

Product Liability Law In Singapore

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Introduction

Consumer products ranging from pharmaceuticals, household appliances to food and drink and children's toys and baby equipment are exposed to potential product liability claims. In the area of food and drink for example, there is growing concern over food safety due to the increased usage of chemicals and pesticides in modern food production processes, causing an interest in organic farming methods. The latest food scare in the United Kingdom was the 1996 breakout of the "mad cow" disease (Creutzfeld-Jakob Disease) which led to a ban on imports of UK beef in many countries. Two years on, the UK agricultural sector is still reeling from its effects, particularly the tremendous economic cost arising from the erosion of market confidence in the safety of UK beef.

The concern for consumer product safety is a global one. As early as 1985, the United Nations adopted Guidelines for Consumer Protection¹ which emphasized the consumers' right of access to non-hazardous products. Among other things, the Guidelines encouraged governments to adopt legal and regulatory measures as well as policies to ensure that products are safe for their intended use.

¹ Resolution 39/248 of the UN general Assembly, New York, dated 16 April 1985.

In Singapore, the legal framework for product liability edress straddles both contract and tort law and there is no distinct body of rules that make up product liability law. The general objective of product liability law is compensatory in nature. It seeks to provide remedies for loss or damage caused by defective products by imposing liability on the manufacturer. Product liability, as is obvious, refers generally to legal liability for *defects* in products. A product can be defective simply because it is unfit for the generally expected use of such a product. This kind of defect is also sometimes referred to as a defect in the goods themselves². Product liability in this context, is based on contract law, as the cause of action depends on the contractual nexus between the buyer and the seller and the remedies are contractual in nature (that is, they serve to try to put the plaintiff in a position as if the contract had not been breached). An example is found in the breach of the statutory implied terms of satisfactory quality and fitness for purpose³. In general, a buyer's contractual remedies for defective goods that are unfit for its expected use are found in the following grounds:

- breach of express term in the contract;
- breach of implied terms in Sale of Goods Act;
- misrepresentation; and
- manufacturer's guarantee.

While product liability, from a legal perspective includes a contract claim against the seller of the goods, from the consumer's viewpoint, product liability relates more to product safety and the culprit is the manufacturer instead of the seller. Here, liability

² PS Atiyah, *The Sale of Goods*, Pitman Publishing 8th ed 1990 at p 236.

³ As discussed in Chapter 2.

focuses on the damage or harm caused by the defective product and the consumer's remedies are founded in negligence, as there is no general statutory liability for unsafe products in Singapore. Negligence, (unlike contractual remedies, which are based on strict liability) is a fault-based approach towards the determination of liability. The advantage of a tort claim in product liability over a contractual claim is that the former is not hampered by the doctrine of privity of contract.

While the law draws a distinction between contractual and tortious claims for product liability, they are not necessarily mutually exclusive. In some cases, the defect in the product can give rise to both types of claims. For instance, a consumer who suffered health problems after consuming contaminated food can sue the manufacturer for negligence for producing food that is unsafe for consumption as well as bring an action against the seller for selling food that is of unsatisfactory quality as it is not fit for consumption.

This chapter will briefly examine the extent of the manufacturer's liability for breach of contract and misrepresentation, as well as include a more detailed discussion of his liability for the tort of negligence. At the same time, it will also consider the effectiveness of a manufacturer's attempt to exclude or restrict his liability.

Contractual Remedies

A contract is an agreement and a breach of contract occurs when either party fails to conform to the terms of the agreement, which can either be expressly embodied in the contract or implied by statute. The buyer or consumer is entitled to damages for these

breaches of obligations. In particular, damages for non-conforming goods or goods which are deficient in quality is expressed in terms of the difference between the value of the goods and the contract price⁴. Hence, such contractual remedies have been described as being remedies for deviations from consumer expectations⁵.

A major point to note about these remedies is the pre-requisite of the existence of some contract which the consumer can resort to for the purpose of enforcing his rights. In this regard, the party generally liable for contractual claims asserted by the buyer or consumer, is the seller himself, that is the retailer, and not the manufacturer, unless the manufacturer has sold his goods directly to the consumer. For this reason, product liability in contract does not usually involve manufacturers, for the simple reason of the lack of privity between the manufacturer and the consumer.

Buyer or consumer remedies for breach of express terms or implied terms (satisfactory quality, fitness for purpose under the Sale of Goods Act) in a contract of sale have already been discussed at length in Chapter 2. A brief mention is made here of the remedies for misrepresentation and the legal effect of manufacturers' guarantees.

The seller of goods (referring here to the retailer) can also be liable for pre-contractual statements or misrepresentations made in the course of a sales pitch, including claims made in advertising. A misrepresentation has first to be distinguished from a mere puff, which is an exaggerated statement and is not intended to be taken seriously and hence should not give rise to any legal liability.

A misrepresentation is essentially a false statement of fact, which induces the representee to enter into a contract with the representor. There are three types of

⁴ Sale of Goods Act, s 53(3).

⁵ Alistair M Clark, *Product Liability*, Sweet & Maxwell, 1989 at p 27.

misrepresentations: fraudulent, negligent and innocent misrepresentation. According to the court in *Derry v Peek*⁶ (1889), a fraudulent misrepresentation is one that has been made knowing that it was false or without belief in its truth or made recklessly without care whether it was true or not. A negligent misrepresentation on the other hand is one that has been made without reasonable grounds for believing that the statement was true while an innocent misrepresentation is one which is a false statement of fact that was neither made fraudulently nor negligently. Hence goods which do not live up to expectations generated by untruthful advertising campaigns may give rise to claims for misrepresentations. Advertising is dealt with in greater detail in Chapter 6.

