the products that being manufactured by them. This case has strengthened the argument that the manufacturers should be held responsible if the goods manufactured are not suitable for a particular purpose.

Prosser also viewed that the manufacturers are the party who have the power to control the goods that has been manufactured by them, so they are in the best position to prevent loss or injury to the consumers. Prosser (1999) expressed his views in the judgment of *Henning Sen v. Bloom Field Motors Inc.* 32 NJ 358. 161 A 2d. 69, " *The burden of losses consequent upon use of defective article is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur...*"

The judgement of *Goldberg v Kollsman Instrument Corporation* 12 N.Y. 2d 432 in the New York Court of Appeal showed that a court is willing to impose liability on the manufacturer as the manufacturer is the party that controls the manufacturing process of goods. This case involves a claim made by the administrator of the estate of the passengers who were killed in air accidents involving aircraft owned by the American Water Line Inc. The accident occurred due to defects in equipment distributed by Kollsman Instrument Corporation. These tools are used by the Lock Heed Airways to install on the affected airplanes. The claims have been made against American Air Line Inc., Kollsman Instrument Corporation and Lock Heed Airways. The Court held that the manufacturer of Lock Heed Airways and American Air Line Inc. are liable. However, Kollsman is not liable. According to Desmond C.J. " *Adequate protection is provided for the passengers by casting in the liabilities of the aeroplane manufacturer, which put into market, the completed aircraft.*"

The existence of section 51 impairs the rights conferred by the CPA 1999 to the consumer in obtaining redress against the manufacturer. Therefore, the exception under section 51 should be abolished. The purpose of abolishing this exception is in line with market ideology practiced in Malaysia which is the ideology of *consumer welfarism*.

This ideology existed to ensure that the consumers are protected in a complex market where a well developed market of the world witnesses the production of complex goods in large quantities. (Sutton, 1971)

The new market trend had caused confusion to consumers. This new form of trade leads to greedy manufacturers whereby they will make money by selling as many goods manufactured as possible. The new market trend also creates an information gap between consumers and manufacturers. The consumers are no longer a party who has information compared to the manufacturers who are well informed. This creates an unequal bargaining power between the manufacturers and the consumers. Manufacturers as a party with more power will take advantage over the consumers, for example by providing defective goods. (Trebilcock, 1971) This is oppression to the consumers. Realizing this problem, a new ideology has been adopted known as *consumer welfarism*. This new ideology emphasized on regulating consumer transaction in order to protect consumers in the market.

The *consumer welfarism* ideology is based on the concept of consumer protection. It emphasizes on the principle of fairness and reasonableness of the contract. This ideology asserts that the contract entered by the consumer should be controlled to ensure protection to the consumers while dealing in the market. The principle of *better loss bearer* applies in this ideology justifies the need to abolish section 51. This principle explains that the manufacturer as party who is financially capable should bear the losses compared to the consumers who are financially incapable. (Adams & Brownsword, 1987)

## 5. Conclusion

Nowdays, the consumer rights against the manufacturers in Malaysia has experienced a new phase. Previously, the claim against the manufacturer for defective goods is impossible under law of contract due to the application of the doctrine of privity of contract which becomes a barrier to the consumers claims. The enactment of the Consumer Protection Act 1999 has introduced a contractual liability which gives rights to the consumers to obtain redress from the manufacturer under section 50. The rights given to the consumer has directly waived the application of doctrine of privity of contract in commercial areas in Malaysia. However, there is a problem with the provision as section 51 provides for the exceptions to the right of redress. Due to the existence of this exception, the manufacturers are still able to escape liability in the event of defective goods. Therefore it is submitted that section 51 should be abolished.

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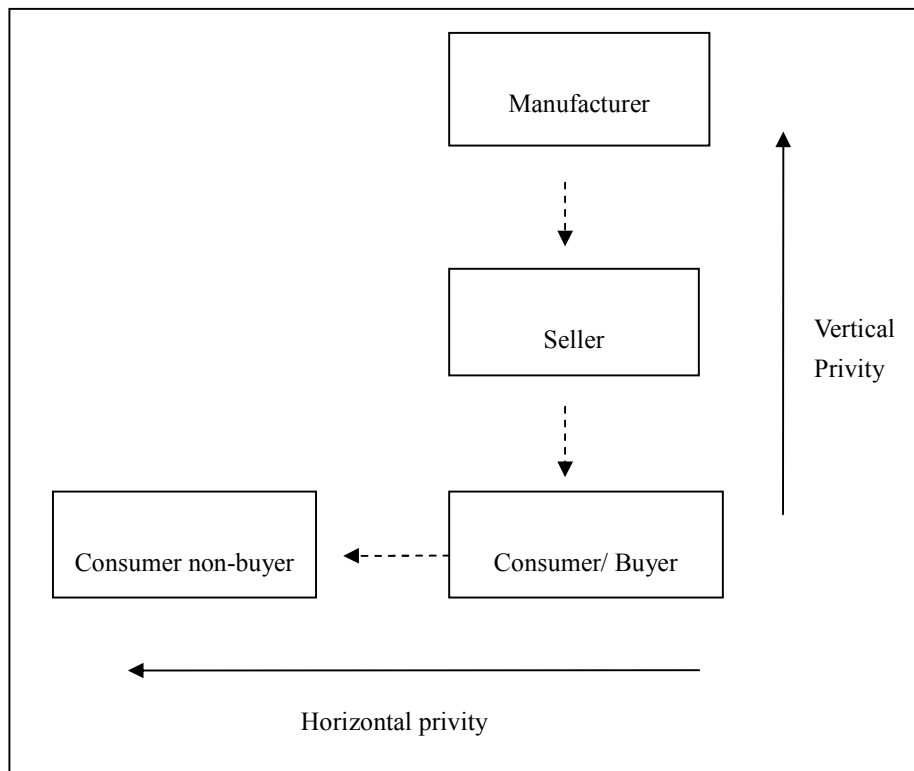


Figure 1. Chain of Distribution of Goods

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