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A REVIEW OF LEGAL PROBLEMS IN MALAYSIAN STRICT PRODUCT LIABILITY LAW – MAQASID SYARIAH AS A WAY FORWARD

[*1]Muhammad Hafiz Mohd Shukri, [2]Ruzian Markom & [3]Rahmah Ismail

[1] Faculty of Economics and Business, Universiti Malaysia Sarawak, 94300, Kota Samarahan, Sarawak, Malaysia.

[2,3] Faculty of Law, Universiti Kebangsaan Malaysia, 43600, Bangi, Selangor, Malaysia.

*Corresponding author: msmhafiz@unimas.my

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ABSTRACT

Background and Purpose: Consumers who suffer from injury or property damage due to the existence of a defect in a given product is entitled to bring a legal action in court based on product liability law provisions in Malaysia. This study aims to analyse the legal problems of strict civil liability in product liability law in Malaysia based on the Consumer Protection Act 1999 (Act 599) (hereinafter "CPA 1999").

Methodology: By applying a doctrinal approach based on qualitative methodology of legal research, this study involved a thorough analysis of the CPA 1999 as well as previous court cases. The findings of this study were analysed using content analysis and critical analysis methods in order to record the similarities and differences which exist, as well as to draw conclusions on the meaning and application of the said law.

Findings: The findings prove that there are several weaknesses in the existing strict civil product liability provisions in Malaysia, which are still unresolved in terms of the meaning of product defect and proof of causation.

Contribution: This paper recommends that any improvements on the legal provisions for strict civil liability under product liability law in Malaysia to be evaluated from a different perspective based on

Islamic principles of product liability and the theory of Maqasid Syariah, which has rarely been analysed.

Keywords: Causation, doctrinal, Maqasid Syariah, product liability, strict civil liability.

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1.0 INTRODUCTION

Product liability law based on strict civil liability was introduced to enable consumers to claim compensation in court upon suffering injury or property damage due to the use of a product (Randy & James, 2008). An example of one of the earliest court cases reported in the context of product liability based on strict civil liability is the case of *Greenman v. Yuba Power Products, Inc* (1963) 59 Cal.2d 57. In this case, the plaintiff suffered from injuries while using a type of all-purpose carpentry machinery to cut wood. The injury occurred when the outer structure of the machine suddenly dismantled and hit the plaintiff's forehead, causing serious injury. The decision favored the plaintiff after it was proved that the injury was caused by the defective carpentry machinery (causation element), and this fact was supported by expert testimonies. All the elements of strict civil liability in product liability law, namely the existence of defect in the product, the user or plaintiff suffering from injury or property damage, and the existence of causation were successfully proved in this case.

In the context of consumer law in Malaysia, the CPA 1999 came into force on 15 November 1999 with the objective of conferring stronger legal protection to consumers. Product liability law provisions in Part X CPA 1999 were found to be in line with provisions in Part I of the Consumer Protection Act 1987 (United Kingdom). This is considered to be one of the key amendments which set aside the doctrine of privity of contract in product liability law. Currently, product liability law based on strict civil liability provides opportunities to third parties in sale of goods contracts to make claims in cases of product liability (David, 2007).

1.1 Strict Civil Liability under Product Liability Law

Product liability law refers to a law where any manufacturer may be found guilty in court for a defective product that causes damage to property or causes injury or death to a consumer. Although there is strict civil liability in product liability law, it is not absolute in nature (Stuart,

2001). This is because the defendant will be free from liability if they are successful in applying a relevant defence as provided by the said law in court (Nahler, 2009). Also, product liability law indicates the importance of manufacturer's efforts to prevent the existence of defective elements in a particular product (Brennan & Thomson, 1990).

A legal study was conducted in Australia on cases of food and beverage contamination, and their position based on product liability law. The researcher delivered a commentary on several relevant court cases and suggested for the term 'product' to include food and beverages from the perspective of Australian consumer law, although food and beverages can generally be considered as consumer goods (Rajapakse, 2016). However, a large portion of this article was focused on discussing cases of food and beverage contamination based on product liability law according to the principle of negligence in tort law. In fact, no specific discussion was made regarding the position of such cases from the perspective of product liability law based on strict civil liability, even though this law has been in force in Australia since 1992.

In general, there are three major components of product defect in product liability law based on strict civil liability, namely design defects, manufacturing defects, and the manufacturer's failure to provide adequate warnings or instructions for the consumer's reference (Stephen, 2016). The study carried out by Stephen (2016) as mentioned above had discussed the impact of product liability law on manufacturers in the United States, especially manufacturers of driverless cars, the types of defence that they can apply, and the steps that they can take to reduce the risk of being taken to court based on product liability law. However, the scope of the current study differs from the above study as the current study gives more focus on the issues of strict civil liability in product liability law from the angle of consumer protection in Malaysia.