Suffice it to mention briefly here that the difference between the three types of misrepresentation lies in their legal effect. The remedies for fraudulent⁷ and negligent misrepresentation⁸ are damages and rescission of the contract while the remedy for an innocent misrepresentation is rescission (or damages in lieu of rescission) and indemnity. Hence, while a retailer could be made liable for innocent false statements, his liability would be restricted to that of rescission or damages in lieu of rescission.

In addition to liability for misrepresentation, a retailer could be exposed to criminal liability for the application of false trade descriptions to goods which constitutes an infringement of the Consumer Protection (Trade Description) Act, as discussed in Chapter 11.

Next we consider the legal effect of manufacturer's guarantees. While there is no statutory right (under the Sale of Goods Act) for buyers to have defective goods repaired or

⁶ (1889) 14 App Cas 337.

⁷ For elaboration on the measure of damages for the tort of deceit, refer to the House of Lords decision in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* (1996).

⁸ Misrepresentation Act, s 2(1).

replaced, nonetheless the manufacturer usually agrees, by express contractual term, to replace or repair defective parts within a specified time. These guarantees also invariably operate as limitation or exclusion clauses in disguise. For example, a manufacturer's guarantee may restrict the manufacturer's liability to a replacement of defective parts for a limited period and exclude his liability for consequential loss altogether. The effect of the exclusion in the manufacturer's guarantee will be discussed later in this chapter.

At this stage, it is still uncertain whether such guarantees are legally enforceable against the manufacturer. First, it is not clear that an enforceable contract of guarantee exists between the manufacturer and the consumer. One must note that the guarantee is not a contract between the buyer and the retailer, as the guarantee is not given by the retailer himself. Hence the question is whether the guarantee is valid as a contract between the buyer and the manufacturer. For a contract to exist between them, the first requirement is that there has to be an offer and an acceptance of that offer. The guarantee is arguably an offer of a collateral warranty from the manufacturer to anyone who is contemplating purchase of its product. This offer is capable of being accepted by the buyer when he purchases the product from the retailer, so that the guarantee may be enforceable as part of the main contract of sale. Another legal requirement is the need for the manufacturer's guarantee to be supported by consideration. The consumer must have furnished consideration to support the manufacturer's promise that is embodied in the guarantee. It is arguable that the consumer's consideration for the collateral warranty is the very act of his purchase of the goods from the retailer. Hence it is conceivable that a manufacturer's guarantee may be upheld by the law as having the legal effect of a contract between the manufacturer and the buyer.

While doubts remain as to the enforceability of manufacturers' guarantees, as a matter of practice, it may not be a problem, because a legal suit against a manufacturer for failing to uphold its end of the guarantee is unlikely. Manufacturers are loath to renege on their guarantees for the simple fact that these guarantees are selling points that help to add to the reputation of the manufacturer's goods. So, manufacturers' guarantees will continue to be honoured although their legal effect remains questionable.

Product Liability in Tort: Legal Nexus between Manufacturer and Consumer

From the above discussion, it is apparent that the traditional contractual remedy for defective products is restricted by the doctrine of privity. If the person responsible for the defect is the manufacturer and not the retailer, the consumer's attempt to seek redress from the manufacturer under contract law will be frustrated by his lack of contractual nexus with the manufacturer. A buyer may sue the retailer for breach of contract, and the retailer can in turn, bring third party proceedings for an indemnity from his supplier and the supplier, likewise, can claim an indemnity against the manufacturer. It is, however, inconvenient to rely on third party proceedings to determine where fault should lie. Moreover, a supplier, in the middle of the chain of distribution, who may not be responsible for the defective product, may end up bearing the brunt of the claim because he may be unable to bring action against the manufacturer. By contrast, the consumer, in an action for product liability in tort, contends directly with the manufacturer, without involving the parties in between.

Sometimes, the lack of privity of contract impacts on the parties in a different way. The person who suffers injury from use of the defective product may not be able to sue the retailer because he did not purchase the product. This was the case for the unfortunate woman in *Daniels v White & Sons Ltd*⁹ who failed in a claim against a retailer for selling a bottle of lemonade that was of unmerchantable quality. In contrast, her husband who had bought the lemonade succeeded in his claim.

Another difference is that product liability in contract is based on strict liability whilst product liability in negligence is based on the finding of fault. This distinction is illustrated by the facts in *Wren v Holt*¹⁰ where a buyer sued a pub owner successfully for selling beer of unmerchantable quality. The beer was found to have been contaminated by arsenic (a poison). It was no defence to the pub owner to argue that the beer came from reputable suppliers and that he had done all that he reasonably could to ensure that the beer was fit for consumption, short of carrying out a chemical test, which may not be reasonable to expect under the circumstances. In contrast, such arguments are not only relevant, but also critical in a negligence case.

Duty of Care

Product liability in negligence is a fairly recent tort, having its origins in *Donoghue v Stevenson*, the landmark decision that allowed, for the first time, an action of negligence for the liability of manufacturers. Prior to this decision, the law did not recognise that there

⁹ [1938] 4 AllER 170.

¹⁰ [1903] 1 KB 610.

could be any basis for a manufacturer to take due care in the absence of a contractual nexus.

*Donoghue v Stevenson*¹¹ (1932)

The plaintiff suffered shock and gastroenteritis after discovering what appeared to be the remains of a decomposed snail in her ginger beer drink. Unable to sue the retailer since the drink was bought by someone else and given to her, the plaintiff resorted to a claim against the manufacturer of the ginger beer. In their judgment, the House of Lords laid down the well-known and oft cited “neighbour” principle and went on to hold that a manufacturer owed a duty of care to a consumer of his products. In particular, when goods are marketed in the form in which the consumer will receive them, manufacturers have to take reasonable care in the preparation or putting up of the product.

