



# INTERNATIONAL JOURNAL OF ACADEMIC RESEARCH IN BUSINESS & SOCIAL SCIENCES



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ISSN: 2222-6990

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To Link this Article: <http://dx.doi.org/10.6007/IJARBSS/v11-i8/10727>

DOI:10.6007/IJARBSS/v11-i8/10727

**Received:** 07 June 2021, **Revised:** 04 July 2021, **Accepted:** 28 July 2021

**Published Online:** 10 August 2021

**In-Text Citation:** (Naimat & Bakar, 2021)

**To Cite this Article:** Naimat, N., & Bakar, E. A. (2021). Producer Liability Under Part X of The Consumer Protection Act 1999 on The Issue of Halal Products. *International Journal of Academic Research in Business and Social Sciences*, 11(8), 255–262.

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**Vol. 11, No. 8, 2021, Pg. 255 - 262**

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## Producer Liability Under Part X of The Consumer Protection Act 1999 on The Issue of Halal Products

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### Abstract

As Muslims, the search for halal products is an obligation. Due to this, the demand for halal products has increased. The halal industry has grown to become a sizable market and a profitable business. However, despite the growth of the halal industry, abuses relating to halal products in terms of the logo and the selling non-halal products as 'halal' haunt consumers. This phenomenon shows that consumers have become victims of irresponsible producers who manipulate non-halal products as 'halal'. Due to the application of the doctrine of the privity contract under the Malaysian contract law, consumers are normally barred from bringing a claim against a producer. However, Part X of the Consumer Protection Act 1999 has introduced a new contractual liability for the producer whereby consumers are given the right to make a claim against the producer. This study adopts a content analysis method which examines the provisions under Part X of the Consumer Protection Act 1999. The purpose of this paper is to see if Part X of the Consumer Protection Act of 1990 provides adequate consumer protection on the issue of halal products. The findings of this paper indicate that there are several loopholes in Part X of the Consumer Protection Act 1999 that must be addressed to provide better consumer protection on the issue of halal products.

**Keywords:** Producer, Product Liability, Defective Product, False Halal Logo, Consumers.

### Introduction

In today's global economy, the halal industry is one of the most profitable and influential market arenas. With the Muslim population globally approaching 2 billion, the halal industry is one of the fastest growing sectors of the global economy. As Islam is the second largest religion in the world, the halal industry market is expected to grow around 2.6 trillion by 2024 (Wunsch, 2020). In Malaysia's context, the market value is expected to grow to 147.4 billion U.S. dollars by 2025. This demonstrates how Halal industries have grown to be a significant market and profitable business (Mujar & Hassan, 2014).

In Islam, 'halal' means lawful or permissible. A 'halal certified product' means that the product is permissible or acceptable in accordance with the Islamic dietary law (Asa & Azmi,

2018). A halal certification provides Muslim consumers with the assurance that they are purchasing halal products. (Yunos & Mahmood, 2017). The recognition of halal's importance to consumers has caused producers to use the concept of halal as a form of marketing. Several local product brands have appeared to the public as Islamic-related brands through their packaging and labelling (Osman & Ab Rahman, 2020). The halal status is written using the expressions 'halal', 'Muslim product', 'Muslim food' and so on. The acts or representations made by these unethical producers are intended to persuade consumers to purchase their products while also creating uncertainty among consumers regarding the halal status of these products.

In Malaysia, the main law that protects consumers is the Consumer Protection Act 1999 (CPA 1999). The CPA 1999 came into force on 15 November 1999 to strengthen consumer protection. The CPA 1999 is crucial to ensure that the rights of consumers are protected and are able to overcome any problems, especially in sale and purchase transactions involving consumers. In cases of defective products which cause injury, the consumer may claim compensation under Part X of the CPA 1999, which provides for product liability. Product liability refers to the liability of person for damage caused by defective products (Curzon, 2006). Product liability claims under Part X are based on the strict liability rule. Based on this principle, the consumer does not have to prove fault on the part of the producer. In addition, the strict liability rule will ease the burden of the consumer, where the consumer does not have to prove guilt on the part of the producer, and this provides more protection to the consumer (Hodges, 1998). However, whether the strict liability rule under Part X of the CPA 1999 will lighten the burden of proof for consumers and thus provide more protection will be discussed later.