Additionally, some studies have suggested that certain problems persist, especially in terms of the definition of defective product, the difficulty in proving the element of causation, and the types of defence available in product liability cases (Fairgrieve, Howells, & Pilgerstorger, 2013). However, these studies do not offer any specific solution in the legal context, except for suggesting that the process of improving product liability law can be done through an alternative method of drafting 'soft law', namely specific rules in the form of guidelines.

The question of whether a non-halal product can be considered as defective under Section X of the CPA 1999 was also studied by previous researchers. They argued that a product with non-halal status may be considered defective if it is not safe for consumption and may cause physical harm, especially to Muslim consumers. However, cases of non-halal

product usage have rarely resulted in physical injury to consumers. Even if a Muslim consumer is found to have vomited after consuming non-halal food, the process of proving the element of causation would be difficult because the vomiting might have been caused by other health problems (Amin & Abdul Aziz, 2015). Researchers in the said study has successfully proven that the process of proving the element of causation poses difficulty to the consumers, and yet this legal issue has been left hanging and remains unsolved.

Khan and Usmani (2018) assessed the strict civil liability based on product liability law in the United Kingdom, where the analysis was made from the perspective of Syariah. They analysed several key elements in product liability law in general, such as the definition of product, the definition of defective product, the element of causation, and the types of defence in cases of product liability. The analysis was conducted from two different perspectives consecutively, namely the perspective of the Consumer Protection Act 1987 (United Kingdom), and the perspective of Islamic law. The results showed that Islam also recognises the theory of strict civil liability in tort law. However, the principles of Maqasid Syariah were not discussed and no specific analysis was conducted to identify the wisdom behind every law and regulation set by Allah SWT on product liability.

Besides that, the principle of product liability is considered to be closely related to Islamic tort law since a defective product can cause property damage, personal injury or even death (Mohamad, 2008; Khan, 2018). In fact, the position of strict civil liability from an Islamic perspective can be found in several key references, such as the Quran, the Sunnah, and the opinions of the religious scholars.

Allah SWT has stated in Surah Al-An’am, verse 164 that means:

> Say: (Upon witnessing the oneness of Allah and surrendering to Him) Is it other than Allah I should desire as a Lord, while He is the Lord of all things? And whatever (wrong) a person commits shall rest upon himself alone; and no bearer of burdens shall be made to bear another's burden. Then, to your Lord you shall return, and He will inform you concerning that over which you used to differ
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> (Basmeih, 2013, p. 337).

Based on the Quranic verse above, Sayyid Abu A'la Al-Maududi opined that every individual is responsible for what he or she does and no one shall be responsible for an act done by another (Al-Maududi, 1989). Therefore, a person cannot deny his or her misconduct if intention has

been established (Mohamad, 2000). In addition, deception in a business, such as a seller concealing defects in a product is prohibited in Islam based on the hadith of Prophet Muhammad SAW, which means:

From Abu Hurairah RA:

> Prophet Muhammad SAW was walking by an area with a pile of food in the marketplace. He placed his hand inside the pile and felt wetness. Then, he said, "What is this, dear food seller?" The seller replied, "Beloved Prophet, this food became wet from the rain." Prophet Muhammad SAW said, "Wouldn't it be better if you put (the wet food) on top of the pile so they can be seen by people walking by? Those who cheat are not among my followers"
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> (Ibn al-Hajjaj, 2007a, pp. 188-189).

The Hadith above explains that the seller is responsible for displaying the defect in the product being sold and declaring it to the buyers (Al-Khin, Al-Bugha, & As-Syarbaji, 2005). Thus, Islam prohibits the sale of defective products or goods to consumers because it regards the condition of products as being of utmost importance in any buying and selling activity. Thus, Islam has set definitive rules for dealing with human problems overall.

Additionally, the element of causation according to Islam can be divided into two parts, namely direct causation (mubashir) and indirect causation (mutasabbib). The existence of the mubashir element in a case can cause the defendant to be found guilty based on strict civil liability, while the existence of the mutasabbib element could only prove the case in the event of an element of infringement (ta 'addi) (Mohamed Shapik, 2013). However, the study conducted by Mohamed Shapik (2013) focused more on discussing the elements of causation in the context of negligence under tort law involving physical injuries between individuals without involving any provision of product liability law in Malaysia. No specific analysis has been made regarding strict civil liability based on product liability law in Malaysia from the perspective of the principle of Islamic product liability in past studies as an attempt to find alternative solutions, even though it appears that the current problems in civil product liability law have yet to be resolved.