This decision in *Donoghue v Stevenson* laid down the basis for product liability claims in tort and established that every manufacturer of a product owes a duty of care to the consumers of his product. However, the existence of a duty of care is merely the first step towards establishing the legal nexus between the manufacturer and the consumer. Liability, however, will only arise when the manufacturer has breached that duty of care and caused reasonably foreseeable loss to the consumer. In this respect, product liability in

¹¹ [1932] AC 562.

tort is often described as being fault-based as it depends on the existence of proof of the manufacturer's fault (that is, his failure to exercise due care).

Manufacturers can be liable for various kinds of acts or omissions. For example, manufacturers have to exercise care in the design of the product ensuring that it is safe. In addition, manufacturers owe consumers a duty of care in the operation of their production (or assembly) process. Likewise a manufacturer has a duty to warn consumers of the dangers of his product, if any and to give adequate instructions for its safe use. A manufacturer also has a duty to ensure that component parts incorporated in his product are free from defects. Other parties in the production chain similarly owe a duty of care to the ultimate consumer, including component part manufacturers, distributors and retailers, installers or assemblers, inspectors and certifiers. Consequently it can be seen that the class of possible defendants in a product liability claim in tort is not limited to the manufacturer alone.

Clearly the duty of care is owed to the ultimate user of the goods, who may either be a consumer who has bought for personal domestic use or even a business entity which puts the goods to use in its business. It includes a purchaser as well as a donee (such as the plaintiff in *Donoghue v Stevenson*). The manufacturers' liability has also been extended to other third persons, who, while not being users of the product were accidentally injured by the defective product, for example, mere bystanders. It should also be borne in mind that although this chapter makes repeated references to the consumer's rights and remedies, a product liability claim is not in fact available merely for consumers. It affords a remedy to commercial or industrial users of a product as well.

The tort of negligence now encompasses a duty of care not only in relation to goods, but also buildings and structures¹² as well as services, such as that of giving professional advice.¹³ Even in the context of goods, products that are subject to this duty of care are not restricted to those produced for human consumption such as food or drink, but also the whole range of consumer items from pharmaceuticals, household appliances to children's toys and baby equipment.

Breach of Duty – The Cornerstone of Liability

Whilst every manufacturer now owes a duty of care in relation to his products, it is the manufacturer's failure to take reasonable care to avoid or prevent reasonably foreseeable damage or injury that is the cornerstone of liability. He is in breach his duty of care if he had failed to exercise such reasonable care. This is a question of fact to be decided on the evidence in each case, and the test of the standard of care required is an objective test: whether the danger or damage was reasonably foreseeable.

The courts will take into account factors, such as the likelihood that the defect in the product would cause injury to the plaintiff. The more dangerous the product, the greater is the risk to the plaintiff and hence a higher duty of care will be expected. Another relevant consideration is the seriousness of the injury or damage that could happen to the plaintiff or his property, as weighed against the social utility of the manufacturer's activity. Hence a life-saving drug which has minor side-effects may be marketed without liability, provided of course that the relevant safeguards in the form of warnings or instructions for

¹² *Anns v Merton London Borough Council* [1978] AC 728 and the local case, *RSP Architects Planners & Engineers v Ocean Front Pte Ltd* [1996] 1 SLR 113.

its safe use are put in place. On the other hand, a drug like Thalidomide, when taken by pregnant women, causes severe physical deformity to fetuses cannot be justified as a remedy for morning sickness! Next, the cost and practicality of avoiding the risk, such as the possibility of making the product safer for use may be a relevant factor.

Last, but not least, the manufacturer's level of skill and knowledge at the time the product was marketed is also relevant in determining liability. The manufacturer is only responsible for those dangers that could be discoverable, given the state-of-the-art information or technology.

*Vacwell Engineering Co Ltd v BDH Chemicals Ltd*¹⁴ (1971)

An explosion occurred on the plaintiff's premises, causing a fatality and damaging property. The explosion was caused by a chemical reaction that resulted when an industrial chemical (sold by the defendants) came into contact with water. The defendants were liable for failing to warn of the explosive quality of the chemical. The defendants were actually unaware of the hazard, but it was found that they would have discovered it if they had conducted a sufficient investigation of the potential hazards of the chemical before marketing it.

As a consequence of the decision in *Vacwell Engineering Co Ltd v BDH Chemicals Ltd*, manufacturers have to take reasonable care to carry out adequate research into the

¹³ *Hedley Byrne v Heller & Partners* [1964] AC 465.

¹⁴ [1971] 1 QB 88.

safety of their products. The courts however, will take into account factors such as the costs and practicability of taking precautions. However, the manufacturer's duty to take reasonable care is limited to those dangers that he knows or ought to have known and there is no liability for risks that are unknown and are not discoverable (the "state of the art" defence). The evolution of this defence culminated in the "development risks" defence, which manufacturers can rely on to avoid liability for damage caused by unforeseeable defects.

The classic example of the development risks defence that is cited in every text on product liability is that illustrated in the Thalidomide tragedy. Legal suits were filed in the UK against the German manufacturer and the British distributor of the drug. The defence was that the development and production of the drug had followed the best practices of the time and that the testing of the drug had complied with the legal requirements of the day. The lawsuits were eventually settled, and the Medicines Act 1968 was passed to regulate the licensing and sale of medicines in the UK, but the legacy of the development risks defence remains.