### **Methodology**

This study was completed through a qualitative research design that adopts the content analysis method. The data was obtained from primary and secondary sources. The primary sources were the consumer protection law as well as case law. As for the secondary sources, the data were obtained from journals and law textbooks. Information on the internet in the form of legal reports was also referred to discover the latest developments in law. The collected data were analysed to identify shortcomings in Part X of the CPA 1999 on the halal issue.

### **Results and Discussions on Part X**

Section 68(1) of the CPA 1999 provides that, where any damage is caused wholly or partly by a defect in a product, the following persons will be liable for the damage: (a) the producer of the product; (b) the persons who put their own name, trademark or other distinguishing mark; and (c) the person who imported the product into Malaysia. Despite the fact that Part X appears to provide better consumer protection, it does not ensure that a consumer's legal action will be trouble-free. For a consumer to succeed in a product liability claim, the consumer must prove that there is a defect in the product, which has caused damage or loss to him and that there is a causal link between the defect of the product and the damage.

#### **i. Defect**

Defects are an important element that must be proven in a product liability claim. A defect exists in a product if the safety of the product is not such as a person is generally entitled to expect. Product defects are broadly classified into three types: design defect,

manufacturing defect and marketing defect. Design defect refers to the defects in the entire product line which exist before a product is manufactured (Amin, 2007). Meanwhile, a manufacturing defect refers to a defect that occurs during the manufacturing or production process due to the use of inappropriate materials or component parts (Krishnan & Vergis, 2018, p.455). Finally, a marketing defect occurs when a product which is properly designed and manufactured becomes unsafe due to incorrect labelling, incomplete instructions or inadequate safety warnings (Krishnan & Vergis, 2018; Amin, 2007). Technically, non-halal products fall under the category of 'product defects' within the manufacturing and marketing defects category. Manufacturing defects may occur when halal products are contaminated with illegal or harmful substances, whereas marketing defects may occur when halal labelling contradicts the content of the label displayed. Both of these instances illustrate that the product no longer complies with halal regulations due to its lack of cleanliness, safety, purity, and high quality (Amin & Aziz, 2015).

Section 67 (1) of the CPA 1999 defines 'defect' as 'subject to subsection (2) and (3), there is a defect in a product for the purposes of this Part if the safety of the product is not such as a person is generally entitled to expect'. This provision clearly indicates that the definition of 'defect' is based on the concept of safety (Amin & Aziz, 2015). Meanwhile, Section 67 (4) of CPA 1999 states that 'safety', in relation to products, shall include (a) safety with respect to products comprised therein; (b) safety in the context of risk of damage to property; and (c) safety in the context of risk of death or personal injury. As provided under section 67(4), not only must the finished products be safe, but all components or raw materials used must also be safe (Ngah & Ismail, 2017). Therefore, a false halal logo product can only be considered defective if it is not safe in the sense that it causes physical damage to the consumer. Similarly, in the case of mislabeling or false labelling, it will not make the product defective if the product does not cause physical injury.

In determining what a person is generally entitled to expect in relation to a product, section 67 (2) of CPA 1999 has outlined several circumstances, such as the following:

- (a) the manner in which, and the purposes for which, the product has been marketed;
- (b) the get-up product;
- (c) the use of any mark in relation to the product;
- (d) instructions for or warnings with respect to doing or refraining from doing anything with or in relation to the product;
- (e) what may reasonably be expected to be done with, or in relation to, the product;
- (f) the time when the product was supplied by its producers to another person.

Section 67 (2) of the CPA 1999, among others, clarifies that the safety standards under Part X are measured based on the application of the criteria that have been stated and this depends on the circumstances of each individual case. Among the considerations given are the manner in which the product has been marketed and the use of any mark in relation to the product. This means that aspects of advertising, packaging and labelling will also be taken into account. Factors like these are seen to have a direct impact on a person's expectations of whether the goods are safe or not. In the case of *TV Media Pte Ltd v De Cruz Andrea Heidi & Another* [2004] 3 SLR (R) 543, Yong Pung How CJ (delivering the judgment of the court) stated that when the television station aired advertisements for the effectiveness and benefits of the slimming pill, this would convince consumers to buy and use it because consumers expect that such slimming pills are safe.