1.2 Maqasid Syariah

Maqasid Syariah refers to the wisdoms behind rulings, the group of divine intents and moral concepts upon which the Islamic law is based such as justice, human dignity, facilitation, as well as social cooperation. A purpose (maqsid) is not valid unless it leads to the fulfilment of some good (maslahah) or the avoidance of some mischief (mafsadah) (Auda, 2010). Fundamentally, Islamic law revealed by Allah SWT aims to safeguard human life, both in this world and in the hereafter. Islamic law provides guidance to mankind through two main categories, namely, general guidance and specific guidance in relation to a prescribed regulation (Al-Raysuni, 2006). An example of a general guideline that can be proven based on the word of Allah SWT is found in Surah Al-Anbiyaa', verse 107 "And We have not sent you, [O Muhammad], except as a mercy to the worlds" (Basmeih, 2013, p. 833). Allah SWT, in Surah Al-Maa'idah verse 38, has specifically stated the form of punishment for theft:

> And the man who steals and the woman who steals, cut off their hands in requital for what they have wrought, and as a deterrent ordained by Allah. And (remember) for Allah is Almighty and Wise
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> (Basmeih, 2013, p. 257).

Thus, Islamic law that has been passed down from the time of Adam a.s. until the time of the Prophet Muhammad SAW has evidently covered all aspects of human life, and can be considered as a complete guide. According to Ibn Qayyim Al Jauziyah, Islam also brings justice, mercy, and is a cure for all problems and diseases (Ibn Qayyim, 2000).

In addition, each of the rules made by Allah SWT has its own purpose and wisdom. For example, there is strong justification for the ban on alcohol according to Islamic law, which is to protect the human mind from the adverse effects of drinking alcoholic beverages. Thus, the principle that can provide the answer to every question regarding the justification for religious rules is known as the Maqasid Syariah (Auda, 2010). Ibn Ashur was of the view that one of the main factors that can prove the importance of understanding the Maqasid Syariah, especially among the mujtahid, was the ability to enact a law or regulation for an act or event when no law or regulation has been specifically prescribed by the Sharia or in the absence of elements that can be linked through the qiyas method. However, at the level of an individual who has no specific knowledge of the Maqasid Syariah theory, the effort put into understanding the Maqasid Syariah theory should be implemented step by step in tandem with the individual's

growing knowledge of other fields. A strong knowledge of the Maqasid Syariah theory can reduce the risk of making mistakes when applying it in everyday life (Ibn Ashur, 2006).

Imam Al-Shatibi divided the Maqasid Syariah theory into two main categories, namely, the objective behind a law or regulation enacted by Allah SWT, and the objective behind an action done by a human being. Meanwhile, the objectives of legislators can be divided into four types: the objective of establishing the law, the objective of establishing the law for the purpose of the individuals' understanding, the objective of establishing the law as a standard for a particular action, and the objective of enabling humans to be subject to the law. Specifically, one of the objectives of the legislators, which is the objective of establishing the law, is found to be closely related to three main elements, namely daruriyat (basic necessities), hajjiyat (complementary necessities), and tahsiniyat (desires). The element of daruriyat refers to fundamental necessities that are essential for the physical and spiritual preservation of human beings, which include the preservation of religion (ad-din), life (al-nafs), intellect (al-aql), posterity (al-nasb), and wealth (al-mal). In fact, the absence of these elements will cause an imbalance in human life. Meanwhile, the element of hajjiyat refers to something that can bring ease to the everyday life of humans. For example, the convenience of rukhsah prayer is given by Allah SWT to individuals who are travelling, where they can shorten their prayers during their journey. Finally, the element of tahsiniyat is something which is intended to bring goodness and perfection in the everyday life of human beings, such as the usage of perfume before Friday prayer. Incidentally, the classification of the main objectives of the Maqasid Syariah theory into these three elements by Imam Al-Shatibi is also in line with the views of Imam Al-Juwainiy, who is also a Muslim scholar from madhhab al-Shafi'e.

Furthermore, when viewed from the aspect of human objectives, Imam Al-Shatibi emphasised the fact that an action cannot be separated from the intention of the perpetrator. Therefore, if the action is followed by a specific intention, then the rules related to the action (al-ahkam al-taklifiyyah) will apply. However, if the action is without any specific intention, no specific rules will be applied to the perpetrator, which can be likened to the actions of a person who is asleep, unconscious or insane (Al-Raysuni, 2006; Omar et al., 2012; Lamido, 2016; Ahmad Ayoup, 2016).

According to a hadith by Prophet Muhammad SAW, as narrated by Imam Muslim:

> From Abu Qatadah who said, "We once joined the Prophet Muhammad SAW during the year of the Hunain war. When we encountered the enemy, we found that the Muslims were in a state of confusion. I saw a Musyrikin man who had defeated a Muslim man. I turned and approached him from behind, and I hit him in the area between his neck and shoulder. Suddenly, he turned towards me and he had me in a tight hold until I felt like I might die, and he then died. I went to see 'Umar bin al-Khattab and he asked, "What is wrong with this man?" I answered, "Allah's will." Then, everyone came back and the Prophet Muhammad SAW sat and said, "Whoever has killed an enemy must bring proof of the killing and he has the right to the spoils of the enemy." So, I stood up and said, "Who will be my witness?" Then, I sat back down. The Prophet repeated his bidding, and then I stood up again and said, "Who will be my witness?" Then I sat down. Then, the Prophet SAW repeated his bidding for the third time and I stood up again. So, the Prophet SAW said, "What is the matter with you, dear Abu Qatadah?" I told him my story and a man there said, "He speaks the truth, dear Messenger of Allah! The belongings of the person he killed are with me. Please persuade him to willingly give them to me". Abu Bakr As-Siddiq then said, "No, for the sake of Allah. You cannot expect one of the lions of God, who has fought for Allah and His Messenger, to readily give up the spoils to you." The Prophet SAW said, "Abu Bakr is right. So, give the spoils to him." Only then did the man give the spoils to me. I sold the armor and bought an orchard among the Salimah tribe, which was my first property after becoming a Muslim
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> (Ibn al-Hajjaj, 2007b, pp. 34-35)."

Based on the above hadith, Ibn Ashur believed that any decision and action taken by the Prophet SAW should be understood in the actual context in order to use them to solve problems faced by Muslims. Imam Al-Shafi'i stated that the Prophet SAW had made these decisions in his capacity as the Messenger of Allah SWT who conveyed the teachings of Islam. In other words, possessions of an enemy killed in a war can be taken by the person who killed the enemy without having to ask for permission from the ruler of a country. Thus, the Maqasid Syariah theory clearly enables Islamic scholars and academics to give a real interpretation of the wisdom and certain objectives behind the words or actions of Prophet Muhammad SAW in

resolving any problems encountered (Ibn Ashur, 2006). In short, the Maqasid Syariah theory consists of certain values and principles, as well as the objectives and wisdom behind a rule in Islam, which must be analysed in the process of solving a problem (Andrew, 2015).

The principle of maslahah is also closely related to the theory of Maqasid Syariah. The terms maslahah and manfa'ah are generally considered to have the same meaning. Manfa'ah means benefit or a particular purpose (utility). Meanwhile, the term maslahah has been literally interpreted as the process of gaining some benefits and eliminating any form of harm. This meaning is seen as having similarities with the principle of utility, as explained by Jeremy Bentham, which is an effort made to maximise human happiness. However, in the technical sense, the term manfa'ah has a different meaning from the term maslahah. From the perspective of Islam, maslahah refers to an effort being made to gain benefit and to prevent harm based on the rules ordained by Allah SWT, the Almighty legislator. Thus, the enactment of a new law must be scrutinised in accordance with the aims and objectives of Islamic law or Maqasid Syariah. Therefore, if the new law is in accordance with or compatible with Maqasid Syariah, the law can then be accepted and vice versa (Nyazee, 2003).

Thus, the authors of this study opine that a review of previous studies on Maqasid Syariah should be conducted to see how far analysis has been carried out on the implementation of Maqasid Syariah in the context of Islamic legal frameworks, particularly product liability. This is because based on the authors' understanding, Maqasid Syariah is an important philosophy that can provide an accurate picture of the objectives and justifications behind the establishment of a rule in Islam.

Previous researchers have stated that the business world should strive towards ensuring the sustainability of the community by meeting their essential needs in life. As recommended by Islamic teachings, business activities should conform to the concept of Maqasid Syariah so that protection can be given in all aspects of life (Rahman, Tareq, Yunanda, & Mahdzir, 2017). In fact, there have been past studies explaining the contemporary aspects of Islamic economy, finance, banking, and economic development that are closely linked to the principles of Maqasid Syariah (Shinkafi & Ali, 2017). For example, several researchers have carried out a detailed study on the approaches and applications of the Maqasid Syariah theory in the context of Islamic economy and financial systems, as well as an analysis of the resolutions made by the Sharia Advisory Council in Malaysia (Lahsasna, 2013). Another study has reported that judges who handled Islamic banking-related cases in civil courts have also indirectly applied the concept of Maqasid Syariah once they have successfully given proper interpretation of the Islamic banking law in the process of deciding cases (Markom & Yaakub, 2015).

Islam also recognises the freedom of individuals to place certain conditions (hurriyat al-ishtirat) in a contract. However, these conditions must be in line with the objectives of the Sharia (Maqasid Syariah), which is to protect the interests (maslahah) of the contract and the parties involved in the contract (maslahat al-'aqidayn). The setting of conditions in a contract should also consider the objectives of the contract being formed, the Sharia-based principles and regulations of the contract, as well as the customs generally accepted by the parties in the contract. For example, one of the conditions that must be met in a contract is that each individual must be sane ('aqil) and rational (rushd) (Laldin & Furqani, 2014).

A number of recent studies have also focused their discussions on the application of the Maqasid Syariah theory in other fields apart from the Islamic financial and economic systems, and Islamic contract law. For example, one study proved that the administering of vaccine injections reflects all elements of Maqasid Syariah, such as protection of religion, life, posterity, intellect, and wealth (Ebrahim, 2014). Efforts made by Ebrahim (2014) in analysing the vaccination process from the perspective of Maqasid Syariah should be given due credit as this process is practiced in most Muslim countries around the world, including Malaysia, as an early step in the prevention of diseases. The findings of this study have also rejected claims that the vaccination process is not in line with the requirements or goals of the Sharia.