As mentioned earlier, a manufacturer owes a duty to ensure that his product is free from defective designs. Manufacturers can also be liable for negligence in the production process as in *Grant v Australian Knitting Mills*¹⁵, where the manufacturers' negligence was their failure to remove a harmful chemical substance (sulphites) in their production of underpants.

If a product is inherently dangerous and the danger is one that the manufacturer was or should have been aware but its utility outweighs the risks, the product can still be marketed provided it was accompanied by appropriate warnings. For example, in *Parker v*

*Oloxo Ltd*¹⁶, the manufacturer was held liable for failure to warn of the dangers of applying hair dye without a prior skin test. Even if a warning is given by the manufacturer, it has to contain sufficient information as to the danger because an insufficient warning, may, in certain circumstances, be as bad as giving no warning at all. Hence manufacturers have to exercise reasonable care by giving a warning with explicit reference to the particular hazards of their product. In *Vacwell Engineering Co Ltd v BDH Chemicals Ltd*, the chemical marketed by the defendants bore a simple warning indicating “harmful vapours” that was manifestly inadequate to inform users of the explosive nature of the chemical.

As a general rule, the manufacturer’s warning should reach the consumer of the product but in certain cases, a manufacturer may be considered to have acted reasonably by relying on an intermediary to pass on a warning to the ultimate consumer. This is especially so where the product is normally used or administered by a skilled person, like a doctor or pharmacist whose duty is to provide warnings and instructions as to use for drugs that are available only by prescription. In *Holmes v Ashford*¹⁷ the plaintiff suffered from dermatitis after having her hair dyed at a hairdresser’s. The defendant manufacturers of the hair dye were excused from liability because they had supplied labels and brochures warning and recommending a prior skin test. Unfortunately for the plaintiff, the hairdresser had ignored the skin test recommendation.

The manufacturer’s duty to warn cannot however, be carried too far, and tort law acknowledges that a manufacturer has no duty to warn of dangers or risks that are either obvious or commonly known. There also appears to be some legal development along the lines of imposing on manufacturers a continuing duty to warn of defects discovered

¹⁵ [1936] AC 85.

¹⁶ [1937] 3 AllER 524.

subsequent to the sale of the product¹⁸. This continuing duty to warn of defects however, may not apparently go so far as to automatically require the manufacturer to recall his defective product¹⁹. The argument is that the manufacturer has to take reasonable care only with regard to products made or marketed after the manufacturer has become aware of the hazard²⁰. Hence a manufacturer who has discovered a defect in his product is to cease production or modify subsequent production. As for the defective products already sold, presumably the manufacturer's duty is to provide a warning as to those defects to buyers to whom the product has already been sold or supplied. However, this argument should be restricted to those situations in which the risk of injury is not serious. Where the risk of injury is serious, possibly even resulting in death, then the standard of care required has to be higher.

A manufacturer's liability for negligence is not limited to those parts of his product made by him. It extends to component parts, supplied by parts manufacturers or others, which he uses in the manufacture of his end product. His duty may be to test or check the component part for safety especially where the defect was apparent or where he could reasonably be expected to test the part before incorporating it into the end product. Alternatively, the law may regard the end product manufacturer as having taken reasonable care by selecting the component part manufacturer with care.

¹⁷ [1950] 2 AllER 76.

¹⁸ *Walton and Walton v British Leyland UK Ltd* 12 July 1978, unreported. A brief mention of this case is made in, Geraint Howells, *Comparative Product Liability* Dartmouth 1993 at pp 79 – 80.

¹⁹ The recall of products where defects are discovered after it has been sold is a common feature of American product liability law.

²⁰ See Geraint Howells, *Comparative Product Liability* Dartmouth 1993 at p 62 and Malcolm Dewis, et al, *Product Liability* Heinemann London 1980 at pp 62 and 66.

*Taylor v Rover Co Ltd*²¹ (1966)

The plaintiff's eye was injured when a chisel manufactured by the defendants splintered. The defendants had manufactured the steel from which the chisel was made but the steel was heat-treated by a third party who, as it turned out, had not done a proper job. The defendant manufacturers were not negligent as they had engaged a competent hardener to undertake the heat treatment and having done so, they were not required to test the chisels but were entitled to expect that the work would be done properly.

Where the component manufacturer is not reputable, the end-product manufacturer is usually under a duty to test or inspect component parts. In these cases, proof that a component part is defective would entitle the plaintiff to sue either/both the component manufacturers (for design defect) and end-product manufacturers (for failure to test).

A component manufacturer likewise owes a duty of care with respect to the component made by him. The problem with trying to establish a component manufacturer's negligence is usually a practical one. First, it may be difficult for the plaintiff to identify the particular component manufacturer, especially in cases where the end-product manufacturer obtains supplies of the same component part from various suppliers. Even if he can be identified, another practical difficulty is isolating the fault of the component manufacturer. While it is possible to make out an argument that the component rendered the product unsafe, it can also be counter-argued that the hazard came

²¹ [1966] 2 AllER 181.

about as a result of negligent installation or failure on the part of end-product manufacturer to select the appropriate part, as in the following case.

*Evans v Triplex Safety Glass Co Ltd*²² (1936)

The windscreen on the plaintiff's car broke into pieces while he was in car with his wife, who suffered nervous shock from the experience. The plaintiff sued the defendant manufacturers of the windscreen glass. As component manufacturers of the glass, the defendants owed a duty of care, however, the case was dismissed because it could not be established that the defendants had breached that duty of care. The problem was that the plaintiff was unable show that the glass was defective.