Products that are widely advertised and properly packaged and labelled lead consumers to believe that the products are safe, as opposed to products that are not

advertised, packaged, or labelled properly. Similarly, on the issue of halal, when a product is sold with any mark indicating that it is halal, then this is a highly relevant factor in determining the customer's expectations that the product is halal. However, this does not answer the question of whether Muslim consumers are entitled to expect that the product to be used is safe in the sense that the product does not carry a risk of not only causing physical injury but also spiritual and emotional injury. In Islam, the term halal refers to safe products that are good, clean, pure, safe, of good quality, and are not harmful (Azhar & Abdul, 2017). Therefore, when the product does not adhere to the Islamic dietary law, it can be considered as a defective product.

ii. Damage

A defective product can cause various types of damage or loss and the major purpose of the product liability law is to compensate for that damage or loss. In a product liability claim, the consumer must prove that the damage occurred due to a defect in the product. Section 66 (1) of CPA 1999 defines damage as 'death or personal injury or any loss of or damage to any property, including land, as the case may require'. The given definition clearly shows that death and personal injury are the most important risks of defective products. However, the definition of 'damage' provided under CPA 1999 is not comprehensive, unlike in Thailand, which gives a more comprehensive definition of 'damage' in the context of product liability law (Amin & Aziz, 2015). Section 4 of the Product Liability Act B.E. 2551 (2008) (Thailand) defines 'damage' as 'the damages caused by unsafe products either damages to life, body, health, hygiene, mind or property, but not include damages to such unsafe product itself'. In short, the definition enshrined in section 4 of the Product Liability Act B.E. 2551 (2008) is seen as more comprehensive in protecting consumers because the damage itself includes damage to life, body, health, hygiene, mind and property.

Furthermore, while section 66 (1) of the CPA 1999 states that personal injury and death are the most important risks for product defects, the CPA 1999 does not define the term 'personal injury', unlike in the United Kingdom under section 45 (1) of the Consumer Protection Act 1987, which defines 'personal injury' as including any disease and any impairment of physical or mental condition. Meanwhile, in Thailand, Section 4 of the Product Liability Act B.E. 2551 (2008), provides a definition of 'mental damage' as 'pain, torture, phobia, anxiety, sorrow, shame or other similar types of mental damages'.

Therefore, on the issue of halal, if a Muslim consumer suffers from some kind of illness such as vomiting after consuming allegedly halal food, he or she may bring a claim under the product liability law. However, consuming products with a false halal logo or non-halal labelled products rarely results in physical injury. On the contrary, consumption of such products is likely to result in emotional injury and unpleasant feelings such as frustration and discomfort. Whether damage or injury can be extended to non-physical damage is questionable due to the absence of a clear definition of 'personal injury' in Malaysian law (Amin & Aziz, 2015).

iii. Causal link between the defect and the damage

In order for a consumer to succeed in claiming under Part X, the consumer has to prove that there is a causal link between the defect in the product and the damage or injury he or she suffered. However, it appears that proving a causal link places a burden on consumers where they need to prove the defect (Amin, 1999). The hurdle of proving causation is clearly illustrated in the case of *Hufford v Samsung Electronics (UK) Ltd* [2014] EWHC 2956. The

claimant pursued a claim under the Consumer Protection Act 1987. The claimant alleged that the fire originated inside the refrigerator as a result of an unspecified electrical fault. However, the defendant argued that the fire originated outside the appliance. However, the defendant argued that the fire was caused by some flammable material outside the refrigerator, which then spread to the refrigerator. The defendant's argument was accepted by the court and the claimant's claim was dismissed. The court held that there was insufficient evidence to discharge the claimant's burden to show that the product was defective and found in favour of the defendant. Notwithstanding this, the court highlighted that the burden of proof remains on the claimant to prove the existence of a defect which caused the fire. It can be observed in this case that the producer could simply avoid having their product classified as defective.