The aspect of religious preservation as one of the elements of daruriyat in the Maqasid Syariah framework was also studied to identify remedial measures that can be practised to curb apostate crimes in Malaysia (Mohamed Shapik, 2013). In other words, the application of Maqasid Syariah not only involves the fields of economy and finance, it is also applied as the main reference for interpreting the goals and wisdom behind religious regulations within different scopes.

It is undeniable that numerous sources of reference related to Maqasid Syariah are available in various fields, especially Islamic economy, financial systems, and banking that have been published over the years. Studies on Maqasid Syariah have become increasingly common because scholars have been working hard to highlight the standards in Maqasid Syariah, the applications, methods, challenges, and their relevance in contemporary society. Nonetheless, most of the previous studies conducted in the context of Maqasid Syariah have not specifically discussed the principles of product liability law based on strict civil liability.

In comparison to studies in other areas, such as the halal food industry, the Islamic financial system and banking, Islamic criminal law, waqf, and tithe, especially in Malaysia, it is evident that studies in the field of consumer law, particularly those that are focused on product liability from the perspective of civil law and Islamic law, are limited. Although Islam

also places emphasis on the concepts of justice and transparency when conducting a business, it has been difficult to find literary sources that can offer complete analyses, for example, on whether the legal framework of product liability law in Malaysia through the CPA 1999 can provide full protection to consumers, as well as evaluation of such law from the viewpoint of Islamic law and the framework of Maqasid Syariah.

The strict civil liability in product liability law that was drawn up in the United States is considered more advanced and is seen to have influenced the process of passing this law in the United Kingdom before it was enforced in Malaysia. Yet, up until now, it has been proven to continue to have weaknesses and uncertainties in the true context of product liability, as well as in its implementation in the countries involved (Fairgrieve & Howells, 2007a).

2.0 METHODOLOGY

The type of research applied in this study is legal research. Specifically, legal research refers to a systematic study of rules, principles, concepts, theories, legal doctrine, court cases, legal institutions, legal issues or a combination of any of these (Yaqin, 2007). Since this study focuses on legal provisions from the aspect of product liability, the type of research put into practice is doctrinal legal research. The doctrinal approach is one of the main approaches in legal research (Duncan & Hutchinson, 2012) which requires researchers to interpret statutes and court cases (Mohammed Na'aim, Rajamanickam, & Nordin, 2019) and to analyse legal issues in order to come up with the best solution from a legal perspective. Further, comparing the decisions of judges in certain cases can also help researchers to carry out comprehensive research about the grounds of judgment and the uniformity of the courts in deciding the outcome of a particular case (Parkinson, 2016).

This study involved in-depth analysis of the CPA 1999 and previous court cases, particularly to analyse the issue of strict civil liability in product liability law in Malaysia. Due to the fact that to this date, the law on strict product liability in Part X of the CPA 1999 has not been tested in Malaysian Courts, the authors referred to English cases when discussing the meaning of 'defect' and 'causation'. The reason why English cases are used as an analysis is because the law on strict product liability law in Malaysia is in *pari materia* with the United Kingdom (UK). Since the laws are in *pari materia*, whatever problems faced by the UK laws might also be a problem in Malaysia. Besides that, the Malaysian courts used to refer to English cases when the laws are in *pari materia*. The authors also referred to cases in Australia to show that the meaning of 'defect' and 'causation' are indeed a problem that requires attention.

In addition, library research technique was also applied in this study to find relevant information on product liability through primary sources such as statutes and court case reports, as well as secondary sources such as textbooks, legal dictionaries, encyclopaedias, journal articles and databases that can serve as legal reference sources, including LexisNexis and CLJ Law. The collected research data was then analysed by using content analysis and critical analysis methods in order to give a detailed explanation about the legal problems surrounding the definition of product defect and proof of causation based on product liability law in Malaysia.

3.0 ANALYSIS AND DISCUSSION

3.1 Legal Problems with Malaysian Product Liability Law

3.1.1 Definition of Defective Product

Section 67(1) CPA 1999 provides that a product can be regarded as defective if the safety of the product is not such that a consumer is generally entitled to expect. However, strict civil liability law as entrenched in Part X CPA 1999 is not seen as being able to provide full justice to all consumers. The definition of product defect as found in section 67(1) and section 67(2)(e) of the CPA 1999 has caused problems because it is based on the calculation or expectation of consumers in general. Indirectly, this means that each consumer's interpretation of the form and type of product defect will result in there being multiple interpretations (Ismail et al., 2015). In fact, a subjective expectation test causes the definition and the actual level of consumers' expectations to be unable to be specifically determined. Therefore, the question arises as to whether the court should conduct a risk and benefit assessment in determining a consumer's level of expectation.