A retailer or distributor generally has no duty in tort relating to the manufacture of goods. This is due to his lack of involvement in the production process. However in certain cases, the issue may arise as to whether the retailer or distributor owes a duty of care to detect or disclose defects in the manufactured goods. In this regard, tort law has established the rule that a retailer owes a duty to warn consumers of known defects and to pass on instructions for use and safety and not to mislead consumers. It appears that this duty is imposed not only in relation to known dangers, but where the retailer has reasonable grounds to suspect danger, he may have a duty to test or inspect goods or to pass on adequate instructions or warnings as to use.

²² [1936] 1 AllER 283.

In deciding whether a retailer or distributor had exercised reasonable care in detecting or disclosing defects caused by manufacturers, regard should be had to various factors. The standard of care required of a particular retailer or distributor would depend on the manufacturer's competence and reputation; the nature of the product itself (eg whether it was an inherently dangerous product); as well as the size and facilities of the retailer or distributor (which is relevant to the feasibility of testing). For example, in *Fisher v Harrods*, the retailer (a well-known department store in London) which sold a cleaning fluid was held to have been negligent for failure to check the manufacturer's competence and ordering the goods from a source that was not a reputable source. It was also decided that the retailer had failed to check and analyse the product or to warn consumers that the cleaning fluid posed a danger to the eyes. It would appear then that large-scale retailers who operate chain stores and sell products (not manufactured by them) under their own house brands would be under a higher standard of care than the proprietor of a small provision shop.

The standard of care required of distributors of a product is illustrated in the following case. Much depends on the extent of the distributor's involvement in the advertising and promotion of the product.

*Watson v Buckley*²³ (1940)

The defendants distributed a hair dye, which they advertised as being so absolutely safe and harmless, even on the most sensitive skins that it did not require any preliminary test. Unfortunately for the plaintiff who used the dye,

the acid concentration turned out to be too strong, and he suffered from dermatitis. The defendants were made liable for the plaintiff's injury as they had been negligent in encouraging the indiscriminate use of the dye without a prior skin test. In addition, the defendants had breached their duty of care by dealing with a previously unknown supplier (in fact the manufacturer had gone into liquidation by the time of the negligence claim) and under the circumstances, should have tested the dye.

Installers, who are not involved in the production of goods, nonetheless have a duty to install goods with reasonable care. In *Howard v Furness Houlder Ltd*²⁴, the defendants, who had assembled a valve upside down in a boiler, were liable in negligence to the plaintiff who was scalded by escaping steam, which would not have occurred if the installation had been completed with reasonable care.

Installers in general, are not liable for defects in products installed by them, however, like retailers and distributors, installers may in certain circumstances have a duty to test or inspect goods for defects known prior to installation. They may also have a duty to pass on instructions or warnings on use.

Inspection and certification authorities are generally too far removed from the production process to be exposed to liability for defective products. However, they may be exposed to liability for negligent misstatement²⁵ in their certification. For an action to be based on negligent misstatement, there must be a voluntary assumption of responsibility towards a particular party that gives rise to a special relationship. For example, in *Smith v*

²³ [1940] 1 AllER 74.

²⁴ [1936] 2 AllER 781.

*Eric S Bush*²⁶, the House of Lords held that a valuer, who had been instructed by a mortgagee to value a house, knew that his valuation will probably be relied on by the prospective purchaser (mortgagor) of the house, and hence owed a duty to exercise reasonable care and skill in his valuation. However, a duty of care is not automatically owed by all inspectors and certifiers in all circumstances.

Swiss Singapore Overseas Enterprise Pte Ltd v Hornng Chang

*Enterprise Pte Ltd & Ors*²⁷ (1993)

The certifiers of a shipment of paper were sued by the buyers in tort. The shipment had been purchased so that the buyers could honour their agreement to supply an Indian sub-buyer with paper that had to be free from chemicals and suitable for recycling into pure white paper. The case against the certifiers was dismissed for want of duty of care. The buyer's special requirements concerning the goods had not been made known to the certifiers who had inspected the goods only to ensure that they were in conformity with the sample furnished to them. Hence, the knowledge, proximity and foreseeability which were necessary to establish the existence of a special relationship between the certifiers and the buyers of the goods were not present.

²⁵ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

²⁶ [1989] 2 WLR 790.

²⁷ (1993) 2 SLR 478.

Causation and Burden of Proof

In a product liability action in negligence, in addition to proving that the manufacturer has breached his duty of care, the plaintiff also needs to show that his damages were caused by the manufacturer's negligence. This causal connection between the manufacturer's action and the plaintiff's injury is determined by the application of the "but-for" test, that is, whether the plaintiff would have suffered damage but-for the manufacturer's negligence.

In determining causation, the doctrine, *novus actus interveniens* should be borne in mind. This doctrine states that the defendant is not liable for the injury or damage suffered by the plaintiff if the chain of causation is broken by an intervening act. An example of an intervening act is when the consumer misused the product, for example by blatantly flouting the manufacturer's instructions for use. In such a case, the manufacturer is not liable for the plaintiff's injury. However, this doctrine is not invoked if the intervening act is a direct or foreseeable consequence of the manufacturer's breach. Hence, sometimes, an improper use may be a foreseeable event, giving rise to a foreseeable risk and the manufacturer remains liable.

While the requirement of causation is simple enough in theory, it poses a serious problem of proof for the plaintiff. In the first place, the plaintiff may not be in a position to identify the manufacturer of the product or component part, simply because he does not have such knowledge. This could happen in cases where there is no indication on the product itself as to the identity of the manufacturer. Another problem has to do with the plaintiff's inability to pinpoint fault on the manufacturer. In some cases, the plaintiff may only be able to prove that the manufacturer's product is one among a number of possible

causes for his injury or damage. This was the problem faced by the plaintiff in *Evans v Triplex Safety Glass Co Ltd*, who could not establish one way or the other whether the glass was defective or whether the glass had been negligently installed and consequently lost the case. Where a plaintiff cannot pinpoint fault on either of two possible defendants, his action fails because he has not been able to fulfill his burden of proving fault. The problem of causation used to be the tobacco industry's trump card as a defence. The argument was that it could not be said with certainty that smoking caused lung cancer. However, medical and health studies now provide statistical evidence of a high degree of correlation between smoking and lung cancer.