Furthermore, customers' lack of knowledge and financial resources make it difficult for them to prove the cause of damage due to defects in the product (Hodges, 1999). This situation makes it difficult for consumers to prove the defects of a complex product, such as in the halal issue, where the product contains illegal or prohibited substances and the cause of damage is due to the defects of the product. To prove that the product has been contaminated, expert opinion and detailed research needs to be done and this requires high costs. It is clear that proving the causal link between the defect and the occurrence of damage is not something that is easy to do, and this is something that burdens the consumer. The objective of Part X to reduce the burden of consumers in product liability claims is not achieved in halal issues. It is thus suggested that, rather than requiring the consumer to prove a defect, the law should require the producer to prove that their product is safe and not defective (Ismail & Abdul, 2015).

#### iv. Defences and its Problems

Part X of the CPA 1999 introduces a strict liability rule whereby the party producing products that are found to be unsafe is liable to pay reasonable compensation for injuries and damage suffered by the consumer as a result of a defective product. Under this rule, the consumer must prove that he or she has suffered an injury as a result of a defect in the product. However, even if the consumer could prove this basic requirement, his or her action may not succeed if it is found to be outside the scope of Part X of the CPA 1999. In addition, although the producer of a defective product is generally liable, he may escape liability by proving the defences provided by Part X of the CPA 1999.

Part X of the CPA 1999 provides for the defence that can be submitted by the parties involved to avoid from being liable and pay compensation to the consumers. Section 72 of the CPA 1999 provides for this defence. Section 72 of the CPA 1999 provides five specific defences for a producer who is sued under the strict liability rule. The defence can be seen as not being able to give justice to consumers. The relevant provision to be discussed on the issue of halal is section 72 (1) (c) of the CPA 1999. Under this section, the producer may escape from liability if he can prove that 'the defect did not exist in the product at the relevant time'. According to section 72(1)(b) of the CPA 1999, 'relevant time' refers to the time the producer supplies the product to others. This defence means that the producer is only liable for defects that exist during the production process and is not liable when the defect exists at the time the products are in the chain of distribution (Corones & Clarke, 2002). This defence is unfair to the consumer as the loss or damage that occurs should be borne by the producer rather than the consumer and the producer should be responsible for the process of supplying their products (Howells, 1991).

On the issue of halal, the producer may apply this defence by showing that the product has been contaminated with illegal substances and caused defects in their products while in the chain of distribution. This defence indirectly provides an opportunity for the producer to escape liability. The producer should be responsible for product defects not because they produce the product, but because they have control over the quality and the safety of the products (Nor & Amin, 2015). Practically, the producer is the one who often carries out the packaging, labelling and advertising to attract customers to purchase their products. These factors increase the consumers' trust and confidence in purchasing any product that claims to be halal-certified (Zakaria & Zakaria, 2017). Therefore, the producer is the one who should be responsible to ensure that the product produced is identical to what is advertised. If no liability is imposed on the producer in the chain of distribution, it will cause consumers of the defective product to not get the appropriate compensation for the issue of halal.

### Conclusion

Part X of the CPA 1999 is considered a regressive piece of legislation due to its loopholes in addressing important issues relating to halal products. As a rapidly developing country in the halal industry, Malaysian consumers should not be overlooked when it comes to halal issues. Even though Part X of the CPA has been perceived as making it easier for consumers to prove their cases because they no longer have to prove the producer's fault, Part X clearly does not remove all the barriers to a successful product liability claim. In the issue of halal, Part X of the CPA 1999 contains loopholes, such as a limited definition of 'damage' under section 66(1) and that the producer may use the defences provided in Section 72 (1) (c) to avoid liability.

On the basis that consumers are easily exploited and oppressed, only the law is expected to protect consumers and uphold their rights. To accomplish this purpose, the law must be clear, specific and consistent. Hence, it is important for the government to ensure that the existing laws are enforced properly and if there is a lacuna in the law, then the laws must be reviewed and improved in order to produce a set of laws that really work and are effective in protecting consumers.

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