The above said issues were found in several previous court cases. In summary, the proceedings of a court case involve the presentation of evidence, the giving of testimonies by the plaintiff or claimant, defendant and witnesses, and a decision set by the court (Ceballos & Sosas, 2018). Unfortunately, the courts still have not applied the definition of product defect in a consistent manner. For example, in the case of *A and others v The National Blood Authority and others* [2001] All ER 298, the claimant filed a case in court in order to obtain compensation when he was found to have contracted Hepatitis C after undergoing a blood transfusion. The blood transfused into the claimant was defective based on English law given that generally, the public deserves to expect that the process of blood transfusion should be free from any infection of disease. In fact, according to the court, the question as to whether the defendant has taken reasonable steps to prevent the existence of contaminated blood during the process of blood

transfusion is not a factor that has to be considered in determining product defect. This is because product liability law based on negligence does not apply in this case as the court referred to the most recent English law, namely product liability law provisions based on strict civil liability. Thus, consumers can make claims in court to obtain compensation without having to prove that the manufacturer has neglected to exercise duty of care or otherwise. Therefore, the defendants were found guilty in this case.

However, a different approach was taken by the court in the case of *Bogle and others v McDonald's Restaurants Ltd* [2002] All ER 436. This case concerns a number of claims filed by various parties against McDonald's Restaurant due to injuries suffered resulting from the preparation of hot beverages in the said restaurant. A ten-month-old child named Sam Bogle was brought into McDonald's Restaurant in Hinckley town centre, United Kingdom, by his guardian. It was alleged that Sam had tried to reach for a cup of hot coffee without a cover lid which had been left on the table. Unfortunately, the coffee spilled on him and caused injuries to his face, neck, chest, shoulder and back. One of the issues which arose during the hearing was whether there existed negligence on the part of the defendant when preparing the hot drink for the plaintiff. The Court opined that the defendant had the responsibility to take several reasonable steps to lower the risk of injury to customers. The defendant was found to have offered convenience to customers by giving them a choice of either buying the hot beverage for eating in or takeaway. Further, the hot beverage was sold using a cup with a sturdy structure. Although beverages made with hot water can cause pain and injury if spilt, the defendant had taken reasonable steps to reduce the risk of injury to customers.

Therefore, the standard of product safety (hot coffee) in the case of *Bogle* was as expected by consumers in general, which is that it was less likely to cause injury after the defendant had taken a few reasonable measures as stated above. Therefore, the hot beverage sold by the defendant was ruled by the court as not in breach of any product liability provisions based on the Consumer Protection Act 1987 (United Kingdom). However, in the process of deciding this case, the court also took into consideration the element of duty of care and the taking of reasonable measures by the defendant to reduce the risk of injury to customers. This approach is seen to differ from the court's approach in the case of *A and others v The National Blood Authority* and others as discussed earlier. The legal provisions which were accepted in the case of *Bogle* involved principles of negligence as the court also considered the defendant's duty of care when deciding on the case. This approach appears to not be in line with Part I of the Consumer Protection Act 1987, the provisions of which are identical with those in Part X CPA 1999, providing for product liability law based on strict civil liability. Consequently, the

court's inconsistent interpretation of product liability elements can lead to injustice, not only to the consumer but also to the manufacturer or the supplier in cases concerning product liability.

Even in Australia, the definition of defective product is in *pari materia* with the definition under Malaysian law, and it has been enforced based on section 75AC(1) of the Trade Practices Amendment Act 1992. The Australian court in the case of *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd Bc200404164* [2004] FCA 853 mentioned that due to the complex nature and effects of certain products such as pharmaceutical products, complete instructions and warnings may not be provided to the consumer by the manufacturer. Detailed product information is provided to doctors and pharmacists by the manufacturer and therefore these learned intermediaries are sufficiently informed to be able to decide whether or not it is appropriate to dispense pharmaceuticals to particular consumers. This factor is relevant in determining whether a pharmaceutical is defective, particularly where a claim of a defect in the information provided is made. However, the overwhelming number of pharmaceutical products that people can purchase through e-commerce platforms increase the risk of buying defective products without having direct, adequate information or instructions from genuine experts. As a result, no liability might be imposed upon the manufacturer even there was no detailed product information in regard to such products.

Although it is the courts that will deliver the final decision regarding how far consumers can place expectation on the level of safety of a product, surely the interpretation also needs to be seen from a different angle if the product liability case was to involve other consumer groups such as children and the elderly (Howells & Weatherill, 2005). It cannot be denied that based on section 67(2)(d) CPA 1999, the failure of the manufacturer to place any instruction or warning on a product can result in the product being unsafe to use if there are any risks involved in the usage (Scott & Black, 2000). It would be unfair if the manufacturer is held to be completely free from liability if there are consumers, especially children and senior citizens, who suffered injury after using a product due to not properly understanding the instructions or due to an incomplete warning being placed on the cover or the external part of the product. This is because section 67(2)(d) CPA 1999 does not state clearly whether an instruction or warning on a product only needs to be in written form or has to be supplemented with verbal information by the seller, especially products bought for the use of particular categories of people such as children, the disabled, and senior citizens.