The plaintiff's burden of proving the manufacturer's negligence and causation is by no means an easy task, especially since he is not usually equipped with the necessary evidence. In some negligence cases, the doctrine of *res ipsa loquitur* (which is Latin for "the thing speaks for itself") can be applied to alleviate the plaintiff's burden of proof. This doctrine applies where the defendant was in control of the thing causing the injury or damage and the facts surrounding the plaintiff's claim are such that the defendant must have breached his duty of care, giving rise to an inference of negligence. Then the burden shifts to the defendant to prove that he has not been negligent. In product liability cases, it is not entirely clear how much scope there is for applying the doctrine of *res ipsa loquitur*. Under English common law, there appears to be very little scope for the application of the doctrine of *res ipsa loquitur*²⁸, although it has been used on occasion.²⁹ This cautious approach of applying the doctrine of *res ipsa loquitur* judiciously has its merits because the

²⁸ Alistair M Clarke, *Product Liability* 1989 Sweet & Maxwell at p 55.

²⁹ For example in *Grant v Australian Knitting Mills*, although the court did not expressly refer to the doctrine of *res ipsa loquitur*, yet liability was found "as a matter of inference from the existence of the defects taken in connection with all the known circumstances" at p 101.

manufacturer loses his control over the product once it enters the marketing or distribution channels. There is also the possibility that the product may have been tampered with once it is outside the manufacturer's control.

In contrast, under American product liability law, a product that functions abnormally and causes injury or damage gives rise to a presumption that the defect itself is evidence of negligence.

Remoteness of Damage and Economic Loss

The aim of an award of damages in product liability cases is to put the plaintiff in a position as if the tort had not been committed. Even though the damage may have been caused by the manufacturer's negligence, damages that are too remote are not recoverable. Only damages that are reasonably foreseeable are recoverable: *The Wagon Mound* (1961). It is however not necessary to foresee the exact damage suffered by the plaintiff so long as the kind or type of damage was foreseeable.

The egg-shell skull rule also applies (that is, the manufacturer has to take the plaintiff as he finds him) so that the manufacturer is liable for foreseeable damages even though the damage suffered by the plaintiff was more severe than normal due to the plaintiff's inherent physical or other condition. For example, in *Smith v Leech Brain & Co Ltd*³⁰, the defendant negligently caused burns around the plaintiff's mouth, which eventually led to the plaintiff's death. Normally, a simple burn around the mouth does not result in death, but it did so in the plaintiff's case as he was already suffering from a pre-malignant cancer. His estate succeeded in recovering damages for death.

The types of damages typically recoverable in tort include damages for personal injury and nervous shock, medical expenses, hospitalization costs, loss of income, loss of amenities and enjoyment of life, pain and suffering and loss of expectation of life, that is, loss of pecuniary benefit due to death. Damage to the plaintiff's property arising from product liability is also recoverable but it is not so clear if damages for the defective goods themselves may be recoverable. The general view appears to be that damage to the defective good itself is not recoverable in tort because it is essentially a claim for pure economic loss. There is no physical damage to the goods, but a claim may arise in respect of repairs necessary to make good the defect. However, some cases³¹ have now allowed recovery of damages for defective buildings and floors (which are equivalent to the defective product) from builders and contractors, and it is possible that these decisions may have some impact on future product liability claims for the defect product itself³².

As for pure economic loss, that is, pure financial loss which does not arise out of physical damage to goods, the traditional view is that it is not recoverable unless it was consequent upon physical damage to property: *Spartan Steel & Alloys Ltd v Martin & Co Ltd*.³³ This principle against the recoverability of pure economic losses in a negligence case was applied in a fairly recent local case: *Swiss Singapore Overseas Enterprise Pte Ltd v Horng Chang Enterprise Pte Ltd & Ors*, the facts of which have already been elaborated. The plaintiffs were suing the certifiers for losses incurred as a result of their breach of the contract with their sub-buyers. The allegation was that the certifiers had been negligent. It

³⁰ [1962] 2 QB 405.

³¹ *Dutton v Bognor Regis Urban District Council* (1972); *Anns v Merton London Borough Council* (1978); and *Junior Brooks Ltd v Veitchi Co Ltd*

³² "Donoghue v Stevenson – The Not So Golden Anniversary", JC Smith, 1983 *The Modern Law Review*. See also Alistair M Clarke, *Product Liability* at pp 117–119.

³³ [1973] QB 27.

was held that in the absence of a special relationship of the *Hedley Byrne* sort, for which economic loss is recoverable, the buyers could not claim such losses.

However, the Singapore Court of Appeal in *RSP Architect Planners & Engineers v Ocean Front Pte Ltd*,³⁴ subsequently allowed the recovery of pure economic loss against developers of a condominium for negligent and defective construction, on the ground that the plaintiff had shown the proximity required to establish a duty of care in the absence of any policy consideration to negative such a duty of care. So there is now a small spark of new hope for recovery of pure economic loss in negligence cases, although “much remains to be seen if the principles in *Ocean Front* will be extended in future to cases beyond the management corporation- developer situation”³⁵.

Defences

In addition to the defences (the state of the art defence or development risks defence) discussed earlier in this chapter, the manufacturer has other possible defences in a negligence claim: *volenti non fit injuria* and contributory negligence.

Volenti non fit injuria refers to the plaintiff’s voluntary assumption of risk. For this defence to apply, the plaintiff must have appreciated (hence this doctrine does not apply to risks unknown to the plaintiff) the risks or dangers of the goods and consented to or deliberately chose to run that risk. So a mere knowledge of the danger is insufficient if plaintiff lacked the freedom to avoid it. The defence is generally difficult to establish, but an example of the defence can be seen in tobacco litigation cases where the plaintiffs

³⁴ [1996] 1 SLR 113.

invariably lost their claims largely as a result of aggressive defence arguments of the plaintiff's freedom of choice and the personal responsibility doctrine, in view of the known risks of smoking. In cases where the defence of *volenti non fit injuria* is applicable, it operates as a complete defence to the plaintiff's claim and hence the plaintiff's claim fails.

Where the plaintiff has failed to exercise reasonable care for his own safety or the safety of his property, he is said to have been contributorily negligent, that is, his own negligence towards himself has contributed to his injury, for example, a driver driving a car without using a seat belt.

In product liability cases, a plaintiff may have been contributory negligent either in the use of the product or in taking steps to minimise the effects of the danger, once he becomes aware of the danger. Where the plaintiff has been contributorily negligent, damages are apportioned according to the plaintiff's share in the responsibility for the injury³⁶. The apportionment of damages between the plaintiff and the defendant is a question that is determined by the court.

Exemption Clauses

Manufacturers often try to exclude or limit their liabilities through the use of exemption clauses. The effectiveness of these exemption clauses depends on the application of various statutes. First, a seller cannot exclude liability for the conditions implied by virtue of ss 13, 14 and 15 of the Sale of Goods Act where the buyer is a consumer: s 6 Unfair Contract Terms Act (UCTA). Hence any guarantee made between a retailer and a consumer is

³⁵ Lau Kok Keng, "Defective Buildings – Claim for Economic Loss Against developers: Ocean Front v MCST 1272" (1996) 12 *Asia Business Law Review* 57 at p 60.

devoid of legal effect. However, if the buyer is a non-consumer, who is buying in the course of business, these implied conditions can be excluded only if the exemption clauses were reasonable as defined by s 11 and Schedule 2 UCTA. Second, s 3 Misrepresentation Act stipulates that a clause excluding or restricting liability for misrepresentation will not be enforceable unless it was reasonable according to s 11 and Schedule 2 UCTA.

The above-mentioned statutory provisions deal with the manufacturer's attempts to exclude or limit liability for product liability in contract law. Next, as regards product liability in tort, s 2(1) UCTA provides that liability for death or personal injury resulting from negligence cannot be excluded or restricted by means of contractual terms or non-contractual notices. Section 2(2) adds that liability for other loss or damage by negligence may be excluded provided the exclusionary term is reasonable according to s 11. However, in the context of tortious liability, there is little opportunity for the manufacturer, due to a lack of contractual nexus, to impose restrictive clauses, other than the manufacturers' guarantees. The question is whether the manufacturer can rely on such a guarantee as a defence. Even if such guarantees are contractual documents (and there are some doubts on this point as discussed above), s 5 UCTA states that liability under a guarantee (promise or assurance in writing that defects will be made good) cannot be excluded if the loss or damage was caused by the manufacturer's negligence. Thus, a guarantee can possibly limit a manufacturer's liability only in respect of damage to property caused by defective goods where the defects were not due to the manufacturer's negligence. Hence the manufacturer's attempts at restricting his tortious liability through the use of guarantees is effectively forestalled by law.

³⁶ Contributory Negligence and Personal Injuries Act, s 3(1).

Development of Strict Liability

In a product liability claim, one of the main obstacles to the plaintiff's success is the burden of having to prove the manufacturer's fault, as demonstrated in the Thalidomide claims. Thousands of children were born with severe deformities to mothers who had taken the Thalidomide drug during pregnancy. The claims were eventually settled out of court amidst public outcry for an alternative framework for a simpler, faster and cheaper means of product liability redress for consumers.

As a result, there has been a consumer protection movement in some countries, away from a fault-based system of liability towards one of strict liability instead. An example is the UK Consumer Protection Act 1987, which was enacted in compliance to the EU's Directive on Liability for Defective Products. The Act does not repeal the common law tort of negligence for product liability but creates an additional and alternative means of recourse made available to the consumer. The Act essentially imposes a statutory duty on manufacturers to supply safe goods. Under the Act, a person who suffers damage (including death or personal injury or loss of or damage to property) caused by a defective product, can sue the producer, the importer, as well as any person who has held himself out to be the producer, without having to prove fault. Producers include the manufacturer of the finished product as well as component part manufacturers. In addition, a supplier of goods (that is the retailer) may likewise face liability if he cannot identify the producer or importer at the plaintiff's request. In this way, the Act has paved the way for a consumer to sue these parties for compensation even though there is neither a contractual nexus nor duty of care between them.

Statutory product liability is characterised as strict liability as the claimant needs only to establish a defect in the product, causation and resulting damage. Under the Act³⁷, a defective product is one that does not provide the safety that a reasonable person is entitled to expect. In this regard, all relevant circumstances have to be taken into account³⁸: in particular the way in which the goods have been marketed, such as its get-up, the use of any mark, warnings and instructions as well as considerations as to what might reasonably be expected to be done with or in relation to the product.