Apart from that, section 67(2)(f) CPA 1999 provides that one of the situations to be considered by the consumer in setting expectations on a product is the time when the product

is supplied by its manufacturer to another person. The said provision is the same as that which is in force pursuant to section 3(2)(c) of the Consumer Protection Act 1987 of the United Kingdom. In the case of *McGlinchey v General Motors UK Ltd* [2011] CSOH 206, a woman suffered injuries after being hit by her own car which had reversed due to the handbrake not being in its original position. The woman claimed that she had placed the handle correctly after parking her car. Based on preliminary inspection made by an engineer, the handbrake functioned as normal without any apparent defect. However, specifically, the findings from the inspection showed there was a possibility that the handbrake did not grip properly because the handle was loose. Nevertheless, the court stressed that since the claimant failed to prove that the handle was loose at the time the manufacturer supplied the hand brake, thus the fault based on product liability law could not be proven, and the decision was made in favour of the manufacturer.

One of the main challenges faced by the consumer in any product liability case based on strict civil liability is to prove that any defect in a product was in existence when the product was still under the control of the manufacturer.

3.1.2 Element of Causation

Causation is one of the elements that must be proven by the consumer in any product liability case. However, proving the element of causation is a difficult process as there is a need to conduct analysis of complex scientific proof based on expert testimonies (Keith, 2016), and it also takes time to prove whether personal injury or property damage suffered by the consumer can be attributed to the product defect (Goldberg, 2014).

In the English case of *Foster v Biosil* [2001] 59 BMLR 178, the court held the view that the claimant had failed to prove the element of causation to establish that the leak of the silicone implant inserted into her breasts was due to the defect of the said implant. Although the court agreed that the structure of the ruptured silicone can increase the risk of personal injury, the court surprisingly accepted the defendant's argument that this case can be regarded as an isolated case because only a unit of the implant was found to be defective, whereas other implants had not been reported as faulty by other parties.

By right, whether the case of a product defect is an isolated case is not the main issue that needs to be resolved. The issue of whether the product defect can be regarded as isolated is completely irrelevant, especially when a product produced by the manufacturer is found to have defects which have caused physical injury or property damage to the consumer. The court

should not accept this argument because product defect is a serious issue that can potentially pose harm to people's lives in certain cases.

Meanwhile, in the case of *Re: Accutane Litigation* [2018] Supreme Court of New Jersey Case No. A-25-17 079958, more than two thousand plaintiffs claimed that they have contracted the Crohn disease, a disease causing inflammation to the intestines, after taking the prescription drug Accutane used in the treatment of acne. The plaintiffs argued that there was causation between the use of Accutane and contracting Crohn's disease. The plaintiffs then produced two experts to substantiate the claim; Dr. Arthur Asher Kornbluth, a specialist gastroenterologist (the body's digestive system), and Dr. David Madigan, an expert in the field of statistical analysis. According to Dr. Arthur, most of the previous cases on Crohn's disease did not take into consideration the factor of time interval between the existence of symptoms and the diagnosis of the disease, and only a few patients were tested.

In addition, according to Dr. Madigan, the epidemiological tests did not provide reliable statistical information. Therefore, considering that most of the results of the epidemiological tests were regarded as not very accurate, Dr. Arthur produced four main references to support his arguments on the existence of causation in this case. His four main references were case reports, research on animals, assessment of causation, and hypothesis of biological mechanism. However, according to Dr. Maria Oliva-Hemker, a specialist gastroenterologist who represented the defendants, Dr. Arthur's arguments based on his research on animals were not valid, as dogs would not suffer from inflammation of the intestines. In fact, the hypothesis of biological mechanism also cannot be accepted because it had never been reviewed by any expert in the relevant field.

Finally, the Supreme Court of New Jersey (United States of America) rejected the arguments of the experts who represented the plaintiffs. The Court opined that the said experts did not apply scientifically-recognised research methodology before expressing their views on this problem. Besides, the acceptance of theory by other experts is a factor that also needs to be considered in deciding the accuracy or strength of a theory.

On the other hand, in the case of *Charmaine Lloyd, et al. v Johnson & Johnson, et al* [2017] Los Angeles Superior Court Case No. BC628228, the plaintiff stated that she had been using the product Johnson Baby Powder since 1965 when she was 11 years old, and had continued to do so until she was diagnosed with critical stage ovarian cancer in 2007. A case was subsequently filed in court, and the law has provided that in such cases the element of causation needs to be proved based on the opinion of medical experts. Evidence based only in terms of probability would be insufficient to form a prima facie case. Medical experts who

represented the plaintiff had referred to various epidemiological studies, as well as research carried out on animals, to substantiate the argument that the element of causation existed in this case, and to conclude that the defendant's product had caused ovarian cancer to the plaintiff due to its usage. However, the judge in this case disagreed with the 'percentage of less than 50%', which was regarded by the plaintiff's experts as sufficient to prove the element of causation based on previous research. Finally, the court decided that the plaintiff was not entitled to claim any compensation from the defendant. This outcome was regarded as tragic as the plaintiff had passed away before the court made its ruling on this case.