In any case, with the imposition of statutory strict liability, manufacturers, importers and retailers will face greater exposure to liability. The Act makes it easier for consumers who have suffered loss or injury caused by a defective good to claim for compensation. In the first place, importers and even sellers who put their own brand name on a product are now made liable for defects in the product without fault on their part, a notion which was previously unknown and even unacceptable. Secondly, the consumer needs only to show that the product is defective and that it caused his injury. There is no longer any need for the plaintiff to show that the defect was the fault of the defendant.

However, numerous criticisms have been leveled against the doctrine of strict liability. First, given the requirement that defect is seen from the perspective of safety according to the expectations of the reasonable man, and the need for taking into account various surrounding circumstances, it is not patently obvious that strict liability thus defined, is necessarily an improvement over the tort of negligence. In addition, strict liability under the Act has also been severely limited as it has been made subject to the

³⁷ Section 3, UK Consumer Protection Act 1987.

³⁸ Section 3(2), UK Consumer Protection Act 1987.

developments risks defence.³⁹ The practical effect of the statutory retention of the development risks defence⁴⁰ is to allow the manufacturer to raise no-fault as a defence to a strict liability claim. While many commentators feel that this is akin to re-introducing the concept of fault into the doctrine of strict liability by the back door, yet an important difference is that the burden of proving no-fault has been reversed and now lies with the manufacturer. The significance of the reversal of the burden of proof should not be underestimated.

Any attempt to evaluate the effectiveness of imposing strict liability on manufacturers has to take into account its objective, which is essentially to alter the framework for liability from negligence, which is fault-based, to that of strict liability, regardless of fault. However, it has been observed⁴¹ that the doctrine of strict liability, as enacted, continues to emphasize the conduct of the manufacturer, instead of focusing on the condition of the product itself. So it remains to be seen whether strict liability will ultimately come into its own and achieve its original objectives or merely regress into nothing more than a refurbished vintage.

Product Liability Insurance

Given the risk faced by manufacturers, product liability insurance can be obtained at a cost. Product liability insurance provides reimbursement or indemnity for sums that the insured manufacturer has become legally liable to pay as damages for injury to others or damage to

³⁹ Section 4(1)(e), UK Consumer Protection Act 1987.

⁴⁰ Mark Mildred, "The Decline and Fall of Strict Liability", *Australian Product Liability Reporter* February 1998 Vol 9 No 1.

⁴¹ Geraint Howells, *Comparative Product Liability* Dartmouth 1993 at p 97.

their property. Coverage is usually for a specified time period and specified insured amount and may not always provide complete cover; for example, liability for economic loss may not be covered. Product liability insurance can be obtained on an occurrence basis or a claims-made basis. In an occurrence policy, the insurers agree to indemnify the insured for amounts that the insured shall become legally liable to pay by way of compensation for personal injury or property damage occurring during the policy period. A claims made policy, on the other hand, provides indemnity for claims-made during the currency of the policy.

While insurance is a useful means of spreading risks, in the US, where product liability is based on strict liability, coupled with the availability of punitive damages, there is growing concern over the increasing cost of product liability insurance. In addition to making liability payments, insurers incur tremendous costs in defending manufacturers in product liability claims. The fear is that insurance may eventually become so costly that it may no longer be available. To encourage greater risk management awareness in the manufacturing sector, insurers take into account the efficacy of risk management programmes as a factor in premium determination. Manufacturers conduct in-house risk assessments of their product development departments with a view towards achieving risk reduction.

Conclusion

Product liability in Singapore, in the absence of a contractual nexus between the plaintiff and defendant, depends solely on the principles of negligence, which requires a finding of

fault (breach of duty of care and causation). The advantage to the consumer of a tort claim is that he is not limited by the doctrine of privity of contract, and hence the class of potential defendants includes every party in the production chain. However, unlike a contract claim, the manufacturer is not bound under a doctrine of strict liability and the consumer has to overcome the hurdle of proving the defendant's fault. In this sense it is ironical that it is relatively easier for a consumer to claim against a retailer⁴² than to claim against the manufacturer, who because of his involvement in the production of the good, is more likely to be the party who is responsible for the defect.

In other jurisdictions, the tort of negligence for establishing liability for defective products has been overtaken by yet another means of redress: statutory strict liability, in which liability arises regardless of fault. Yet, it has been noted by P S Atiyah⁴³ and Alistair M Clarke⁴⁴ that in many of the decided cases, the difference between negligence and strict liability is neither significant nor substantial. Having said that, the doctrine of strict liability probably goes a long way in raising standards among producers and manufacturers by instilling a greater sense of responsibility and increasing their awareness of liability for breach of consumer protection laws⁴⁵. There is as yet no proposal for reform of product liability law in Singapore and it is not certain whether strict liability will find a place in Singapore's consumer protection law.

In addition to the provision of remedial measures in the form of negligence or strict liability, many countries are placing greater emphasis on preventive measures. As the old

⁴² The seller's liability under the Sale of Goods Act extends to consequential loss (such as personal injury arising from a good that is not of satisfactory quality) caused by the defective goods and is not limited to a claim for defects in the goods themselves.

⁴³ See note 2 at p 242.

⁴⁴ See note 5 at pp 41 – 45.

⁴⁵ This is the view expressed by Geraint Howells *ibid* at p 97.

adage goes, “prevention is better than cure”. From a consumer protection perspective, preventing unsafe goods from entering the market is more critical than providing remedies for the consequences of a lack of product safety. Preventive measures can take the form of product safety regulations, product safety standards and guidelines for manufacturers and suppliers and includes procedures for the removal of unsafe goods from the market through product bans or product recalls. Governments are also taking more effort to increase manufacturers’ and suppliers’ awareness of safety measures. This trend towards product liability prevention is coupled with the development, in some countries (particularly in the United States), of a corporate risk management movement.