In the Australian court case of *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* [2011] 284 ALR 1, the respondent suffered from arthritic back pain; later, his doctor prescribed the medication Vioxx to treat his arthritis. The respondent took Vioxx regularly according to the instructions given by his doctor until one day he suffered a serious heart attack. The major issue at trial was whether the consumption of Vioxx caused or contributed to the respondent's heart attack. The trial judge found that the Vioxx was defective under section 75AD of the Trade Practices Act. The manufacturer appealed to the Full Court challenging the trial judge's conclusion on the issue of causation. The Federal Court of Australia held that the epidemiological studies that were relied upon did not assist to determine whether it was the risk posed by Vioxx, either alone or in combination with the other causes, which eventuated in this case. As such, the appeal was allowed. In other words, the difficulty of proving causation can clearly be seen in the above case, which relates to the negative effects of taking certain medication, where even the epidemiological studies failed to prove it.

Based on the above cases, it is clear that the need to prove the element of causation causes considerable difficulty to consumers in the process of hearing product liability cases in court, despite the product being proven to be clearly defective and harmful to the consumer due to its usage (Macleod, 2007; Che Ngah, Ahmad Yusoff, & Ismail, 2017). The element of causation is also difficult to prove, especially in cases of product liability involving pharmaceutical products (Verheyen, 2018). The high cost of obtaining the views of experts in the relevant field and the lack of access to important information, especially involving high technology products, add to the complication of proving the element of causation in product liability cases (Ueffing, 2013). Another concern is that this requirement will also drag the hearing of a case since proving the element of causation involves a complex process, whilst the consumer has already suffered injury due to the defect in a particular product (Fairgrieve & Howells, 2007b) or has passed away before the product liability case is settled in court.

4.0 CONCLUSION

The results of previous studies have shown that product liability law in Malaysia based on strict civil liability is problematic, especially in terms of the definition of defective product and proving the element of causation. Admittedly, the court cases related to product liability law, which were referred to in this study, were heard outside of Malaysia. As of 2019, 20 years after the enactment of the CPA 1999, there have been no court cases in Malaysia relating to product liability issues, particularly cases that have resulted in property damage, physical injury or death of a consumer pursuant to Part X of the CPA 1999. However, the issue of product liability should not be left unattended by adopting a 'wait and see' approach, being neglectful or proposing legal reforms only after the existence of product liability cases that do not accord appropriate justice to consumers in any court in Malaysia. In fact, upon closer inspection, the provisions of the product liability law enforced in the United Kingdom and Australia are similar to that in Malaysia. Thus, it is not impossible that previous court cases in the United Kingdom and Australia, particularly in the context of product liability, could influence the court's decision in Malaysia, even though such cases do not have binding authority.

Future studies on product liability law from an Islamic perspective and the theory of Maqasid Syariah should be conducted in order to find alternative solutions to the problems in existing civil law. Based on the previous discussion, it is proven that cases of product liability can cause damage to property or injury or death to a consumer. As such, the unresolved legal issues of the definition of 'defective' and proving causation may affect the right of innocent consumers to obtain justice in court. By analyzing these legal issues within the ambit of Islamic law and Maqasid Syariah, which includes the preservation of life (al-nafs), intellect (al-aql), posterity (al-nasb), and wealth (al-mal), it is hoped that the outcome of future research will not only provide new insights into the body of legal knowledge which is to be utilized by the policy makers and academic community, but will also benefit society.

Although the overall consumer law in Malaysia is based on civil law which is influenced by English law, the authors opine that this does not serve as a hindrance to academics and legal experts to conduct research in various branches of knowledge, especially product liability law from an Islamic perspective, in order to develop the best solutions to the legal issues mentioned earlier. It is possible that one day, Islamic consumer law can be specifically introduced in Malaysia to be in line with civil consumer law, similar to the Islamic financial and banking law which has now become an alternative legal framework to conventional financial and banking law.

Indeed, the enhancement of consumer law is essential to protect the welfare and well-being of consumers. Comprehensive consumer law, especially from the aspect of product liability, must also be prioritised to ensure that the manufacturing industry in Malaysia will always place emphasis on the quality and safety of products to be marketed. Consequently, a competitive and high impact manufacturing industry will become one of the key drivers of the country's economic growth. It is hoped that a comprehensive product liability law can ensure the physical safety of consumers, especially to protect consumers from high risk of being supplied with products that may result in physical injury or property damage.

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